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With this thought, we hereby present to you

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THE REGULATORY FRAMEWORK FOR VENTURE CAPITAL FUNDS IN INDIA, WITH AN EMPHASIS ON THE CURRENT INVESTMENT LANDSCAPE

- ARUN ARANGIL

Abstract

Venture capital (VC) is a subcategory of private equity in which investors make investments in start-ups and small firms that have the potential for long-term growth. The Indian government's initial efforts date back to the 1970s, and there is still confusion over the regulatory system controlling this business. When funds are raised domestically, a domestic investment vehicle is established in the form of a trust or corporation. Overseas investors pool their funds and invest in a tax haven fund such as Mauritius. In India, there are six main types of domestic venture capital funds. Venture capitalists prefer the trust structure in India since it avoids the corporate dividend distribution tax. Investors benefit from the limited liability structure's flexibility and liability protection. According to a recent news report, the Indian government has approved the formation of limited liability partnerships. Venture capital funds may invest in the securities of overseas companies subject to the Reserve Bank of India's and the Board's rules and guidelines. Any investor, barring employees, principals, or directors of the venture capital fund, shall be permitted to invest a minimum of Rs.500,000.

SEBI's 2000 Foreign Venture Capital Investor Regulations were revised in 2001, 2004, and 2006. In India, 99 percent of venture capital funds are organized as trusts. The Companies Act applies if a venture capital fund is organized as a corporation. Few are incorporated as corporations due to the taxation of dividend distributions. India's venture capital investments increased by 3.8x between 2010 and 2020, totaling $38.5 billion in capital deployed. India’s global venture capital funding share is predicted to nearly double to 5.6 percent by 2021, from less than 3%. In 2021, global venture capitalists led 92 large-ticket rounds (mostly follow-on growth equity investments), including seven worth more than $500 million. India has surpassed China in terms of annual unicorn count for the first time (44 vs. 42), increasing India's total active unicorn population to 73. Due to a solid value generation flywheel, India's start-up ecosystem has achieved escape velocity. In 2021, over 30 start-ups will announce ESOP buybacks, igniting a new generation of founder

operators. The pace and quality of acquisitions, on the other hand, are unavoidable; the emphasis will shift to larger rounds in high-quality assets.

Definition

Venture capital (VC) is a subset of private equity and a type of finance provided by investors to start-ups and small businesses with the potential for long-term growth.1 Wealth individuals, investment banks, and other financial institutions often provide venture capital. However, it is not necessarily monetary compensation; it may also take the form of technical or administrative experience. Typically, venture capital is invested in tiny businesses with tremendous development potential or in organizations that have expanded rapidly and are ready to continue growing. A venture capital fund (VCF) is an investment instrument for private investors that pools their money. It can be established or incorporated as a trust, company, limited liability partnership, or another type of business that takes assets from investors and invests them according to a stated investment plan for the benefit of its stakeholders. With the growth of financing among strong investors in India, it is critical to grasp the regulations governing venture capital funds and their current state in the Indian context.

Introduction

The Indian government took steps to build a venture capital business. The Indian government's first efforts date back to the 1970s, and even today, there is a misunderstanding over the regulatory structure governing this business. Venture capital investments decreased somewhat between 2000 and 2001 but increased significantly after 2004. During the early phases of India's venture capital industry's growth, only development financial institutions and nationalized banks were permitted to engage in venture capital operations. The effectiveness of such venture capital firms was unsatisfactory for obvious reasons, including a lack of entrepreneurial expertise and risk tolerance necessary to make sound investment selections.

Structuring of Venture Capital Funds in India

The stages of the venture funding process would be consistent worldwide. However, the duration and structure of transactions may vary depending on the regulatory and legal framework, entrepreneurial culture, and legal aspects of starting a new business, among other factors. Taxation,

[1] Private Equity Vs. Venture Capital – Understanding The .... https://alternativelatininvestor.com/private-equity-vs-venture-capital-understanding-the-difference/

valuation, the instruments to be used for financing, exit options, and investor rights are the primary considerations once structuring deals.

1) Domestic Funds

When funds are raised within India, a domestic investment vehicle is created in a trust or a corporation. This investment instrument combines investor cash. The fund is managed by an investment advisor or an asset management business. The asset management business or investment adviser identifies and invests in investee companies.[2]

2) Offshore Funds

A tax haven forms a structure for pooling assets from international investors. The investment vehicle invests in venture capital enterprises in India. Due to India's DTAA with Mauritius, most offshore funds have created investment vehicles in Mauritius. A limited liability partnership or a limited liability corporation may be used as the investment vehicle.[3] The fund is managed by an offshore manager based in Mauritius and is often advised by an investment adviser based in India. It is critical to organize the connection between the offshore fund, the offshore management, and the Indian adviser in this sort of arrangement in order to avoid the Indian advisor being labeled a Permanent Establishment (PE). If it is treated as a Permanent Establishment, it may have adverse tax consequences.

3) Unified Funds

Domestic and international investors jointly engage in the venture capital fund under this framework. A domestic fund is formed as a trust and registered as a domestic venture capital fund with India's Securities and Exchange Board. Domestic investors make direct investments in the fund. Overseas investors pool their cash and invest in an offshore fund domiciled in a tax haven such as Mauritius. The offshore fund makes investments in the domestic fund, making investments in domestic venture capital firms.

Types of Venture Capital Funds in India

i. Domestic venture capital funds

[2] Investing Basics: Frequently Asked | Charles Schwab. https://www.schwab.com/how-to-invest/investing-basics
[3] Business and Non-profit Forms. https://www.sos.state.tx.us/corp/forms_boc.shtml

In India, there are six distinct types of domestic venture capital funds. It comprises venture capital arms of development financial institutions, banks' venture capital funds launched by state industrial development corporations, multilateral venture capital funds, corporate venture capital funds, and independent venture capital funds.

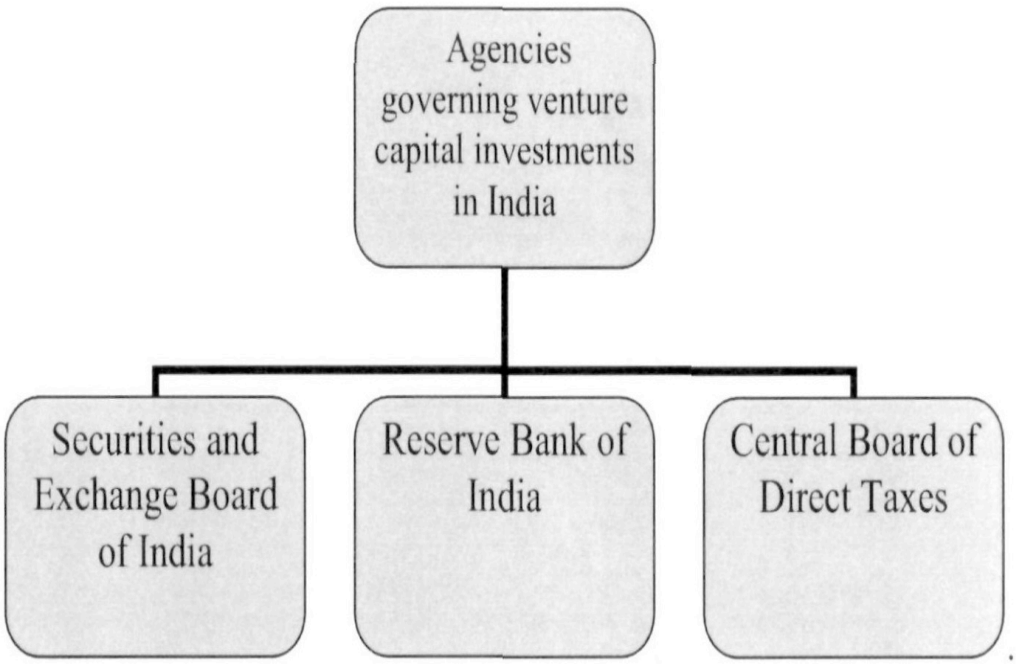
ii. Foreign Venture Capital Funds

There are three types of foreign venture capital funds operating in India. Foreign independent venture capital funds, venture capital arms of foreign companies, and foreign banks operating in India.

India's Regulatory Framework

The regulatory framework in a country has several implications for the venture capital industry and investments. In nations such as the United States, Israel, and Taiwan, where the sector has developed, the industry is governed by few laws. The governments of most of these nations have made steps to foster an enabling environment conducive to developing a vibrant venture capital business. Some of them have been implemented, while others have not. Dossani Rafiq conducted a comprehensive assessment of the regulatory framework governing the venture capital business in India and gave various recommendations to policymakers on how to foster an enabling environment. Indian entrepreneurs founded 565 businesses in Silicon Valley between 1980 and 1997. This demonstrates that Indians are likewise prepared to take risks under appropriate conditions.

Agencies governing the venture capital industry in India



Significant Indian legislations affecting venture capital investments

i. SEBI (Venture Capital Funds Regulations) Act, 1996

SEBI permits establishing venture capital firms in India as a Trust or a Company, including a body corporate. If it is created as a Trust, the Indian Trusts Act, 1882 will regulate it. The Trust Deed must be registered under the 1908 Registration Act. If the venture capital fund is organized as a limited liability company, it must be registered under the Indian Companies Act, 1956.4 In India, venture investors favor the trust structure because it avoids the dividend distribution tax applied to companies.5 Numerous experts and high-level committees have recommended that venture capital funds be formed as Limited Liability Partnerships or Limited Liability Companies. A venture capital fund may also be founded as a corporation according to a statutory provision of Parliament or state law. This demonstrates that India's legislation prohibits the formation of venture capital

[4] Ajinkya, Bijal., & Goradia; Shefali. (2004). Regulatory Framework for Venture Capital Investments in India. In V.Suubbulakshmi, (ed). *Venture Capital Industry-An Introduction* (pp. 89-102). Hyderabad: ICFAI Books, ICFAI University Press.

[5] Verma, Sunny., & Anm, S. (2009). New Rules Complicate FDI status of ventiu-e capital investments. Financial Express.

firms as Limited Liability Partnerships or Limited Liability Companies.6 The limited liability structure provides investors with flexibility and liability protection. It is a distinct legal body, and the partners' responsibility is restricted to the amount of their investment or ownership. According to a recent news report, the government has notified that limited liability partnerships can be formed in India. The extent to which this will be extended to venture capital firms remains to be seen.

There is a condition about the minimum investment that the fund will take from an investor. The minimum investment allowed from any investor, except employees, principals, or directors of the venture capital fund, should be Rs.500,000. A minimum capital investment of Rs. Its investors should make fifty million or five crores. This may address the issue of undercapitalization but also discourages small investors and funds from investing in venture capital. This might provide difficulties for firms seeking minor venture capital financing.

- A venture capital fund is not permitted to invest in affiliated firms.
- This clause was added to safeguard the interests of fund investors.
- A venture capital fund may not invest more than 25% of its money in a single enterprise.
- A minimum of 66.67 percent of the venture capital fund's investible funds shall be invested in unlisted equity shares or equity-linked instruments of venture capital undertakings.
- Note that 66.67 percent of investible funds are invested in unlisted venture capital firms.
- This criterion will guarantee that venture capital funds make significant investments during the early phases of the venture capital undertaking's life cycle.

Venture capital funds may invest in the securities of foreign firms subject to the rules and guidelines established or published from time to time by the Reserve Bank of India and the Board. In April 2007, the Reserve Bank of India issued a circular authorizing domestic venture capital firms registered with SEBI to invest in international enterprises. The SEBI announced in August 2007 that a venture capital fund might invest up to 10% of its investible funds, subject to a maximum of $500 million. Venture capital funds may invest in equity and equity-linked securities

[6] Report of the Committee on Technology Innovation and Venture Capital, Planning Commission, Government of India. (2006).

of only overseas firms connected to India. SEBI defined an offshore venture capital undertaking as a foreign firm whose shares are not listed on any recognized stock market in India or elsewhere.7

- SEBI regulations prohibit a venture capital fund from listing its securities for three years following its issuance.
- This is critical to deterring speculative trading in the venture capital fund's units until the fund is firmly established.
- A SEBI-registered venture capital fund's affair will be subject to inspection/investigation by a SEBI-appointed inspector.
- While it is necessary to oversee venture capital fund operations, excessive monitoring, particularly by government officials, can create issues.
- Venture capital is, without a doubt, a fundamentally distinct type of financial intermediary.
- SEBI may designate an officer who lacks the skills necessary to comprehend the functioning of a venture capital fund.

ii. SEBI (Foreign Venture Capital Investor) Regulations, 2000

Offshore funds or Foreign Venture Capital Investors are pretty active in India. Under the SEBI (Foreign Venture Capital Investor) Regulations, the term "foreign venture capital investor" refers to an investor incorporated or formed outside India, is registered under these regulations, and seeks to invest in compliance with these regulations. SEBI (Foreign Venture Capital Investor) Regulations, 2000, were amended in 2001, 2004, and 2006.

iii. The Income Tax Act, 1961

This Act taxes venture capital funds on revenue derived from investments in venture capital operations. Sections 10(23F), 10(23FA), and 10(23FB) of the Income Tax Act make it abundantly plain that income received by the VCF in the form of dividends or long-term capital gains from any venture capital business is not included in the VCF's total income for taxation purposes. Section 115 U of the Income Tax Act provides that income obtained from an investment in a

[7] BS Reporter. (2007). SEBI caps VC's foreign investments at 10% http://www.business-standard.com/india/news/sebi-caps-vcs-foreign-investments-at-10/293994/

Venture Capital Fund is taxable in the investor's hands. This means that the venture capital fund or firm is taxed on the revenue gained through venture capital investments. They are only appropriating/allocating funds for which they get compensated.8

iv. The Companies Act, 1956 and Trusts Act

As previously stated, venture capital funds in India can be incorporated as a trust, a corporation, or a body corporate. In India, 99 percent of venture capital funds are registered as trusts. The Corporations Act applies if a venture capital fund is established as a corporation. Few are formed as corporations because corporations must pay dividend distribution taxes. Rajasthan Asset Management Corporation Pvt. Ltd., the Rajasthan Venture Capital Fund manager, is one of India's few venture capital funds founded as a company.[9] However, one advantage of the corporate form of organization is that ownership and control requirements are explicitly defined. Under the most accurate form of organization, there are no owners and just beneficiaries. This clarity is critical when a venture capital fund includes non-resident investors.[10]

v. Foreign Exchange Regulations

Foreign exchange regulations affect venture capital investments, as foreign investors make the majority of venture capital investments in India. Under certain conditions, foreign venture capital investors may participate in domestic venture capital funds or directly in Indian venture capital firms. Additionally, Indian venture capital firms can invest in overseas venture capital firms. According to an RBI notification dated 26/12/07, "the consideration for investment in VCFs/IVCUs shall be paid out of funds remitted from abroad through normal banking channels or from funds held in an account maintained with the designated branch of an authorised dealer in India in accordance with regulations."

vi. Foreign Direct Investment Policy

Foreign Venture Capital Investors registered with SEBI may invest automatically, subject to sectoral limitations. Foreign venture capitalists not registered with SEBI must obtain authorization

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[8] Bothra, Nidhi., & Kothari, Vinod. (n.d). Venture Capital Regulations in India. http://india-financing.com/The%201aw%20oP/o20Venture%20capital%20in%20India.pdf

[9] The official website of Rajasthan Venture Capital Fund. (n.d.). http://www.rvcf org/

[10] Srivastava, Saurabh., & Goenka, Abhisek. (2009). New Rules Complicate FDI status of venture capital investments. Financial Express.http://vyww.financialexpress.com/news/new-rules-complicate-fdi-status-of-venture-capitalinvestments 425825/0

from the FIPB. Numerous changes are anticipated in India's regulatory framework and tax regulations governing venture capital. Policy measures can contribute to venture capital, start-ups, and entrepreneurship.

Current Scenario

In 2021, venture capital investments in India experienced a stratospheric 3.8x growth over 2020, reaching $38.5 billion in capital deployed. The share of VC deal value in total PE-VC investments exceeded 50% for the first time. India's venture capital investments expanded much faster than worldwide venture capital investments, which increased by 1.9x between 2010 and 2020. The US and China, whose venture capital investments increased by 1.9x and 1.3x, respectively. India's portion of global venture capital funding is expected to nearly double from less than 3% to 5.6 percent by 2021. A critical convergence of tailwinds has fuelled India's investment momentum. Fundamentals of digital infrastructure (e.g., low-cost data access, UPI, and e-KYC via Aadhar) have created the tremendous economic potential that is progressively being handled by India's growing start-up ecosystem.[11]

Additionally, investor confidence was bolstered by a record of exits, mainly as public listings gained traction. Further uncertainty was generated by China's regulatory assault on technology enterprises, which resulted in some capital flight to India. Over 2020–21, investment growth was driven by deal volume expansion (1,545 deals vs. 809 in the base year—1.9x rise) and average deal size growth (from $12.4M to $24.9M). Additionally, in 2021, global venture capitalists led 92 high ticket size rounds (mainly follow-on growth equity investments), seven of which were $500 million+ rounds in market leaders such as Swiggy (online food delivery), Dream11 (gaming), and Eruditus (EdTech). Finally, scaling rounds resulted in a general increase in valuations. In 2021, India generated 44 new start-ups. In a dramatic move, India eclipsed China for the first time in terms of annual unicorn count (44 vs. 42), bringing India's total active unicorn count to 73 and propelling India into third place globally in terms of total active, privately-held unicorns.

The most important investment themes (2021-present)

Similar to 2020, three sectors (fintech, consumer technology, and SaaS) continued to account for more than 75% of all venture capital investments by value; however, 2021 was marked by a

[11] VC investments in India grow 4-fold in a year, hit record .... https://timesofindia.indiatimes.com/business/india-business/vc-investments-grow-4-fold-in-a-year-hits-record-high-of-38-5-billion-in-2021/articleshow/90535603.cms.

dramatic increase in new technology investments, such as B2B commerce and technology (6.6x growth over 2020) and Web 3.0 or cryptocurrency-based start-ups (28x growth over 2020, reaching $500M+ in investments). E-commerce and SaaS deals grew in size primarily due to the sectors' maturity, while fintech and other consumer technology sectors (EdTech and gaming) grew in size and volume. On the other hand, online B2B commerce and Web 3.0 experienced a surge in deal-making.

Numerous investment topics originated or gained appeal (2021-present)

- Innovative e-commerce models (social commerce, video commerce)
- Aggregators of direct-to-consumer brands
- Video-on-demand or social networking (targeting Tier 2+ users)
- Neo banks for consumers and SMBs[12]
- SaaS[13]
- Marketplaces for business-to-business transactions online
- Web 3.0 and technologies based on cryptography

India's investment projection till 2022 and beyond

We believe India's venture capital-funded start-up ecosystem has achieved escape velocity, owing to a robust value generation flywheel. The year 2021 was noteworthy for ESOP liquidity events across the start-up ecosystem—more than 30 start-ups announced ESOP buybacks, which are anticipated to feed a new generation of founder operators with higher risk tolerance and skill, further expanding the ecosystem's depth of prospects. While the first quarter of 2022 remains solid, public market trends predict some challenges for venture capital investments in 2022, as seen by a flurry of numerous compressions in publicly traded technology businesses on worldwide exchanges. Given the availability of dry powder and the ecosystem's depth, we anticipate ongoing funding momentum; nevertheless, a few adjustments in the pace and quality of deals are inevitable. As deal-making returns to a more measured pace, the emphasis will move to larger rounds in high-

[12] The threshold for investment in small enterprises ranges between INR 1-10 crores, while that of turnover ranges between INR 5-50 crores; in medium enterprises, the investment threshold ranges between INR 10-50 crores, while that of turnover ranges between INR 50-100 crores.

[13] B2B software is delivered on the cloud, including horizontal business software, vertical business software, and horizontal infra software.

quality assets. A few new sectors are likely to experience emergent growth (crypto- and blockchain-based technologies, health-tech, and agri-tech). Additionally, anticipated technology listings in the pipeline may have to take a wait-and-see attitude until the markets recover. Several watchdogs may continue to have an effect on the ecosystem for some time: SEBI is projected to tighten its IPO guidelines, regulatory ambiguity in a few industries (e.g., online gambling and fintech) is likely to persist, and the ecosystem will continue to be strained by a competitive talent market.

Conclusion

Economic prosperity in any country is contingent upon sustained corporate growth and an environment that supports investor confidence. India is expected to attract significant investment and business growth in the following years, owing to significant judicial precedents and liberal legislation. Investor trust may be established when investors can exit firms after profiting without incurring losses due to other shareholders' or promoters' wilful default or deceit.

References

- Agarwal, D. C., (2000), "Indian Economy, Sahitya Bhavan Publication, Agra.
- Balasubramanyam, V. N., (1984), The Economy of India, Weidenfeld and Nicolson, London, pp- 1,3,6,39,41.
- Central Statistical Organization, (2014), Government of India, National Accounts Statistics.
- Chary T Satyanarayana, "Venture Capital – Concepts & Applications," Macmillian India Ltd, 2005, pg 19 – 22.
- Dossani Rafiq, Kenney Martin, "Creating an environment: Developing venture capital in India" Asia Pacific Research Centre, 2002.
- Dossani, R. and Kenney, M (2002) Creating an Environment for Venture Capital in India, World Development, Vol. 30 (2), pp. 227-253
- Economic Survey, (2012-2013), Government of India, Ministry of Finance, Economic Division, New Delhi.
- Government of India Micro Small and Medium Enterprises-Annual Report (2012- 13)
- Indian Venture Capital and Private Equity Report-2013

- Pandey I M, "Venture Capital – The Indian Experience," Prentice Hall of India Pvt Ltd, 1999, pg 95 – 97
- Rejeshwari Adappa Thakur. (2008) Infrastructure Financing: Betting Big on India. http://www.ibef.org/download/funding.pdf
- Ruddar Dutt and K. P. M. Sundharam, (2000), S. Chand and Company Ltd., New Delhi, India.
- Thillai Rajan Annamalai and Ashish Deshmukh, "Venture Capital and Private equity in India: an analysis of investments and exits," Journal of Indian Business Research, Vol. 3, Issue 1, 2011.
- Trends of Venture Capital in India, survey Report by Deloitte, 2014.

Website:

- www.sebi.gov.in
- www.indiavca.org.
- www.vcindia.com
- www.ventureintelligence.in
- www.nasscom.org
- www.ciiionline.org
- www.msme.com
- www.economictimes.indiatimes.com
- www.100ventures.com
- www.thomsonreuters.com
- www.planningcommission.nic.iN

SOLID WASTE MANAGEMENT UNDER SUSTAINABLE DEVELOPMENT

- MADHAV MENON

1. Abstract

Sustainable development is defined as progress that meets present needs without endangering the ability of future generations to satisfy their own. Sustainable development is a form of development that aims to balance multiple, often conflicting goals against an awareness of our society's environmental, social, and economic restrictions. All too frequently, progress is driven by a single need without taking into account the broader or longer-term consequences. From large-scale financial crises created by reckless banking to global climate catastrophe caused by our reliance on fossil-fuel-based energy sources, the repercussions of this strategy are becoming clear. We must act quickly because the longer we pursue unsustainable growth, the more common and severe its consequences will become. One of the key ideas of sustainable development is to live within our environmental boundaries. Climate change is one of the consequences of not doing so. However, the aim of sustainable development extends well beyond the environment. It's also about ensuring that society is robust, healthy, and just. This entails satisfying the different needs of all individuals in current and future communities, as well as encouraging personal well-being and community coherence.

1.1 *Research Question*

How have reforms in the field of SWM helped India achieve the goal of sustainable development and how can these policies be improved?

1.2 *Statement of Problem*

India confronts significant environmental issues due to excessive generation of waste and its insufficient collection, transportation, treatment, and disposal. "The existing waste management systems in India are unable to cope with the increasing volumes of waste produced by a burgeoning urban population, posing a hazard to the environment and public health." SWM training is lacking, and competent waste management personnel are scarce. There exists a lack of accountability in India's present SWM systems. "Municipal governments in India are in charge of handling MSW, but their budgets are insufficient to pay the expenses of constructing proper collection of waste and its storage, treatment, and disposal systems. In India, attaining successful SWM is hampered by a lack of strategic MSW planning, waste collection/segregation, and a government financial regulatory framework."[14] Low motivation and a lack of environmental knowledge have stifled innovation and the adoption of innovative technology that may improve garbage management in India. In India, public attitudes around waste are also a key impediment to developing SWM.

In densely populated cities, effective SWM is a huge difficulty. "Since India is a diverse country with many different religious groups, cultures, and customs, attaining sustainable development in a country with rapid population growth and improvements in living standards is more difficult." Despite tremendous progress in the areas of social, economic, and environmental development, India's SWM systems have remained mostly intact. In order to extract value from garbage, in a country where about 90% of residual garbage is typically discarded rather than properly landfilled, the informal sector is crucial. It is critical to transition to a more sustainable SWM, which necessitates the implementation of new systems of management and facilities for waste management.

[14] Sunil Kumar, Stephen R. Smith, Geoff Fowler, Costas Velis, S. Jyoti Kumar, Shashi Arya, Rena, Rakesh Kumar and Christopher Cheeseman, *Challenges and opportunities associated with waste management in India*, ROYAL SOCIETY OPEN SCIENCE (2017)

1.3 *Research Objectives*

(i) To explore the features of solid waste management methods in India and their environmental implications;

(ii)To analyze how better waste management practices may contribute to India's sustainable development processes.

1.4 *Research Methodology*

The research presents an overview of India in relation to the issue, and it is primarily based on secondary data collecting. The researcher will rely heavily on secondary material, such as research publications, journals, working papers, newspaper reports (to stay current on advancements in the field), Supreme Court cases, and so on. The researcher will use a consistent citation style, such as the 21st Edition Bluebook edition.

2. Literature Review

2.1 *Theoretical Background*

Sustainable Development Theory - The implementation of the 'Polluter Pays' idea is one of the key ways that sustainable development has aided the issue of Solid Waste Management. To discourage trade-damaging subsidies, all members of the Organisation for Economic Cooperation and Development (OECD) resolved to incorporate the 'Polluter Pays' principle into their environmental policies. One of the most efficient techniques for preventing environmental pollution is the 'polluter pays' approach, which was first utilized in India in the case of *Indian Council for Enviro-Legal Action v. UOI (2011)*.[15]

2.2 *Laws*

1. Indian Penal Code 1860 Chapter XIV

[15] Indian Council for Enviro-Legal Action v. UOI, 2011 8 SCC 161

2. Criminal procedure Code 1973 S. 133

3. Criminal procedure Code 1973 S. 133

4. Prof. Satish C. Shastri, Solid Waste Management-An Indian Legal Profile, NLS Enlaw - INDIAN CONSTI. Art 21

5. INDIAN CONSTI. Art 47

6. Prof. Satish C. Shastri, Solid Waste Management-An Indian Legal Profile, NLS Enlaw - The Municipal Solid Waste (Management and Handling) Rules, 2000 S. 2

7. Integrated Solid Waste Management, Swach Environment The Municipal Solid Waste (Management and Handling) Rules, 2000 Schedule II

8. Swati Singh Sambyal, Government notifies new solid waste management rules, DOWN TO EARTH - Solid Waste Management Rules (SWM), 2016

2.3 *Journal Articles / Books*

In their 2016 study, ***"Status and Challenges of Municipal Solid Waste Management in India: A Review,"***[16] Rajkumar Joshi and Sirajuddin Ahmed assert that the failure of Municipal Solid Waste Management (MSWM) is due to a lack of knowledge and technical skills, limited funding, and poor enforcement of rules and regulations

In their paper ***"Sustainable Municipal Solid Waste Management in India: A Policy Agenda,"*** Shyamala Mani and Satpal Singh argue that the policy agenda for sustainable SWM must drive behavioral change among citizens, elected officials, and decision-makers in order to reduce waste and maximize recycling and reuse.[17]

[16] Rajkumar Joshi and Sirajuddin Ahmed, *Status and Challenges of Municipal Solid Waste Management in India: A Review,* (Sep. 3, 2021, 04:56 PM), https://www.researchgate.net/publication/295258981_Status_and_challenges_of_municipal_solid_waste_management_in_India_A_review

[17] Shyamala Mani and Satpal Singh, *Sustainable Municipal Solid Waste Management in India: A Policy Agenda*, (Sep. 1, 2021, 06:19 PM), https://pdf.sciencedirectassets.com

Annepu looks into techniques for reducing the amount of solid waste in his article ***"Sustainable Solid Trash Management in India."***[18] Open burning of solid waste and fires from waste dumpsites in Mumbai emit almost 20000 tonnes of pollutants into the atmosphere every year. Annepu recommends incorporating informal recycling into the formal system by training and engaging garbage collectors for door-to-door garbage collection and enabling them to sell recyclables collected, among other waste reuse possibilities.

3. Understanding the Concept

3.1 *Waste management*

Waste management is the gathering of all discarded items in order to recycle them and, as a consequence, reduce their negative impacts on our health, environment, and quality of life. This phrase usually refers to man-made substances that are utilized to reduce the impact of such substances on the environment and overall societal health. Waste management is also used in order to recover resources. Waste management procedures vary across industrialized and developing countries, urban and rural locations, and household and industrial waste generators. Monitoring, collection, transportation, processing, disposal, and recycling are all steps in the waste management cycle. Solid, liquid, gaseous, or radioactive wastes may all be managed, with distinct procedures and fields of knowledge required for each. In urban regions, local government bodies are often responsible for non-hazardous residential and institutional garbage, whereas the generator is typically responsible for non-hazardous commercial as well as industrial waste.

Reduce, Reuse and Recycle are known as the primary tools for segregation and appropriate processing of waste and it allocates a plan of action for the management of waste based on its appeal for waste minimization. Most waste minimization solutions still use the waste hierarchy as their foundation. The goal of the waste hierarchy is to get the most practical value out of things while producing the least amount of garbage.

With population increase, affluence, and consumption throughout the world, waste creation per capita has grown and is predicted to continue to rise. Approaches to solving the waste problem in a scalable and sustainable way would lead to a paradigm in which trash is used as an input in the

[18] Ranjith Kharvel Annepu, *Sustainable Solid Waste Management in India*, Columbia: Columbia University, pp. 3-7 (2012)

manufacturing of commodities and its value is exploited, making waste management a genuine profit center.

3.2 *Solid Waste Management*

Solid waste management is described as the science of producing, storing, collecting, transporting or transferring, processing, and disposing of solid waste substances while taking into account a range of engineering, environmental, conservation, economic, and public health problems.[19]

Planning, administrative, financial, engineering, and legal tasks are all part of solid waste management. Complex interdisciplinary relationships between subjects including public health, city, and regional planning, political science, geography, sociology, economics, demography, engineering, and material sciences might be used to find solutions.[20]

Residential and industrial producers, urban and rural regions, and developed and developing countries all have different solid waste management techniques.[21] Local governments are responsible for the management of non-hazardous waste in urban regions. Hazardous waste management, on the other hand, is often the duty of those who create it, and it is regulated by local, national, and even worldwide authorities.[22] The major purpose of solid waste management is to reduce and eliminate the negative effects of waste products on human health and the environment in order to promote economic growth and a higher quality of life.[23] This must be done in the most effective manner feasible in order to keep expenses down and waste from accumulating.

3.3 *Sustainable Development*

The essential premise of the coexistence of two seemingly contradictory ideas, namely development and environment, has evolved into the principle of sustainable development. However, in practice, the ecological, economic, and social components of sustainability are inextricably linked. As William Rees correctly points out, maintaining ecological integrity must

[19] Rick LeBlanc, *An Introduction to Solid Waste Management*, THE BALANCE SMALL BUSINESS (Nov. 15, 2021, 07:12 PM), https://www.thebalancesmb.com/an-introduction-to-solid-waste-management-2878102 ,
[20] *Ibid.* ,
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

take precedence over meeting socioeconomic human wants, therefore there should be a confluence of ecological and economic components in the growth process. The concept emphasizes two primary needs: the first is the need for socio-economic growth, and the second is the need for limits put on the environment's ability to cope with current and future demands. The goal of the principle of sustainable development, from an environmental standpoint, is around three issues: (i) maintaining important ecological processes, (ii) preserving genetic variety, and (iii) ensuring sustainable exploitation of species and ecosystems.

The Brundtland Report (1997) explained how conservation and sustainable development are intertwined and it stated: "Sustainable development is a development that satisfies current requirements without jeopardizing future generations' ability to satisfy their own needs…. To achieve sustainable development, all people's fundamental needs must be met, and all possibilities to achieve their goals for a better life must be expanded."

Environmental protection is an essential component of long-term development. To promote sustainable growth inside their borders, the majority of countries have implemented environmental protection legislation. An efficient environmental protection framework is required to support sustainable development. The lowest sectors of society are disproportionately affected by inadequate environmental protection or deterioration, as they rely on unlabeled environmental resources such as woods, water from hand pumps, air polluted and noisy slum houses, and so on. Water resources, forestry, agriculture, industry, energy and electricity, and other sectors all contribute to environmental degradation; consequently, policy actions in these areas should be environmentally oriented and properly planned to guarantee that the natural environment is not harmed.

The Environment (Protection) Amendment Rules, 2021[24] is the primary body of legislation, with regards to the safety and well-being of the environment, in India. There are also some additional pollution control and prevention laws, and states have enacted their own anti-pollution legislation in response to local needs. The ultimate goal is to secure long-term development in order to safeguard the environment from degradation or pollution. The Talloires Declaration is another

[24] Environment (Protection) Amendment Rules 2021

call to action for environmental sustainability, addressing the unprecedented volume and pace of pollution and deterioration, as well as the depletion of natural resources.

4. Indian Jurisprudence on Solid Waste Management

4.1 *Laws regarding SWM*

The ***Indian Penal Code***, which was adopted in ***1860***, and the ***Code of Criminal Procedure***, which was enacted in ***1973***, are two key criminal legislation that deals with the subject of solid waste management. The Indian Penal Code of 1860 deals with solid waste management under Chapter XIV of offenses that affect the safety, morals, convenience, decency, and health of both the individuals and the general public.[25] In the code, solid waste has no particular section devoted solely to it.

In the Criminal Procedure Code of 1973, Section 133[26] talks about removing nuisance and authorizes the Sub-Divisional Magistrate or any Executive Magistrate to issue an order to eliminate the public nuisance and prohibit conducting businesses or trade that give rise to public nuisance after obtaining information or a report.[27] To take action against the problem of solid waste management, courts have extensively applied Section 133.

To ideally encourage efficient policing, incentives are an excellent source. A useful strategy to minimize criminal actions is the prosecution of criminals for their misconduct. As a result, criminal provisions operate as a "negative incentive," reducing the buildup of solid waste, and therefore it is considered hazardous to public health. As such, it has been classified as a public nuisance and made illegal/punitive.

[25] Indian Penal Code 1860 Chapter XIV
[26] Criminal procedure Code 1973 S. 133
[27] Prof. Satish C. Shastri, *Solid Waste Management-An Indian Legal Profile*, NLS ENLAW (Aug. 18, 2021, 03:45 PM), https://nlsenlaw.org/solid-waste-management-an-indian-legal-profile/#

Courts have frequently concluded categorically that preserving both sanitation and health falls under the jurisdiction of Article 21[28] of the Constitution because a failure of this could endanger citizens' lives and amounts to gradual poisoning and a loss in life expectancy if risks are not addressed. The court further stated that removing trash, filth, night soil, or any other toxic or unpleasant matter is a primary, mandatory, and compulsory responsibility of Municipal Corporations/Councils. Under the Environment (Protection) Act of 1986, pollution boards and their officials have a fundamental obligation to prevent unlawful waste movement and/or disposal. As a result, Article 21 highlights the need for a pollution-free environment in cities and towns, as well as proper hygienic conditions, a lack of which enjoyment of life cannot be fulfilled. The court also stated that Article 47[29] of the Indian Constitution, declares that improving public health is one of the government's key responsibilities and a core principle.

The right to life is essential to our survival as human beings, and it encompasses all elements of life that make a man's life meaningful, full, and worthwhile. Therefore, the right to life is given prominence and acknowledged as a fundamental element in our Constitution because the essential idea of the right is that bare necessities, minimal and basic requirements for a person are of extreme importance.

The Municipal Solid Waste (Management and Handling) Rules, 2000[30] consists of 9 Rules and IV Schedules. Municipal Solid Waste is defined in Section 2 as solid or semi-solid commercial and residential trash generated in municipal or notified areas, excluding industrial hazardous wastes but including treated biomedical waste.[31] The municipal solid trash is managed and treated in accordance with the regulations' compliance criteria and method, which are outlined in Schedule II. Collection, segregation, storage, transportation, processing, and disposal of municipal solid waste are the requirements for management and handling.[32] Rule 4 assigns responsibility for enforcing the regulations to each 'Municipal Authority.'

[28] INDIAN CONSTI. Art 21
[29] INDIAN CONSTI. Art 47
[30] The Municipal Solid Waste (Management and Handling) Rules, 2000
[31] Prof. Satish C. Shastri, *Solid Waste Management-An Indian Legal Profile*, NLS ENLAW (Aug. 18, 2021, 03:45 PM), https://nlsenlaw.org/solid-waste-management-an-indian-legal-profile/#
[32] *Ibid.*

The revised Solid Waste Management Rules (SWM), 2016,[33] were recently announced by the Union Ministry of Environment, Forests and Climate Change (MoEF&CC) and will take the place of the Municipal Solid Wastes (Management and Handling) Rules, 2000. The new guidelines require waste to be separated at the source in order to channel waste into income through recovery, reuse, and recycling. Before handing over garbage to the collector, waste generators must now separate it into three streams: biodegradables, dry (plastic, paper, metal, wood, etc.), and domestic hazardous waste (diapers, napkins, insect repellants, cleaning agents, etc.).

4.2 *Sustainable development Policies and Reforms*

India has taken the lead as a potential change-maker in addressing climate change and developing development plans that are in line with the Sustainable Development Goals, which were adopted in September 2015 and cover the social, environmental, and social aspects of development, as well as ending all forms of poverty.

One of the most effective programs for avoiding single-use plastic and promoting Swachh Bharat has been India. This has aided in raising awareness among children as early as elementary school, with children confronting their parents about their right to cleanliness. The SBM used versions of the community-led total sanitation (CLTS) strategy, as well as administrative and financial incentives, to encourage long-term behavior change. It sparked a desire for toilets in remote areas by conducting community mapping and transect walks to determine how and where open defecation affects health outcomes. It also encouraged the use of cost-effective and long-term sanitation techniques while prohibiting the use of temporary constructions.

The ***Namami Gange Mission*** is a high-priority policy initiative aimed at attaining SDG. Sewerage project management, urban and rural sanitation, industrial pollution, water usage efficiency, and

[33] Solid Waste Management Rules, 2016

quality improvement, ecosystem protection, and the Clean Ganga Fund are just a few of the major components.[34]

While there were several laws present, none of them were well-written to satisfy the demands of the twenty-first century in terms of sustainable development, and they were not executed in an efficient and effective manner, and they were not efficiently and effectively implemented, nor did they provide monitoring and evaluation schemes to track the progress of such laws' implementation, as shown in the preceding discussion. Furthermore, these laws do not assign sufficient obligations and duties for producing "sustainable systems." It is evident that effective legislation alone will not solve the problem unless we also have effective processes in place, as well as the willingness of the government to enforce such rules and a shift in public attitude.

4.3 *Judicial Decisions*

In Re: Outrage as Parents End Life After Child's Dengue, 12 December 2017 is a case in which the Court granted suo moto cognizance (Suo Moto PIL) based on a media article headlined "Outrage as parents end life following child's dengue death." This article sparked tremendous indignation across the country, as well as condemnation of local officials for failing to properly dispose of solid garbage. One of the key causes of vector-borne illnesses like dengue fever was thought to be the buildup of solid waste. Despite the fact that the Solid Waste Management Rules came into force on or around April 8, 2016, more than two-thirds of the states and union territories in the country have yet to comply with its most basic requirement, have bothered to comply with the Court's orders, or have bothered to comply with the MoEFCC's directives.[35] If states care about people's health and cleanliness, the Court believes they should create a policy in compliance with the Solid Waste Management Rules to maintain their states clean. Even after two years, the States/Union Territories' contempt for drafting policies is sad.

[34] *India follows a holistic approach towards its 2030 Sustainable Development Goals (SDGs)*, Press Information Bureau Government of India Ministry of Finance, July 04, 2019, https://pib.gov.in/Pressreleaseshare.aspx?PRID=1577014

[35] *Delhi getting buried under garbage, Mumbai sinking but govt does nothing, says SC*, HINDUSTAN TIMES, November 18, 2021

In *M.C. Mehta v. Union Of India, 13 January 2020*, the Court believed that DPSPs could be enforced under Article 21 since the right to a pollution-free environment is considered to be a fundamental right. This is supported by the actual implementation of a preventative strategy against both the public and the government, as well as concerns about sustainable development. Regarding the 'preventive principle,' despite the fact that the preventative approach is not expressed in precise words in judgments, the Court believes that all statutory law, which incorporates criminal elements, is a codification of the same.

In *Samir Mehta V. Union Of India, 28 August 2016*, the petitioner's main argument was that "the applicant filed the application raising substantial questions relating to the environment and compensation commensurate to the damage done to the ecology on the facts of the case." "The respondents countered by stating that there was no immediate effect of the oil spill on 4 August 2011; however, the Indian Coast Guard dispatched their oil pollution response ship, namely 'Samudra Prahari,' to deal with the said pollution and disaster caused thereof." The tribunal unanimously agreed that the "Precautionary Principle" and "Polluter Pays Principle" recognized the right to a clean environment as a basic right under Article 21 of the Indian Constitution, which assures life and personal liberty protection.[36]

4.4 *Concerns and Difficulties*

In India, SWM is in a deplorable situation as the ideal and efficient waste collecting and management processes are not being utilized. There is a scarcity of skilled waste management specialists and there is a dearth of training in SWM. In India's present SWM systems, there is also a lack of accountability. "Municipal governments in India are in charge of handling MSW, but their budgets are insufficient to pay the expenses of constructing proper garbage collection, storage, treatment, and disposal systems. In India, attaining successful SWM is hampered by a lack

[36] Varshini R, *Case Analysis:- Samir Mehta v. Union Of India*, LAWFOYER (Aug. 22, 2021, 07:53 PM), https://lawfoyer.in/case-analysis-samir-mehta/

of strategic MSW planning, waste collection/segregation, and a government financial regulatory framework."[37]

The ***'Tragedy of the Commons'*** is a circumstance in which people who have the access to a resource, common to all, behave in their own self-interest, causing the resource to be depleted. In the year 1833, a British writer named William Foster Lloyd proposed this economic theory. In the year 1968, Garrett Hardin used the word for the first time in Science Magazine. The idea explained why individuals prefer to make the best options for themselves without considering the disadvantages that others could face. Individuals may justify their selfish behavior if they believe others will not behave in the better interests of the entire community. Individuals may act in their short-term best interests when presented with the potential misuse of a shared or public benefit, such as by consuming an unsustainable product and paying little attention to the harm that it may do to the entire society and the environment as a whole.[38]

The primary cause of India's unmanaged waste problem may be examined through the lens of Garrett Hardin's 'Tragedy of the Commons' theory. In 1968, Hardin defined a 'commons' as any shared and unmanaged natural resource, such as the atmosphere, oceans, rivers, fish, or, to use a more contextually relevant example, a trash dump in India.[39] The 'Tragedy of the Commons' thesis is well-suited to the problem of solid waste management. The government's only solution to waste management is to dump rubbish into landfills; when that solution is no longer viable or appropriate for one landfill, the curse is transferred to another piece of property. Due to this, the entire community soon finds itself living in a garbage waste. It's vital to remember that the trash we throw out doesn't just vanish or evaporate. The problem with landfills is that garbage builds up, resulting in a bevy of environmental impacts that claim a slew of lives, putting the existence of the remainder in jeopardy. According to a 2017 report, India is the world's third greatest trash generator, with waste levels anticipated to reach 436 million tons by 2050. As a result, applying the "Tragedy of

[37] Sunil Kumar, Stephen R. Smith, Geoff Fowler, Costas Velis, S. Jyoti Kumar, Shashi Arya, Rena, Rakesh Kumar and Christopher Cheeseman, *Challenges and opportunities associated with waste management in India*, ROYAL SOCIETY OPEN SCIENCE (2017)

[38] Alexandra Spiliakos, *Tragedy of the Commons: What It Is and 5 Examples*, HARVARD BUSINESS SCHOOL ONLINE (Aug. 12, 2021, 09:27 PM), https://online.hbs.edu/blog/post/tragedy-of-the-commons-impact-on-sustainability-issues

[39] *Tragedy of the Commons*, ATLAS OF PUBLIC MANAGEMENT, (Aug. 12, 2021, 07:33 PM), http://www.atlas101.ca/pm/concepts/tragedy-of-the-commons/

the Commons" idea to the Indian situation allows us to have a better understanding of how Solid Waste Management concerns are addressed.

5. Conclusion and Suggestions

SWM has become a big issue in India as a result of population increase and, in particular, the development of megacities. India now relies on insufficient trash infrastructure, the informal sector, and garbage dumping. There are significant challenges with public engagement in the management of waste, as well as a general lack of community accountability for waste. It is critical to raise community awareness and modify people's attitudes toward garbage in order to build effective and long-term waste management systems. India confronts issues in the waste management industry, including waste legislation, waste technology selection, and the availability of adequately qualified workers. Until these fundamental requirements are met, India shall go on to deal with inadequate management of waste and face its effects on their well-being and the environment.

India's waste management vision emphasizes the need for the transformation of waste into resources with the use of the 3 R's thus helping improve the amount of value obtained from such transformation. Waste management must be the responsibility of ULBs, with the ULB Commissioner and Chairman being directly responsible for waste management system performance. Waste management must be viewed as a critical function that requires long-term funding in Indian society. A waste tax must be imposed on waste producers to collect funds for waste management firms and infrastructure. A daily tax of one rupee would earn almost 50000 crores yearly, and this amount of financing would most likely be adequate to enable effective trash management across India. Information on future waste amounts and characteristics is critical since it influences the suitability of various waste management and treatment strategies. Primary and secondary collection, as well as adequate methods for monitoring collection, transport, and disposal, requires state-level purchase of equipment and trucks. Long-term waste management planning necessitates imaginative project creation by local governments, the commercial sector, and non-governmental organizations. The roles and responsibilities for delivering sustainable

systems must be established, and progress must be monitored and evaluated. Experiences from many parts of India and from various socioeconomic groups should be shared.

CONTRACT OF SALE

- VALLARI KAPOOR

Abstract

A condition is a term that is so essential to the agreement that its breach is considered to be a substantial failure to perform the contract. A breach of a condition is said to go to the root of the contract. A warranty is a term of contract that is not so essential. A warranty must be performed, but a breach of it is not considered to go to the root of the contract. This meaning of warranty should not be confused with other uses of the word such as in "one-year maintenance warranty". Damages are the remedy for breach of a warranty.

Introduction

Where a seller delivers defective goods, two questions immediately arise:

a) What is the precise legal basis of his liability,

And

b) What rights does the buyer have against him.[40]

[40] Samuel J. Stoljar "Conditions, Warranties and Descriptions of Quality in Sale of Goods"(15 Mod. L. Rev. 439 1952) available at: http://heinonline.org (visited on September 1, 2015).

Although these questions appear quite simple, the answers to them are difficult enough. The rights and remedies of the buyer often depend on the classification of the terms. The terms of a contract are the essence of a contract and indicate what the contract will do. For instance, the price of a good, the time of its promised delivery and the description of the good will all be terms of the contract. Before entering into a contract, a series of statements are made by one party in order to encourage or induce the other party to enter into contract. A dispute may later arise as to which of the statements made should be considered a part, or a term, of the contract, and which should be taken as merely precontract talk, and therefore, not a part or term of the contract[41]. Parties to a contract are bound only by its terms, not by any peripheral statements that may have been made prior to or after entering into contract. A representation which is subsequently made part of the contract ceases to be a representation and becomes something more, viz., a promise that such a thing is or shall be. The question then arises whether this representation, which has ceased to be a mere representation, and has become a term of the contract, is a condition or is a warranty. In the light of this question, the author in this paper shall discuss in detail the conditions and warranties pertaining to contracts of sale

Essentials Elements of a Contract of Sale

These six elements are essential for any contract of sale:

1. Two parties
2. Items to be sold
3. Price
4. The transfer of ownership
5. A contract of sale
6. An agreement to sell

NATURE OF STATEMENTS

Statements can be split into the following types:

i. **Puff (sales talk):** If no reasonable person hearing this statement would take it seriously, it would be considered as a puff,and no action in contract is available if such a statement is

[41] Anson, Contract 182 (15th ed., 1920).

proved to be wrong. It may also be referred to as "puffery". These kind of statements are common in TV commercials

ii. **Representation:** A representation is a statement of fact which does not amount to term of contract. Maker of the statement does not guarantee its truth. This gives rise to no contractual obligation but may amount to a tort, for example misrepresentation.

iii. **Term:** A term is similar to a representation, but unlike representation, the truth of the statement is guaranteed by the person making the statement and therefore, giving rise to a contractual obligation. For the purposes of breach of contract, a term may further be categorized as a condition, warranty or innominate term

The court may take into account various factors in determining the nature of a statement. These include:

i. **Timing:** If the contract was concluded soon after the statement was made, this is a strong indication that the statement induced the person to enter into the contract. Lapse of a week within the negotiations of a car sale was held to amount only to a representation in Routledge v. McKay[42]

ii. **Content of Statement:** It is necessary to consider what was said in the given context which has nothing to do with the importance of a statement.

iii. **Knowledge and Expertise:** In Oscar Chess Ltd v. Williams, a person selling a car to a second-hand car dealer stated that it was a 1948 Morris, when in fact it was a 1939 model car. It was held that the statement did not become a term because a reasonable person in the position of the car dealer would not have thought that an inexperienced person would have guaranteed the truth of the statement.

iv. **Reduction into Writing:** Where the contract is consolidated into writing, previous spoken terms omitted from the consolidation will probably be relegated to representations. The old case of Birch v. Paramount Estates Ltd5 provided that a very important spoken term may persist even if omitted from the written consolidation; this case concerned the quality of a residential house.

Representations And Terms

Representation is a presentation of facts, either by words or by conduct, made to induce someone to act, especially to enter into a contract. A representation looks at the present or the past,

[42] [1954] 1 WLR 615.

presenting what the status is or was.6 A representation is something that is offered in order to induce the other party to contract; it is, in a way, independent of the contract itself. If I offer to sell you my car, saying that 'you won't find a better model of Skoda Rapid car in Delhi', no sensible person would assume that I intent to be contractually bound by that statement. Representations are frequently referred to as 'mere puff' and if they are demonstrably false, such statements may be misrepresentations. Terms or clauses, on the other hand, are the contents of the contract. A contract generally consists of several terms. Terms form the essence of any contract be it a simple or a complex contract. The main terms in a contract are price paid and the subject matter of the contract, eg. the goods or services provided. It is common for businesses to have standard form contracts reduced into writing which can be quite lengthy. Contract terms may be express or implied and they may be classed as either conditions, warranties or innominate terms, particularly in contracts of sale.

Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly. The function of the law in such cases is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made. Once it is determined what the implied provisions are, they are read into the contract and the rights of the parties are to be adjudged as though such provisions were expressed.7 In both the US and UK, generally the sellers want to include in the agreement an “Entire agreement clause” and “Non-Reliance Statement” and include a provision to that effect that the buyer has not relied on any statement or promise not included in the written agreement. The intention behind such clause is that they want to ensure that they cannot subsequently be found liable for representations and/or warranties that are not included in the written agreement. So a caution should be taken on such clauses in the agreement to helps the sellers limit the extension of liability and the buyers to take care on future litigation.

Sale Of Goods Act, 1930: Terms, Conditions And Warranties

The Sale of Goods Act 1930, was a part of the Indian Contract Act 1872 and got separated from it on 1 July 1930. This was applicable for the whole of India except the state of Jammu and Kashmir, but now it is also applicable on Jammu and Kashmir after it was declared as Indian territory in 2019. Earlier in the period of 1930, The Sale of Goods Act was “The Indian Sale of

Goods Act" later in 1963 on 23 September the act was amended and named as "**The Sale of Goods Act 1930**[43]". It is still applicable in India after being amended in 1963.

According to the Sales of Goods Act 1930, the performance of the contract of sale comes under chapter IV from Section 31 to Section 44 it is described how the goods are being displaced and how their possession are being transferred from one person to another voluntarily. There are basically two parties for the agreement, one is the seller and the other one is the buyer. The seller sells the goods and the buyer buys the goods. There are some criteria on the basis of selling and buying which takes place, which we are going to discuss in this article.

An express term is one that buyer and the seller actually agree upon. It doesn't matter if the agreement was verbal, or written, or a bit of both. If the seller doesn't give the buyer what was agreed, then the buyer will have certain rights to get what was agreed to or get the money back. When parties conclude a written contract, some part of it remains unexpressed. It would be impossible for parties to contemplate all possible eventualities and provide for them in their contract. As a result, the law has recognised that the express terms of a written contract can be supplemented with other unexpressed terms.8 In most contracts, the primary obligations of the parties are contained in express terms. In addition there are various circumstances in which extra terms may be implied in the agreement. A condition is a term that is so essential to the agreement that its breach is considered to be a substantial failure to perform the contract. A breach of a condition is said to go to the root of the contract. In other words, had B known that A would not honour this term of the contract, B would not have entered into it in the first place. Breach of condition may entitle the buyer to termination or damages. When termination takes place, the offending party has repudiated the contract. The aggrieved party, if aware of the impending breach, could accept this repudiation and terminate the contract, ending all future obligations except for the damages that stem from non-performance, or the aggrieved party could not accept the repudiation, and may wait for the future breach to occur before pursuing damages. A warranty is a term of contract that is not so essential. A warranty must be performed, but a breach of it is not considered to go to the root of the contract. This meaning of warranty should not be confused with other uses of the word such as in "one-year maintenance warranty". Damages are the remedy for breach of a warranty. Section 16 makes it clear that there is no implied warranty or condition as to

[43] Sale of Goods Act, 1930 is one of the oldest mercantile laws. Sale of Goods is one of the special types of Contract. Initially, it was a part of Indian Contract Act itself in chapter VII (Sections 76 to 123).

quality of fitness of goods for any particular purpose except those specified in Sale of Goods Act or any other law. This is the basic principle of caveat emptor' i.e. buyer be aware. However, there are certain stipulations which are essential for main purpose of the contract of sale of goods. These go the root of contract and non-fulfilment will mean loss of foundation of contract. These are termed as 'conditions'. Other stipulations, which are not essential are termed as 'warranty'. These are collateral to contract of sale of goods. Contract cannot be avoided for breach of warranty and aggrieved party can claim damages. A breach of condition can be treated as breach of warranty, but vice versa is not permissible .

Terms Implied By Custom

The terms of a contract may have been negotiated against the background of the customs of a particular locality or trade. The parties automatically assume that their contract will be subject to such customs and so do not deal specifically with the matter in their contract.

Terms Implied By The Court

The courts will be prepared to imply a term into a contract in order to give effect to the obvious intentions of the parties. Sometimes the point at issue has been overlooked or the parties have failed to express their intention clearly. In such circumstances, the court will supply a term in the interests of 'business efficacy' so that the contract makes commercial sense. A more recent test is the 'officious bystander test' used to incorporate implied obvious terms.If while the parties were making their contract, an officious bystander were to suggest some express provision, they would both reply, "oh, of course.

Implied Conditions

a) Implied condition as to title, etc. [44]

Implied conditions under a sale by description:

• Goods must correspond with description.

• Goods must be of merchantable quality.

• Condition of wholesomeness.

b) Condition as to quality or fitness for any particular purpose of goods

• Goods must be reasonably fit for such purpose

[44] 31 See Hong Kong Fir Shipping Co V. Kawasaki Kisen Kaisha [1962] 1 All ER 474; The Mihalis Angelos [1971] 1 QB 164; The Hansa Nord [1976] QB 44; Reardon Smith Line V. Hansen-Tangen [1976] 3 All ER 570; Bunge Corporation V. Tradax Export [1981] 2 All ER 513.

• Goods must be of merchantable quality

c) Implied conditions as to sale by sample:

• Correspondence with sample.

• Buyer's opportunity of comparing bulk with sample.

• Free from defects and merchantable.

Implied Warranties

a) Implied warranty of quiet possession of goods.

b) Warranty as to goods free from encumbrance in favour of third party.

c) Disclosure of dangerous nature of goods

Conditions And Warranties: Differences

1. **Stipulation:** Condition is an essential term or stipulation of the contract which must be fulfilled for the performance of the contract. Warranty is a collateral or incidental stipulation to the main purposes of the contract. It is not as essential a stipulation of the contract as a condition.

2. **Remedy:** Breach of condition gives right to repudiate or treat the contract as broken or rescinded and also a right to claim damages. Breach of warranty gives right to claim damages only. A breach of warranty does not entitle a buyer to reject the goods and his only remedy would be to set up against the seller the breach of warranty in diminution or extinction of the price or to sue the seller for damages for breach of warranty.

3. **Exercise of options as to treatment:** Breach of condition may be treated as a breach of warranty. However, a breach of warranty cannot be treated as a breach of condition. Whether stipulation in a contract is a condition or warranty depends on the construction of the contract. Stipulation may be a condition even though called a warranty. Option is given to the party to either claim damages or repudiate the contract even if stipulation is a condition. Where damages are only claimed, the condition is reduced to a warranty.34 There is a marked difference between a condition and a warranty both as to their nature and their effect upon the primary obligation of a contract of sale; and yet it is often difficult to determine whether a clause in a contract of sale is one or the other.35 This difficulty is ascribable to the confusion caused by some courts calling various stipulations conditions,other courts calling them warranties; while still other courts seem to use the words condition and warranty as synonyms.

Doctrine Of Caveat Emptor

The doctrine of 'caveat emptor' means 'buyer be aware'. Generally, buyer is expected to be careful while purchasing the goods and seller is not liable for any defects in goods sold by him. This principle in basic form is embodied in section 16 that subject to provisions of Sale of Goods Act and any other law, there is no implied condition or warranty as to quality or fitness of goods for any particular purpose. As per section 2(12), "Quality of goods" includes their state or condition. However, like every other doctrine, this doctrine is also subject to certain exceptions which are listed as follows:

a) False representation by seller
b) Seller actively conceals a defect
c) Buyer relying upon the skill of the seller
d) Goods bought by description

Conclusion

The law of sale of goods regarding terms of contract is batting on a sticky wicket and lacks consistency. The distinction taken between conditions and warranties has probably caused more confusion than assistance. The remedy of rescission is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. If the seller has promised in any form that the goods possess some quality and they do not, the buyer may refuse to take the goods if he has not already taken them, and may return them if he has previously received them.36 He may refuse to pay the price if he has not already paid, and if he has paid it he may recover it. The concepts of express and implied terms show how the conventional outlook towards contracts have changed and how the main emphasis was on freedom of contract but slowly there was a decline in this concept and the concept of implied terms started having a stronger hold in the interpreting process. Earlier the main function of the implied term was to provide for a fair result in exceptional circumstances where the express terms of the contract could not. The courts have started taking a more active role in ensuring justice to the parties by preventing one party to take advantage of another either due to omissions, errors or superior drafting skills. The doctrine of implied terms is very flexible. However, the concept of implied terms can lead to ambiguity especially when there has been an over zealous utilization of implied terms as has happened in the Johnstone case. Cases such as these show the element of uncertainty which may arise while practical application of implied terms is being done.

Bibliography

1) The Indian Contract Act, 1872

2) The Sale of Goods Act, 1930

3) Avi Tandon "Stipulations As To Time Of Delivery In Contract Of Sale Of Goods: Whether A Condition, Warranty Or An 'Innominate' Term?" available at: http://airwebworld.com/articles/index.php?article=1028 (visited on August 30, 2015)

4) J. W. Carter, C. Hodgekiss, "Conditions and Warranties:Forebears and Descendants" (8 Sydney L. Rev. 35 1977, 1979)

5) L.N. Shrinivas, "Representations and warranties" available at: http://www.legalindia.in/representations-and-warranties (visited on August 31, 2015)

6) Samuel J. Stoljar "Conditions, Warranties and Descriptions of Quality in Sale of Goods"(15 Mod. L. Rev. 439 1952)

7) Samuel Williston, "Rescission for Breach of Warranty", Harvard Law Review, 16, No. 7 (May, 1903), 465-475, The Harvard Law Review Association available at: http://www.jstor.org/stable/132280

FOREIGN POLICY - ANALYZING RELATIONS WITH NEIGHBORING COUNTRIES

- PRAJWAL DWIVEDI

Introduction

Diplomatic connections between countries have become increasingly important as the world has become more interconnected and globalized. Effective commerce and investment, as well as steady prosperity at home, all depend on a country having a good and purposeful foreign policy. India's foreign policy has changed dramatically since its independence. Global networking policies have developed from a principled approach to goal-oriented and objective-oriented. To combat international tensions like the Cold War and other post-colonial conflicts, India's post-independence policy centered on forging new ties with former colonial powers. India's neighboring countries, such as China and Pakistan, have prompted the nation to shift its foreign policy and no longer maintain a neutral stance. Allegiances formed during the Sino-Indian and Indo-Pakistani wars resulted in the frequent reorientation of relations with the United States, the Soviet Union, and other nations. After this shift, military preparations grew and foreign policy became more agenda-driven. As a result of the 1991 industrial strategy, India changed its economic and trade policies with the rest of the world, transitioning to a mixed economy. For the first time, the

country's job and industrial opportunities were vastly improved, as well as the country's international collaboration and participation.

Research Question

1. How is India's relations with our neighboring countries?
2. What are the institutions dealing with India's foreign policies?
3. What is the current development of India with our neighboring countries?
4. What is the opinion of experts on India's foreign policies?

Current Development in India's Foreign Policy

The current administration has made a concerted effort to extend India's diplomatic footprint, cultivate strong foreign links, and utilize these partnerships for mutual benefit and advancement. It's a lot more intense and proactive strategy to forging strong connections than was seen in prior times by the Bharatiya Janta Party (BJP) government's 'fast track diplomacy Mr. Narendra Modi's increasing personal trips to neighboring and other nations as well as greater involvement in regional and international conferences and summits are how this is accomplished order to meet the nation's unique objectives, this dynamic strategy includes outreach and engagements that are focused on the right people. Included in these goals are:

Improved relations with neighboring countries

India's borders include Afghanistan, Bhutan, Bangladesh, China, Maldives, Myanmar, Pakistan, Nepal, and Sri Lanka. Currently, the Central Government has highlighted the need of establishing close connections with its immediate neighboring countries. The 'Neighbourhood Firstiii' and 'Act East' policies are being used to execute this prioritizing.

Neighbourhood First' Policy

The government's policy is aimed at improving relations with its near neighbors and the Indian Ocean Island states. Various objectives are achieved with a regional foreign strategy that is comprehensive.

Connectivity

With the signing of Memorandums of Understanding (MoUs) with SAARC countries for cooperation in areas of commerce, infrastructure, commercial links, and transit facilities, this policy is a major component of this strategy. Agreements like this allow for the free flow of resources and information across international borders.

Resource support

In addition to financial help, equipment, human resource training, and diplomatic relationships, India's neighboring countries also benefit from this method. For example, in the wake of the 2016 earthquake, India generously sent approximately 1,700 metric tonnes of humanitarian supplies and medical aid to its neighbor Nepal.

Regional Institutions

key to India's rise as South Asia's most powerful nation. As a result, India has engaged in and invested in SAARC as a means of promoting regional growth and development. Despite this, it has also begun to form issue-specific working groups, allowing for more rapid and efficient development without the need for agreement. BBIN, a grouping of Bangladesh, Bhutan, India, and Nepal for energy development, is a good example of this type of cooperation.

Act East's Policy

In 1992, the administration of PM Narasimha Rao announced the "Look East Policy." Act East is the new name given to this organization because of the current geopolitical and economic conditions, and it represents the current government's pro-active involvement in increasing India's integration into ASEAN and East Asian nations. These meetings are facilitated by the Prime Minister, who attends the annual ASEAN Summits and participates in high-level discussions. Indian participation in the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) shows the country's dedication to this strategy. It aims to accomplish three key goals, notably

Connectivity-

- Infrastructure
- Investments
- (bridges/highways)

Culture

- Promotion of tourism famous cultural and religious sites

- Preservation of ancient manuscripts, heritage sites, and artifacts

Commerce

- Strong Production Networks
- Regional Value Chains
- Bilateral trade agreements

Under the Act East Policy, India has given special attention to Cambodia, Lao PDR, Myanmar, and Vietnam. In light of manufacturing initiatives like 'Make in India,' India may establish new global value chains through these kinds of strategic collaborations. A Project Development Fund of INR 500 crores has been set up to support India's industrial footprint in these nations to advance this. It also aims to strengthen regional integration, security, and defense through the implementation of initiatives. Improving border infrastructure for better overland access to Southeast Asia is one of the more recent goals set forward in this approach.

Institution Building

For India, participation, and leadership in several international governance forums have become a key foreign policy goal. It is the goal of the Indian government to expand India's clout in existing organizations. G20, East Asia Summit, and BRICS alliance members are already a part of the Indian government's strategy to expand its influence in these organizations. For the government, UN Security Council participation is also a goal. As part of its foreign policy, India strives to establish itself as a leader in the international community. More than 120 nations have joined the International Solar Alliance, which was founded by India and is dedicated to the development of solar technology and the widespread use of solar electricity. The Indian Ocean Rim Association (IORA) and the BBIN are two further instances of India's endeavors. For India to get to the top of the global table, it must continue to adapt and engage in contemporary global issues, and properly express its international policy.

Advancement of Domestic Development

Increasingly, India's foreign policy is aimed at building international partnerships to further its domestic goals. For example, India has collaborated with other countries in a wide range of areas, including technology and capital sourcing, the acquisition of natural resources, and the acquisition of market access. Because of a rise in international collaboration, India's Foreign Direct Investments (FDI) has increased by 5 billion USD compared to the previous fiscal year. Because

of India's international goals and the importance it places on mending ties with its neighbors, current changes in the country's diplomatic activities and policies in the surrounding area should be examined.

Recent Evolution of India's Relations with its Neighbouring Countries

Indian foreign policy and domestic goals are more intertwined as the world's political landscape become more multipolar. The present administration has taken steps to improve community ties and develop a regional neighborhood policy. The Hon'ble Prime Minister has pursued active regional diplomacy by interacting with the neighboring countries and enhancing political connectedness through discussion. When he invited the heads of the SAARC countries to his oath-taking ceremony in 2014, he demonstrated his desire to build bridges of understanding. India's relationship with its near neighbors was a clear indication of his intention to strengthen them. Progress in connections with neighboring countries shows the government's increasing attempts to establish and deepen ties with these countries.

India and Bhutan:

Relations between India and Bhutan were formally established in 1968 with the installation of an Indian permanent representation in Thimphu. Landlocked Bhutan relies largely on India for access to the sea, trade, and aid in the form of loans and grants. Over 79% of Bhutan's total exports are imported from India, which accounts for 90% of Bhutan's export market. During his first foreign trip to Bhutan in 2014, the Hon'ble Prime Minister referred to India-Bhutan ties as "Bharat to Bhutan" (B2B) relations. A digital library with two million books and periodicals would also be built with the help of the Indian government, he said, and the number of scholarships for Bhutanese students studying in India will be increased by three times.

In 2015, commerce between Bhutan and India increased by 7.3 percent. Bhutan's main importer (worth INR 5374 crores) and largest exporter (worth INR 3180 billion) during the last year have both been India vii. Bhutan and India inked an agreement on November 12, 2016, aimed at strengthening bilateral connections and reducing bureaucracy by reducing paperwork and developing additional exit/entry points for the export of Bhutanese goods to India as well as to other trading partners.

National Assembly members voted to approve the "BBIN MVA," a motor vehicle pact between Bangladesh, Bhutan, India, and Nepal, which was an Indian "eastern strategy" effort to develop connections with Bhutan and Bangladesh.

India and Nepal

Both India and Nepal have benefitted greatly from the establishment of diplomatic relations on June 13th, 1947, when the two nations signed a treaty. There is a $1 billion "soft credit line" set up by India for future infrastructure, irrigation, and energy-related cooperation. FDI from India has accounted for more than 40 percent of Nepal's allowed foreign investment (FDI). On the other hand, the Pancheshwar power plant, which had been put on hold for 18 years, was just started by the current administration. Some of the most pressing issues are now being considered to agree, such as the sharing of water and benefits between Nepal and India and the valuation of these advantages (DPR). Each country would receive an equal amount of electricity from the combined plant, according to bilateral agreements. It is yet to be decided upon how much the reservoir will cost to use its benefits, such as irrigation and flood control. The Indian government's assistance and relief to Nepal following the earthquake significantly improved the ties between the two countries. Nepal's Prime Minister Pushpa Kamal Dahal and Indian Prime Minister Narendra Modi inked three key agreements during a recent visit to India from September 15-18, 2016. Reaffirmation of the 1950 India-Nepal Treaty of Peace and Friendship, which had been in effect for six decades. Both India and Nepal plan to erect Integrated Check Posts at the ports of entry in Birgunj, Biratnagar, Bhairahwa, and Nepalgunj (ICPs).

India and Bangladesh

As early as December 1971, India became the first country to recognize Bangladesh as a sovereign state and establish diplomatic relations with the country. In 2014, India's Prime Minister announced a fresh $2 billion line of credit to the neighboring country as a consequence of the 41-year-old border dispute being settled and approved. In the end, he made a significant contribution to the healing of the rifts and distrust between India and Bangladesh that had built over time.

In January 2016, a preliminary agreement was struck to provide Bangladesh with 100 MW of gas-based energy daily from the ONGC Tripura Power Company (OTPC) for INR 5.50 per unit, which is comparable to Bangladesh's average generating tariff (Taka 6.50)vii. Chittagong port was opened to international trade as a result of the Bangladeshi government's response. India commenced construction on Payra Port around this time. Besides Bangladesh, India aims to build

a rail link from Agartala to Bangladesh's Akhaura Junction. The movement of persons and goods between the United States and Canada will be considerably enhanced once this policy is implemented. Under the BBIN MVA, Bangladesh has supplied India with an Agartala - Agartala road transit route. This will save the equivalent of 1,500 miles of road traffic. There were 22 agreements signed in April 2017 between the two nations in the areas of nuclear energy, cyber security, and media. According to reports, India has agreed to lend Bangladesh $500 million so that it may buy defense weapons. Economic ties between the two countries have previously been bolstered three times by India, which has identified 17 projects that might benefit from the money. On the other hand, the presidents of both nations have yet to agree on the Teesta River Water Sharing Agreement. India has benefited greatly from Bangladesh's 54 rivers that flow into the Bay of Bengal. India and Bangladesh now have only one agreement in place regarding water from the River Ganges. It has been six years since the Teesta Treaty was signed because of political pressure from both countries.

India and Sri Lanka

More than two millennia of cultural, religious, and linguistic contact have taken place between India and Sri Lanka. India's most significant commercial partner in South Asia is Sri Lanka. Sri Lankan Customs estimates that trade between the two countries was $4.7 billion in 2015. In 2015, India exported $4.1 billion worth of goods to Sri Lanka, while Sri Lanka exported $645 million worth of goods to India (up by 3.2 percent). India exported $ 2.809 billion worth of goods to Sri Lanka in the first nine months of 2016, while Sri Lanka exported $414 million worth of goods to India.

A more equal division of trade between the two nations was one of Indian Prime Minister Narendra Modi's goals when he suggested extending the India-Sri Lanka Free Trade Agreement (FTA) in 2015. Trade between India and Sri Lanka rose dramatically with the signing of the India-Sri Lanka FTA in March 2000. There was no agreement on the Comprehensive Economic Partnership Agreement (CEPA) until recently. Talks on the Economic and Technical Cooperation Agreement have already begun (ECTA). A total of 250 million people and a combined GDP of $400 billion will be included in India's "five fastest-growing southern states," as well as the 22 million inhabitants of Sri Lanka, which has an economy worth US$80 billion. On March 8th, 2016, the Export-Import Bank of India and the National Water Supply and Drainage Board (NWSDB) of Sri Lanka inked Buyer's Credit Agreements worth $403.01 million as part of the National Export

Insurance Account (BC-NEIA). The Buyer's Credit portfolio of EXIM Bank has so far given roughly US$ 185 million in financing for water supply and other projects in Sri Lanka.

The Trincomalee port, which is vital to both nations, has recently been the subject of discussions between India and Sri Lanka over the prospect of jointly running oil tanks. The administration of 73 of the port's 99 storage tanks would be governed by a new equity agreement between India and the Sri Lankan nation. In addition to the civil nuclear cooperation agreement, Indian authorities have been pressing for the construction of a coal-fired power plant and over-and underwater transmission lines between India and Sri Lanka.

India and Maldives

Promoting stability, political pluralism, and economic growth in the Maldives has been India's strategy. The United States and Maldive's diplomatic ties began in 1972. India and the Maldives have consistently supported one another in international forums including the United Nations, the Commonwealth, the Non-Aligned Movement, and the SAARC. From a low of $4 million in 2014, Indian aid to the Maldives jumped to $30 million in 2015 and 2016. Japanese Prime Minister Shinzo Abe's "Neighborhood First" policy further promotes this partnership. The leaders of the two nations met for lunch to continue discussions that resulted in six agreements being signed. An agreement on SAARC satellite service was also signed, as was one on tourism taxes and environmental protection. In 2012, the Maldives canceled an Indian infrastructure company's $ 511 million project with GMR Infrastructure Limited (GIL).

India has set up a $100 million standby credit facility for the Maldives, which comprises long-term loans as well as trade credit that may be drawn on at any time. Under a new Line of Credit for US$40 million, the Indian government has given the Overseas Infrastructure Alliance (OIA) of India a contract to develop 485 housing units in the Maldives. The value of commerce between India and the Maldives has now surpassed Rs.700 million. A bilateral agreement between India and the Maldives allows for priority shipments of necessities such as food and building supplies to the archipelago in the Indian Ocean.

Table 1: Bilateral Trade with Maldives (in million USD)

Period	Indian Exports	Indian Imports	Total
2010	125.5	2.5	127.5

2011	147.8	2.6	150.4
2012	147.7	2.8	150.5
2013	154.0	2.3	156.3
2014	170.6	2.9	173.5
Up to Nov 2015	205.0	1.6	206.6

Source: Brief Note on Myanmar, Ministry of External Affairs, 2016

India and China

The past 12 months. EEP's goal is to enhance the relationship between higher education and vocational education. On April 1, 1950, India and China established diplomatic relations. It was a big stride forward in the bilateral relations that began in 1988 when the leaders of India and China signed the Agreement on Maintaining Peace and Tranquility on India-China Border Areas (LAC). Since then, China-US trade and economic connections have grown tremendously. Bilateral trade between India and China increased to $70.4 billion in 2015 from just $2.92 billion in 2000. 61.54 billion dollars of Chinese exports went to India in 2016, whereas 8.86 billion dollars went to China. Additionally, India is a major export market for Chinese project exports. EEP (Education Exchange Program) was signed by India and China in 2006 and then revised to enhance educational relations between the two countries' countries.

Relations between the two nations have worsened as a result of recent hostilities. China's threat to India earlier this year to restrict the Dalai Lama's visit was the first step in creating this chasm. China's hegemony was a key issue when India announced a joint strategic vision with the US for the Asia-Pacific and Indian Ocean region back in January 2017. The enmity between the two countries grew as a result of this. A transit route through Gilgit was built against India's protests, and China did not consider India's proposal to join the Nuclear Suppliers Group as a result. Masood Azhar and Hafez Sayeed were also rejected as international terrorists by the UN Security Council, and China increased the frequency with which its submarines entered the Bengal Sea. Doklam has been occupied by the Indian and Chinese military for the previous 50 days. China's People's Liberation Army (PLA) was prevented from building a class-5 track in Bhutan's Dolam Plateau region by the Indian army.

India and Pakistan

Since 1947, negotiations on economic integration, collaboration, and peace between India and Pakistan have been thorny. This is a list of conflicts in which countries engaged in an armed confrontation with one another. Nations continued to work toward developing friendly, constructive relations despite this. Travel and commerce between J&K were introduced in 2005/2008 as an important milestone in this strategy. In September 2012, eCommerce Secretaries from both nations agreed to three agreements, including the Customs Cooperation Agreement, Mutual Recognition Agreement, and Redress of Trade Grievances Agreement.

Inviting leaders from throughout the South Asian region, including Pakistan, to his swearing-in event, looked to have a positive effect on his health. The attempt was applauded. Tensions erupted once again in January 2016 when Pakistani extremists attacked the Pathankot Air Force Base. The Comprehensive Bilateral Dialogue (CBD) had been slated to restart when this occurrence occurred. Tensions arose as Pakistan accused India of violating human rights in Kashmir. Both nations recalled their diplomats after accusing each other of eavesdropping. The 2003 ceasefire agreement between the two countries broke down due to the constant firing across the Line of Control. "Surgical strikes" by India in response to Pakistan-backed terrorist attacks on a military facility in Uri virtually eliminated any chance of negotiation between the two nations. PM Modi was unable to attend the SAARC summit in Pakistan due to the ongoing hostilities, and the meeting has thus been postponed till further notice. The construction of India's Kishanganga (on the Jhelum River) and Ratle (on the Chenab River) hydroelectric power plants in Jammu and Kashmir has recently been criticized by Pakistan due to the 1960 Indus Water Treaty (IWT).

India and Afghanistan

Cultural and historical exchanges between the two nations date back millennia. In 2011, the bilateral connection between India and Afghanistan was further reinforced with the signing of the Strategic Partnership Agreement (SPA). Afghanistan's natural resources and the development of local Afghan capabilities are two of the aims of SPA. An Afghan-led, Afghan-owned, wide, and inclusive peace and reconciliation process is also provided duty-free access to the Indian market, and the international community is asked to continue its long-term commitment to Afghanistan.

Afghanistan's second-largest export market in India, despite the country's lack of land access. The new parliament building in Afghanistan was inaugurated by Indian Prime Minister Narendra Modi and Afghan President Mohammad Ashraf Ghani on December 25, 2016. For the children of Afghan security force martyrs, he also provided 500 scholarships to attend school or college. India

constructed a new edifice worth about $90 million as a gesture of goodwill. Afghanistan has received nearly $2 billion in financial assistance from India, which has also taken an active role in the enormous development efforts underway in that nation. This year's commerce with Afghanistan was $684.47 million, an increase of 0.20 percent and a 20.41 percent increase over the previous year. The value of India's exports to Afghanistan in 2014-15 was $ 422.56 million, while the value of India's imports from Afghanistan was $261.91 million. 92 projects in Afghanistan have been approved by the Indian government as part of the country's continued engagement with India.

India and Myanmar

In terms of land and water distance, Myanmar and India share the world's second-longest border (1609.34 kilometers). Arunachal Pradesh, Nagaland, Manipur, and Mizoram are the four Northeastern states that border Myanmar. Under India's 'Act East' Policyxv, India is looking to strengthen its economic ties with ASEAN and Southeast Asia, including Myanmar. The 'Act East Policy was launched by the Hon'ble Prime Minister during the ASEAN meeting in Naypyidaw, Myanmar, in 2014. This strategy has been essential in improving ties with Myanmar. It was established in July 2015 by the India-Myanmar Joint Consultative Commission to serve as a focal point for the promotion of contacts and the expansion of bilateral ties in all areas.

An Indian assessment of the influence of India's foreign policy on Myanmar's political and economic transformation has been taking plate xvii. In 1970, India and Myanmar signed their first trade agreement to form a bilateral trade pact. Over time, the bilateral business ties between Myanmar and India have become stronger. Trade between India and Myanmar has more than doubled in the last seven years, reaching a total of $2 billion in 2013-14. As Myanmar's 11th largest commercial partner, India, there is a lot of work that needs to be done. Approximately 25% of Myanmar's exports go to India, and 15% of its imports come from India. Only 1% of Myanmar's total border trade is with India, according to the World Bank. Between 1989 and 2012, India invested $1.89 billion in Myanmar, making it the 12th largest investor in the country. First, nine months of 2014-15 saw Myanmar receive $6 billion in foreign direct investment. The Indian government has also offered a contract of INR 1,600 crore for consulting a 109-kilometer road from the Paletwa river terminal to Zorinpui on the Mizoram-Myanmar border as part of the $484 million Kaladan Multi-Modal Transportation (KMTT) projects in Myanmar. The first big project in Myanmar for the Indian government was KMTT.

Opinions from Experts and Media

India's neighbors often bring up Narendra Modi's new approach to foreign policy while talking about India's foreign policy. This includes criticism of Modi's travels to neighboring states and the consequences of those visits. In addition, critics focus on India's connections with China and Pakistan, as well as the alliances formed in reaction to present and emerging conflicts with these nations. Part xvii examines some notable media sources and foreign policy experts' thoughts on the current political climate.

First Post, April 2017: S.L. Narasimhan, Former Commandant and Member, National Security Advisory Board

China's ties with its neighbors have affected India's foreign policy in the region. When it comes to providing resources and diplomatic support to its neighbors, India has always been considered a regional leader. Because of increased suspicion among smaller nations of India's ultimate goal and a lack of implementation by Indian officials, this support has diminished over time. Due to China's growing influence in South Asia, ties between India and its neighbors have taken an unexpected turn.

China sent a supply of weapons and supplies to Afghanistan in July 2016. With Chinese investments in Nepal's roads, ports, and airports, the country's ties to Nepal have grown significantly. During Sri Lanka's conflict with the LTTE, China made considerable expenditures on connectivity and provided armament at a discounted price to Sri Lankan officials. In 2014, Chinese investments in Nepal overtook those from India for the first time in the country's recorded history. China, Myanmar's most important trade ally, is also helping the nation resolve internal conflicts. 80% of Bangladesh's armed forces equipment comes from China, and the two countries have the biggest bilateral trade, at roughly $25 billion in established commercial and industrial zones.

Because of this, India's regional standing has deteriorated. Minor nations in the region are also unsure of how to respond to the changing circumstances in their area. Increased aid and investments in neighboring countries have been implemented by India as a form of retaliation. China, on the other hand, continues to thwart India's efforts to gain permanent UN membership. India's worldwide progress will be difficult if it does not establish a strategic policy toward China to resolve this hostile relationship.

The Indian Express, August 2017: C. Raja Mohan, Director of Carnegie India; Leading foreign policy analyst; Leading South-Asia security expert

The Doklam territory between Bhutan and China has recently been the subject of a tense standoff. New Delhi fears that permitting China to build a road in the area may give Chinese military access to India's northeastern states, a concern that is reflected in the dispute. A large part of his literature deals with India's relationship with its neighbors. As a result of the Doklam stand-off, he has recently reassessed India's ties to China. Indians, he argues, are ill-prepared for a transformation in their relationship with China's strong foreign policy, which is why he thinks India underestimates China's rise. With China's present economic and military might, together with China's potential to question Indian primacy on the subcontinent, this is a major factor. To put it simply, if India rejects China's territorial claims, it might face reprisals from Beijing. If India expects to maintain its current approach to the Doklam issue and future crises, it must be prepared for a scenario in which strong regional centrality and the support of India's neighbors are required.

Livemint, May 2017: Harsh V. Pant, a Fellow at the Observer ResearchFoundation.

An entirely fresh viewpoint on the new government's risk-taking foreign policy is presented in this article. Earlier this month, he wrote about how India's dynamic and inventive policies may help the country.

He contrasts the new approach to the tacit and covert responses to global political trends with the new approach. ' As India's prime minister, Mr. Modi has adopted a public and frank approach to foreign policy. Indian foreign policy is now more aligned with that of China as a result of this trend. Because of the reciprocal nature of the approach, the East Asian power relies on its relations with countries like the United States and Japan to sustain its hegemony. These changes have altered India's status as a globally consistent player. According to Pant, this might be a strategic advantage and be used to achieve regional and international objectives. Indian neighbors are being put to the test, something India has done many times throughout its history.

Indian diplomacy has been criticized by some, but many others believe it will help the country gain a better foundation and drive prosperity. India should be able to overcome the challenges of an aggressive foreign policy provided it maintains tight control over its military and budget and develops a sound defense strategy.

Outlook, July 2017: Ashok Swain – Professor, Peace and Conflict Studies

The article discusses the "Modi Doctrine," the policy of the new administration, and the achievements it has made in the previous 38 months. The relationship between India and its neighbors has deteriorated under the Modi regime, according to the report. In comparison to the previous administration, the government's "hard stance" looks to have "fallen flat," with Kashmir drifting further away from Indian control. Its relationship with Pakistan is claimed to be at an all-time low.

The first genuine threat of full-fledged war in modern memory has arisen from India's boundary disputes with China. Chinese officials have threatened military action while also expressing support for Pakistan's claim to Kashmir. "Open adversary" is how the essay describes Mr. Modi's foreign policy, which reveals the obvious limitations of an approach like that. In the end, India risks being isolated from the rest of the world, not only in South Asia.

As a result, the present government is advised to take a more diplomatic and less confrontational approach to ongoing foreign policy issues to maintain flexibility and the capacity to carefully select the next move.

The New York Times, January 2016: 'India and Pakistan Try Again

On security issues, Pakistan's current administration has taken a far more hard-line stance than its predecessor. Because of this approach, the New York Times reports, the relationship between the two countries has become fragile, with internal forces threatening an alliance between them.

Indian Prime Minister Narendra Modi made a historic trip to Pakistan in December 2015. The cancellation of high-level talks with Pakistani President Nawaz Sharif led to a deterioration in diplomatic relations. Indian Prime Minister Narendra Modi has recognized and pushed the necessity for a strong relationship with Pakistan for India to fulfill its home objectives and become an economic powerhouse. However, the Indian bureaucracy and political parties' anti-Pakistan actions and rhetoric have made this task considerably more challenging.

India's economic development and global trade will be negatively affected if the conflict with Pakistan persists, according to the paper cited. To close the trust gap and maintain international harmony, Prime Minister Modi must establish close personal contact with Pakistani leaders.

Conclusion

The aforementioned studies demonstrate that there is a common thread of concern about India's assertive attitude in its new foreign policy framework, which can be traced back to the British

Empire. At this point, the escalation of hostilities between India and Pakistan as well as China has led both journalists and analysts to believe that India is woefully unprepared for the consequences of its present foreign policy, both economically and militarily. It is thought that China's rising alliances and investments in neighboring countries such as Bangladesh, Sri Lanka, and Myanmar have put India on the defensive and fueled its desire to position itself as a regional force, according to reports. Opposition to the new strategy is still mixed, with some opponents praising it, stating that an objective and goal-oriented foreign policy has the potential to enhance ties while also accelerating economic growth.

Reference

1. INDIAN FOREIGN POLICY. (1983). Pakistan Horizon, 36(2), 18–25. http://www.jstor.org/stable/41394186
2. Holsti, K. J. (1970). National Role Conceptions in the Study of Foreign Policy.International Studies Quarterly, 14(3), 233–309. https://doi.org/10.2307/3013584
3. http://www.firstpost.com/world/india-china-relations-new-delhi-needs-better-ties-with-neighbours-to-tackle-beijings-string-of-pearls-3385606.html accessed as of 14th August 2017;
4. http://www.livemint.com/Opinion/2BuQAIK7nndoYIfXX8av0J/Three-years-%20of-Narendra-%20Modis-foreign-%20policy.html accessed as of 14th August 2017
5. Holsti, K. J. (1970). National Role Conceptions in the Study of Foreign Policy.International Studies Quarterly, 14(3), 233–309. https://doi.org/10.2307/3013584

NATIONAL POLICY FOR CHILDREN IN INDIA

- VALLARI KAPOOR

Abstract

A nation's future rests on the well-being of its children, hence they are seen as a valuable national resource. In today's society, protecting children from all forms of abuse and exploitation is the primary goal. Sexual molestation, child marriage, underfeeding and verbal abuse are just some of how children are being exploited in our society. This shows our society's failure to protect our future generations. The government and society have a responsibility to protect children, given the obstacles and difficulties they encounter.

Throughout this article, we've discussed the numerous types of atrociti that children experience, as well as a real-world case study, as well as recommendations for improving children's rights in India.

Objectives

Human rights include the protection of children. Many governments responded to the growing concern for the world's children by creating policies and initiatives for children. The devotion to these objectives was manifested in India through child development policies and programs. Following this course, you should be capable of the following outcomes:

1. discuss the constitutional safeguards and legislation for children;

2. Explain the policies advocating child rights in India; and
3. Describe the programs for children in India.

Introduction

When it comes to a kid's well-being, child rights are essential. The Indian government and civil society have worked together to implement a variety of policies and programs to help guarantee children have access to these rights and to satisfy international obligations. As part of these efforts, the children are given the essential rights of survival, protection, growth, and involvement to foster their childhoods. Concerning children's rights in armed conflict (OPC) and child trafficking (OPC), India has signed the UN Convention on the Rights of the Child and its two OPCS. Protecting children from poverty, destitution, abuse, or any other damage is the primary goal of the organization. Through a variety of programs since the passage of our Constitution, we have reaffirmed the importance of child rights.

Legal Definition of Child

Under the Indian Constitution, "Child" is not a term. Article 1 of the United Nations Convention on the Rights of the Child 1989 defines "child" as anybody under the age of 18 unless the child has reached the age of majority. According to the law, "kid" might be defined in a variety of ways. A child can be defined in a variety of ways under Indian law. The Indian Majority Act of 1875 establishes an 18-year-old minimum age of majority; however, if a minor's body or property is in the care of the Court of Wards or a guardian, the minimum age of majority is 21 years old.

Anyone under the age of fourteen is prohibited from working in any industry that involves manual labor. The Child Marriage Restraint Act of 1926 defines a person as a child if he or she is under the age of twenty-one or eighteen at the time of marriage. A "Juvenile" or "Child" is someone under the age of 18 according to the Juvenile Justice (Care and Protection) Act, 2000.

Protection of children's rights through an international agreement (CRC) The basic rights of children are secured by the United Nations Convention on the Rights of the Child, which was approved in 1989. Civil and political liberties (such as the right to a fair trial in court) and governmental tyranny (such as the right to an adequate standard of life) are among them (from

abuse and exploitation). Child rights are guaranteed to all those who are under 18 years of age, according to the United Nations Convention on the Rights of the Child.

Children are the most essential item we possess and value since they are a gift from God. Children's health and well-being are critical to the long-term success of a community. In folklore, it is said that "whoever owns children's spirits, has the nation.". 4 It is difficult for a nation's physical and mental well-being to develop fully when it is young. Future generations will benefit by ensuring that every child has as many opportunities as possible to flourish physically, morally, mentally, and spiritually. Every child has the right to speak for justice in their way, and he believes this is a right that should be respected.

Winston Churchill's greatest contribution to society was "getting milk into newborns." 'The beginning of juvenile justice is an appeal to the people all over the world, a basic belief in juvenile justice and a restructuring of the worth of the youngsters born and unborn,' says Justice Krishna Ayer's opinion.

Policies for children

The degree of progress made by a country is directly related to the growth of its youth. To better the lives of India's children, several governmental measures have been implemented. The following are some important laws and regulations about children:

National Policy on Children 1974

Including children's education and programming in national plans for human resources, expansion underscores the importance of this issue. Children are regarded as the country's most valuable resource. This policy has three main objectives: to provide children with adequate services before and after birth and throughout their growth, to ensure that they have the opportunity for growth in all areas, and to gradually expand the scope of these services so that all children in the country enjoy optimal conditions for a balanced growth within a reasonable period. of time. There are several ways to accomplish these goals, including free and required education for children up to the age of 14, a large healthcare program for children, and efforts to ensure that all children are protected from abuse.

National Policy on Education (NPE) 1986 and its Programme of Action (POA) 1992

Every child has the right to an education. It is crucial that the NPE 1986 and its POA 1992 focus on child-centered early childhood care and education (ECCE) and primary education. Education

for Children's Cognitive and Emotional Development (ECCE) is the fifth section, and it discusses ECCE's argument that nutrition and health are vital elements of a child's development. Integrating Early Childhood Care and Education (ECCE) into ICD-S is a priority that will be prioritized (ICDS). The goal of elementary education is to ensure that all pupils are enrolled and retained to the age of fourteen, as well as to increase educational quality significantly. For Everyone's Benefit: Primary education programs were formed in 1993 and 1994 as a result of the National Elementary Education Mission, which was founded at that time. As of right now, the Sarva Shiksha Abhiyan is aiming to provide all children in India with a quality primary education by the year 2010.

National Policy on Child Labor 1987

With this strategy, young people who have been hurt while performing actions that they believe to be dangerous would receive financial assistance. To guarantee that children are not engaged in dangerous jobs and that their working conditions in non-hazardous sectors are regulated in line with the terms of the Child Labor Act, child labor laws and other labor regulations must be carefully enforced. The Policy's Action Plan outlines the following: Other jobs and processes that might impair children's health and safety, as well as programs to support child laborers, are also part of this effort. Government initiatives to decrease poverty and generate jobs should be extended to include the children and their families who are forced to work as child laborers because of their poverty. For a project-based strategy to be successful, it must be implemented in areas where there is a high prevalence of child labor. Thus, in 1988, a nationwide child labor project was launched in nine locations where child labor is widespread. They will be put in special schools for those who have been excused from employment. All of these things assist these children to make the transition to normal education, which is why they attend special schools where they receive a combination of formal and non-formal education, as well as a stipend of Rs 100 per month, supplementary food, and frequent health checks. According to the Plan, the District Administration provides financial support for child labor schools. The district's schools are managed by a variety of non-profit organizations. A rise from 12 districts in 1988 to 100 in the Ninth Plan is remarkable.

National Plan for SAARC Decade of the Girl Child 1991-2000

South Asia's Regional Economic Community (SAARC) member states convened in Male in 1990 to declare 1990 to be the "SAARC Decade for the Girl Child." The Indian government responded

by launching a "Survival, Protection, and Development" National Plan of Action. As a humble member of society, the female child was to be given an equal opportunity for accomplishment while yet being respected. Priorities included protecting women and girls' health and well-being, ensuring that women could have successful pregnancies, and ensuring that girls could realize their full potential as people and as members of society.

National Nutrition Policy 1993

As stated in the policy, chronic and persistent hunger caused by widespread poverty is the world's most serious humanitarian problem. Nutritional deficiency affects large groups of the poor, especially women and children. Nutritional deficiency leads to stunted physical development and poor health, and is known as "undernourishment." When it comes to nutrition, we need to think of it from many different angles. In the same way that nutrition influences growth, so does growth influence nutrition. Both direct nutrition intervention for vulnerable populations and various development policy instruments can help improve nutrition, according to a nutrition policy instrument in its strategy.

National Population Policy 2000

Its goals include a stable population level by 2045 at sustainable economic growth, social development, and environmental protection level; achieving TFR replacement levels by 2010; addressing issues of child survival, maternal health, and contraception simultaneously; and achieving TFR replacement levels by 2010. With the support of the 2010 National Sociodemographic Goals, decision-makers hope to achieve their aims shortly.

National Health Policy 2002

The National Health Policy had not been revised since its inception in 1983. All citizens of the country are to be kept in good health as the main objective of this program The purpose is to increase access to the decentralized public healthcare system by building new infrastructure in neglected areas and modernizing existing institutions. All citizens should have equal access to health care, regardless of their financial background or location in the country. To reduce infant and maternal mortality rates to 30 and 100 per 100,000 live births, respectively, by 2010, the National Health Policy, 2002 proposes to increase government health expenditure as a proportion of GDP from 0.9% to 2.0% by 2010.

Children's Charter of 2003

The National Charter for Children 2003 was signed on February 9th, 2004, and shows the government's commitment to children's rights. Our nation's well-being will be fostered by tackling the root causes of children's poor health while also boosting public awareness about the importance of protecting children from all forms of abuse. For the sake of all children's well-being and safety, this policy aims to ensure and protect their survival, life, and liberty, as well as their health and nutrition, while also emphasizing play and leisure time, early childhood care, free and mandatory primary education, protection from economic abuse and exploitation, the empowerment of girls and young women and their right to seek out information.

National Plan of Action 2005

All youngsters up to the age of 18 will be protected by the scheme. It focuses on children's well-being, safety, growth, and engagement. The Plan of Action is guided by the following principles:

- To regard the child as an asset and a person with human rights
- All policy and programmatic actions should place the most vulnerable, poorest of the poor, and least served kids at the top of the priority list.
- Recognizing and responding to each child's unique stage of development, and offering entitlements that fulfill their rights and satisfy their needs in each scenario, is the goal of this policy statement.

The Plan prioritizes twelve primary categories based on the magnitude and severity of the challenges to deal with the most urgent and pressing concerns. Quality education for all children, universal access to and retention in pre-schools, the complete abolition of female foeticide, female infanticide, and child marriages, and ensuring the survival and development of the girl child by improving water quality are some of the goals set forth by the United Nations' Millennium Development Goals (MDG) for the period from 2015 to 2030. To ensure that all children have the chance to realize their full potential and become healthy and productive members of society, the government has the responsibility. All levels of government, the commercial and non-profit sectors, as well as the general public and children, must collaborate to attain this aim. The strategy will be implemented across the country via state plans of action for children.

Constitutional safeguards

For more than 60 years, India's Constitution has protected children's rights. Child protection is a top priority for the Indian Constitution's fundamental rights, directive principles, and fundamental

duties. Directive Principles must be implemented by law and serve as a guide for the government, whereas fundamental rights can be enforced in court. It is stated in Article 14 that the right to equality, including equality before the law and equal protection under the law, is a fundamental human right; Article 15 prohibits discrimination based on religion, race, caste sex, or place of birth; Article 17 abolishes untouchability, and Article 18 provides for the right to education (Article 32). These rights have ramifications for children of all ages. To protect children, the Directive Principles were established. "The State shall, in particular, direct its policy toward ensuring (e) that the health and strength of workers, men, and women, and the tender age of children, are not abused and that citizens are not forced by economic necessity to enter professions unsuitable to their age and strength; (f) that children are given opportunities and facilities to develop in a healthy manner and conditions," says Article 39. Schedule 11 (Article 243G plus Schedule 11) allows Panchayats to be entrusted with additional topics that have a direct influence on children's development, such as education, family welfare, and health and sanitation. The Constitution (86th Amendment) Act, which went into effect on December 13, 2002, ensures free and compulsory education for children ages six to fourteen. All children between the ages of six and fourteen must be provided with free and compulsory education by the state, according to Article 21 A of the Constitution. "The State shall endeavor to provide early childhood care and education for all children until they finish the age of six years," reads Article 45. Children between the ages of six and fourteen are entitled to educational opportunities under Article 51 A (k), if relevant. Changes were made to fundamental rights, principles, and duties. As part of the Right to Education Bill, we want to put this amendment into practice.

Constitutional Provisions Relating To Children

Constitutional Guarantees that are meant specifically for children include:

To assure the success of the nation, the Constitution's founders recognized the significance of protecting children from being abused and exploited. The rights of children are protected by more than a dozen provisions of the Constitution. Article 21A stipulates that free and compulsory education for children aged six to fourteen is to be given at the state's discretion. Article 24 of the Labor Code prohibits the employment of any child under the age of fourteen in any industry, mine, or other hazardous activity. It is the government's policy to preserve employees' health and strength, as well as the delicate ages of young children, and to guarantee that individuals are not compelled to engage in activities that are not appropriate for their age or strength because of

economic difficulty. A child's right to protection from exploitation and abandonment is outlined in Article 39(f) of the UN Convention on the Rights of the Child. Article 45 of the Constitution ensures that all children in the state under the age of six have access to quality early childhood care and education.

Besides, Children also have rights as equal citizens of India, just as any other adult male or female:

Under Article 14, no individual should be denied equality before the law or equal protection of the law within India's borders. Article 15 of the United Nations Convention on the Elimination of Racial Discrimination No one can be deprived of his or her life or liberty unless it is done so by the law, according to Article 21. Right to be safeguarded against trafficking and bonded labor slavery. Article 29 states that minorities have a right to self-defense. Protection from social injustice and exploitation of the weakest sectors of society is guaranteed under Article 46 of the Constitution. Article 47: The right to a healthy diet, a decent quality of life, and access to medical care are guaranteed.

Other Legislations:

Apart from the Constitution, several legislations deal with children. The following are some of them:

The Children (Pledging of Labour) Act, 1933

The pre-independence era Act, on the other hand, remains in force. Because of the detrimental implications of enlisting minors, this legislation aims to prevent it. As long as the child is under the age of 15, an agreement between the child's parent or guardian and the employer is void. The law holds both the kid's parent or guardian and the employer responsible if a minor is compelled to work. Employers can be fined as much as Rs.200/- if a parent or guardian is found guilty of violating the law.

The Employment of Children Act, 1938

When it comes to children working in certain professions, this is the oldest known piece of legislation. It is against the law for anybody under the age of 15 to work for a railroad or a port authority that transports persons or goods by rail. Only children between the ages of 15 and 17 are afforded the same level of legal protection as adults. This restriction does not apply to children who are apprentices or are enrolled in vocational training programs.

The Factories Act, 1948

The first British welfare law was enacted by the Factories Act of 1881. The Act's scope was narrowed in 1948 by the addition of the following crucial elements: Workers under the age of 14 are not allowed to work in factories, according to the law. Factories are defined as businesses that employ at least 10 people with the usage of power or 20 people without it. 15-year-olds can work with the following limitations under Sections 68, 69, and 71 of the Act: A surgeon's certification of fitness is required, as is a token displaying the surgeon's signature. Section 69's guidelines should be followed by the surgeon who is certifying. 12 hours, starting at 10 PM and ending at 6 AM, is considered 12 hours.

The Mines Act, 1952

The scope of the Mines Act is rather limited. Excavation in the vicinity of mineral exploration is covered by this rule. 19 Under this rule, the mere presence of a minor in any part of a mine that is below ground or any open cast operating is forbidden. 20 Every teenager above the age of sixteen must get a medical certificate stating that they are fit to work. 22 For one year, the certificate can be used.

The Apprentice Act, 1961

A legislative effort is underway to regulate and oversee trade apprenticeship training and related topics24. A person who is engaged in an apprenticeship program to learn a certain skill is referred to as an "apprentice." Applicants for apprenticeships must be at least 14 years old and complete any further physical or educational standards that may be stipulated. If the apprentice is under the age of 18, a contract of apprenticeship must be signed by the trainee's legal guardian and recorded with the Apprenticeship Advisor. regulation of newborn formula and formula alternatives as well as feeding bottles enacted in 1992 To assure the safety of their goods for newborns, makers of infant milk substitutes, feeding bottles, and baby food are required to fulfill this law's tight criteria.

The Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act 1994

To prevent female feticide, the act prohibits prenatal sex determination that leads to genetic, metabolic, or chromosomal problems, as well as certain congenital deformities and sex-related disorders.

The Juvenile Justice (Care and Protection of Children) Act 2000

Under the Act, various institutions established under the Act must ensure that children in need of care and protection, as well as those who conflict with the law, receive the care, protection, and

treatment they require, while also taking a child-friendly approach to adjudicating and making decisions in matters that are in the best interest of children and their eventual rehabilitation.

Right to Education (RTE) Act, 2009

Providing free and compulsory education for all Indian children between the ages of 6 and 14. No pupil can be held back, expelled, or forced to take a standardized test before finishing elementary school. Unenrolled or unfinished elementary school students will be put in a more appropriate class at age six if they have not yet been admitted into the school system. A kid can enroll in a classroom of their age at times, but special education must be made available to them within any time constraints that may be imposed. If you're a 14-year-old youngster who has been accepted into primary school, you'll still be eligible for free education until you finish elementary school.

To gain entrance, one must provide proof of age. Under the provisions of birth, birth certificates are used to determine the age of children for primary school enrollment reasons. Any other relevant documentation, such as the Death and Marriage Records Registration Act of 1856, would suffice. Because of a lack of proof of age, no child should be denied admission to a school. Upon graduation from elementary school, each student will receive a certificate of achievement. In the classroom, a predetermined student-to-teacher ratio needs to be implemented. Educational standards must be raised.

Judicial Response

M.C. Mehta Vs. State of Tamil Nadu and Others

M.C. Mehta, an Indian activist, sued the state of Tamil Nadu, in this case, to improve the working conditions for minors and provide rescued young people with an education. Article 24 of the Indian Constitution demands that the government make every attempt to provide free and compulsory education to all children, according to the Supreme Court of India. The appeal court rules that children under the age of 14 cannot engage in risky employment and orders government to set up a rehabilitation fund for youngsters working in hazardous conditions. There would be a demand for deposits from child labor violators and government agencies, as well as employment offers for any government employee whose child's parent worked in a potentially risky role.

Vishal Jeet vs. Union of India

The Supreme Court ordered the state government to build up rehabilitative facilities for youngsters discovered begging on the streets, as well as for juvenile girls who had been coerced into the "flesh trade."

Gaurav Jain vs. Union of India

After a thorough investigation, the Supreme Court has decided to help rehabilitate children and child prostitutes. As a result, child prostitutes should be housed in juvenile rehabilitation facilities.

Suggestion

- It's time to change the name of the Child Labor (Prohibition and Regulation) Act, 1986 to the Child Labor (Prohibition and Rehabilitation) Act, to put more emphasis on rehabilitation and less on enforcement.
- To ensure that the requirements of the Right to Education Act, 2009 are properly implemented, each state government must promptly draught rules under the Act.
- The Convention No. 182 and Recommendation No. 190 on "Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labor" should be ratified by the Indian government. The Government has yet to ratify the Convention, which was signed in 1999.
- This should be made a cognizable offense that is not subject to bail or compounding, even in the agricultural /farm sector.
- The government should support non-governmental organizations (NGOs) working to end child labor by providing them with regular funding and holding them accountable for how the money is spent.
- In dealing with child labor instances, the Judiciary should be more careful. If an employer is found guilty, the "benefit of the doubt" rule cannot be provided to them. When an employer is found guilty, he or she should be sentenced to jail rather than fined. The imposition of a fine should be an exception rather than the rule in penal policy. Employers are put off by this. In addition, the conviction rate must be raised.

Conclusion

Youth are the country's most valuable resource. The well-being of a nation is directly related to how children are reared and nurtured. Milton wrote, "Child exhibits the man as day shows the sunrise." Thus, society must guarantee that every child has the opportunity to fully develop their uniqueness. Future generations will be the stewards and torchbearers of our cultural values. Our children are the future. Children are, in reality, society's future leaders, innovators, scientists, judges, doctors, architects, engineers, and politicians (rests). As a result, millions of children suffer abuse and exploitation because they are denied the right to a happy childhood and an education.

References

1. Bajpai, Asha (2003) Child Rights in India: Law, Policy and Practice, Oxford University Press, New Delhi.
2. Government of India (1986) National Policy on Education, Ministry of Human Resource Development, Department of Education.
3. Government of India (1992) Programme of Action, National Policy on Education, Ministry of Human Resource Development, Department of Education.
4. Government of India (2005), National Plan of Action for Children, Ministry of Human Resource Development, Department of Women and Child Development, New Delhi.

Book Source

- M.P. Jain, Indian Constitutional Law (Kamal Law House, Calcutta, 5th ed., 1998). Kailash Rai, Constitutional Law of India (Central Law Publications Allahabad 7th ed.,2008),
- Rao Mamta, Law relating to Women & Children (Eastern Book Company Lucknow 2nd ed., 2008).
- Malik & Raval, Law and Social Transformation (Allahabad Law Agency, 3rd ed.,2012)
- Ishwara Bhat, Law and Social Transformation (Eastern book company, 1st ed.,2009)
- J.N Pandey Constitutional Law of India (Central Law Agency Allahabad, 38th ed., 2002)

A STUDY ON CURRENT SCENARIO OF WOMEN AND CHILD TRAFFICKING IN NORTH EAST REGION

-BHARGOV BIKASH DUTTA

Introduction

Human trafficking is considered as the third biggest criminal industry on the planet. It is an issue of a solitary state or nation, as well as around the world. It has increased enormous consideration in everywhere throughout the world after arms and drug trade. As per the definition of United Nations- "Trafficking is any activity that leading to recruitment, transportation, harbouring or receipt of persons, by means of threat or use of force or a position of vulnerability''. Human trafficking is one of the greatest issues in Russia and previous Soviet Republics, where women and children were for the most part influenced.

Today entire world is confronting this issue irrespective to caste and creed. Be that as it may, alarmingly North East India is turning into the problem area of women and child trafficking from all edge of the globe. Human trafficking has as of recent risen in North Eastern area of India on account of the diminishing traditional social value along with large levels of corruption. The corruptions are so deep to the point that law enforcement officers are included in the trafficking industry. Frequently women and children have no other choice to turn if they are trafficked. Young ladies also, ladies from North East India are taken from their local spots to faraway conditions of India or outside India for bonded labour and for sex business. According to the Government of India's measurements in every eight minute a child disappears in our nation in 2011 and the greater part of them are from West Bengal and North East India. Among the states in India, Jharkhand has

the highest rate of cases in human trafficking. As per an article in First post, Delhi is the centre point of human trafficking trade India and half of the world's slaves live in India. Young women and girls from North eastern area are sold in Delhi by unlawful broker by luring their parents for better future of their children. A large portion of the conditions of North Eastern locales are battled for roti, kapra aur makan. So poverty is the prime reason for such sorts of unlawful business of human trafficking. Human trafficking incorporates sexual exploitation, bonded labour, cross border trafficking and trafficking for human organs and so forth. It is turning into a sorted out business everywhere throughout the nation. Notwithstanding sixty nine years of freedom, the monetary improvement of India is not remarkable. The minimized area of India is still under the poverty line and they survived for food, shelter and cloths, which are essential needs of individuals. Poverty and hunger makes women and children more helpless against human trafficking. Trafficking keeps on being an issue for the most part because of absence of activity. Trafficking continues to be a problem mostly due to lack of action. The corruption is particularly problematic in neighbouring countries with whom trade is conducted. Law officers and police are frequently clients and equivalent band together with the traffickers. Different NGOs give needed assistance and help to trafficking victims; however the large amounts of corruption regularly restrain their capacity to have an extensive effect. Sometime rescued victim need to stay scarred and they are not ready to get the psychological help which they need. Many are dragged once again into trafficking. There are a few principle exporters and importers of traffickers. Much all the more should be done to stop human trafficking, yet as long as it remains fuelled by economic disparity and local corruption, it will proceed.[45]

Present Scenario of North Eastern States

Trafficking of women and children from the North-eastern states of India and the bordering countries in the North-East is a considerate issue yet has so far not attract public attention. North-East region of India consist of seven states Assam, Mizoram, Nagaland, Meghalaya, Manipur and Tripura. It has a long worldwide international border with Bangladesh in the West, Myanmar (Burma) in the east and China and Bhutan toward the north. It is connected with rest of the country via narrow passage. Assam serves as a gateway for other six states to reach to other parts of India. Trafficking in North East region occurs at two levels there is the international trafficking of

[45] *Journal Of Humanities And Social Science, ISSN: 2279-0837, p-ISSN: 2279-0845 by* Mrs. Eli kumari Das, "Human trafficking in North Eastern region: a study with global perspectives"

children and women from conflict affected rural areas for domestic work and prostitution. Secondly, on an international level, there is trafficking of women to other South East Asian Countries the Bangladesh, Bhutan, Bangkok via Myanmar (Burma) for various purposes, such as drug trafficking, labour, bar girl and prostitution.

The term 'internal trafficking' was not an issue in North East region recently. In the year 2003 onwards it was addressed by the initiatives of some social organisations. The awareness building and rescue intervention carried out along with the drug trafficking in border district made internal trafficking as subject of growing concern. There is no study on the subject in the context of eight North-eastern regions on internal trafficking of women and children. The internal trafficking does not exist in the border district of North-East region. Almost the 60 CSWS interviewed in Nagaland, Dimapur and Assam border indicates growing menace of internal trafficking of girls in the region. Besides this luring women and children in the name of providing domestic work in metro cities are growing particularly in the conflict affected areas such as Bodoland Territorial Council, Assam. There are 109 girls lured from the relief camps of Srirampur Gate under Kokrajhar district of BTC, Assam in domestic work in many parts of the country and outside of the country such as Bhutan and Nepal. So, study has been carried out so far on young girls working on bar, cabin restaurant. There is no particular caste or community only working in such areas, but all section of the community from that region.[46]

North east region such as Assam, Meghalaya, Nagaland, Manipur, Mizoram, Tripura, Arunachal Pradesh including Sikkim main destination for domestic servant are Kolkata, Delhi, Mumbai and certain extended in Bangalore and Darjeeling.

Insurgency, militancy or whatever name is given to the low intensity warfare in India's North East region is part and parcel of life in the region. Violence is the neutral bio product of insurgency. After effects of violence are both tangible as well as intangible. Very often state formulates strategies to address the visible effect of violence by paying compensation to the victims or their next of kin in case of death. But while material compensation address the immediate financial need; the psychological, social and economic need of victims who have survive deaths do not received adequate attention. Much less of plight of women who become targets of a different kind during the times of conflict. There are no such institution/NGOs documenting such kind of heinous

[46] Dr. Rekha Roy, *"Women and Child Trafficking in India, A human right perspective"*, ISBN 978-8370-253-9

crime taking place amongst the women largely ethnic women in the region. While insurgency affects normal life of the normal people, it has very devastating effects on women particularly ethnic women in far lung remote village. But lack of documentation of the tremendous psychological and mental sufferings undergone by women indifferent parts of the North East region conflict situation makes difficult for those states to make appropriate interventions. Very often when peace returned, even temporarily in a certain conflict areas, there is a tendency to forget insidious effects that violence has had on women and children. Everyone believes that life goes back normal, but it's certainly not. Women's does not have control over their body, sexuality and reproductive health service and no access to traditional livelihood and above all, no privacy. Wherever and whenever such conflict occurs in the state, women and children become the first target of both the state and non-state actors because they are seen as cultural identity of the group. Non state actors, as terrorists are called, imposed dress code and other norms of behaviour on their women. Hence they told to be vanguards of their culture. The social mobility of women is thus severely restricted. In case of the married women rapped, she suffers multiple trauma, because her family members, including her husband, consider her defiled, she develops guilt feeling and has live with that since there is hardly any social support system available in the region. Centres for counselling victims of rape and trauma are not place in the entire North East states Due to lake of alternative employment opportunities and an increased demand for sexual services by truck drivers, rickshaw pullers, businessman along with the soldiers.[47]

Men and women migrate from Northeast region for many purposes to other metros city. The trends of migrate has been increasing day by day due to uncertainty of live. Acute poverty, growing adult unemployment adding to uncertainty of live. Acute poverty, growing adult unemployment adding to the flood and unending ethnic conflict has compelled the many ethnic youth (boys and girls) to migrate in search of better livelihood options in the metros and cities. This ethnic groups are as it is vulnerable in many forms often they language barriers, identity crisis forms often they faced language barriers, identity crisis from the main stream of the society. In contrary they get exploited in many forms. Women and girls are the most targeted and exploited in many ways including sexual exploitation. It is fact that all migrants are not trafficked. But migration nexus trafficking cases are reported from the North East region. It is impossible to say in number how many of the migrants are trafficked.

[47] *Ibid*

From various reports, it seeks to highlights at the issue of trafficking within a boarder's migration framework and to propose policies which, who are effective in reducing trafficking and in preventing and in preventing the human and labour rights violation to which ethnic migrants workers are so often subjected. It also try to focused on the need to recognize about respect the labour and human rights of all migrant workers as set out in the UN Convention on the Protection of the Rights of All Migrant Workers and Their families, 1990 (subsequent referred to as the 1990 Migrant Convention). This is for the variety of reasons including, fear of social ostracism, and fear of retaliation from trafficking against themselves or families, an unwillingness to discuss what has happened to them because of trauma or shame; distrust that they will be persecuted. The trafficked person therefore need reflection period.[48]

Reasons for Trafficking in Women and Children in North East

There are many reasons for trafficking; some of the important reasons are prostitution, sexual purpose, smuggling, bonded labourers, entertainment industries, drug/ arms trafficking, cheap domestic labour etc.

- With the advent of the security forces, prostitution has emerged as growing menace in North-East region. Added to these are the drugs and alcohol available in the states. Despite denial by the government authority, it is a fact the trafficking network exist, connecting to other South East Asian countries. Local residents confirm the presence of middle men who deal the girls. The most victims are women and girls from the indigenous groups are especially vulnerable to trafficking in North- East region. They often do not share the language educational access or even the right to citizenship of the minority population. So they lack the economic opportunities, the knowledge and the rights, which could protect from the trafficking. It is much cleared from the statistics that 61% commercial sex workers in India belong to schedule caste and schedule tribes and the other backward communities. Trafficking of women for prostitution has not been documented in North- East region
- Armed conflict in North-East region has caused wide-scale trafficking of a different kind. Large numbers of children in conflict areas are recruited as comrade by the rebel forces. It is also revealed by the returnees (surrendered) girls rebel forces that most of the time they were made to performed sex to their superiors/commanders and other rebel groups leaders

[48] Dr. Rekha Roy, *"Women and Child Trafficking in India, A human right perspective"*, ISBN 978-8370-253-9

visiting the camp. They also informed to authority that they were making to act sex for the blue films. Such films were made in order to raise fund to run the rebel camps in the deep jungles. Most of the film made was sold to the foreign countries. It is one of the biggest blue films making network operating in the North-East region. In the period from 1986-2003, approximately 3000 children were abducted, and till date 5000 children remain missing.

- Lack of employment opportunities in the NE region is also one of the root causes of problem. Searching for employment, driven by poverty and insecurity of life has forced many women and girls to move in uncertain destination with unknown person
- Women are trafficked both from urban and rural are as in context of North East region. The present mushrooming trends of trafficking in the North East is from high vulnerable ethnic women and children living in the relief camps due to the unending ethnic conflict in the region. Such situation living women and girls are more likely to be exploited more as compared to the urban and non-disturbed rural areas.
- There are many cases of adolescent girls ignorantly pregnant. In such case young girls are not allow to abort the child. North East region has large population belongs the Christianity and as per the beliefs system abortion is prohibited. Most of the time pregnant girls are brought to Missionary home for delivery. Once the child is delivered within few days mothers are sent back to respective villages.

Various NGOs Work in Combating Trafficking of Women and Children

1) NEDAN Foundation:

The NEDAN Foundation is social development organisation advocacy and network of concerned individuals, media coalition against trafficking and HIV, Student Union, Human rights activist and CSOs who have joined together with sincere efforts to prevent trafficking of women and children and PLHIV related stigma discrimination in the North East region of India. NEDAN has been working in the North East Forum against Trafficking & HIV (NENFATH) formed by NEDAN within the eight states of North East has porous border with South East Asia countries, NEDAN with NENFATH efforts is to combat trans-border trafficking and HIV in the trans-border areas with North East region. Their main objectives are-

- To unite grass-root CSOs to national level for the social revolution against trafficking & HIV

- To work as pressure groups at different level against trafficking

- To build the capacity of NENFATH partners in countering trans- border trafficking and HIV

2) Ujjawala (A Comprehensive Scheme to combat Human Trafficking):

The Ujjawala a Comprehensive Scheme to combat Human Trafficking was initiated by GOLD on 1st November 2009. This project was supported by Ministry of Women and Child Development, Government of India.

"Human Trafficking has been identified as one of the most ruthless crimes amongst all type of crimes committed against marginalized women and children. The sex trafficking has risen out as a stealthy business involving a huge financial turnover. The fortress of traffickers with their odious plan has turned into a potential danger to the general population of the northeast. Covered by long international border and invaded with terrorism the region has become a cantered place of human traffickers. The circumstance is additionally declined by poverty and perennial flood. Consciousness in the community about human trafficking is also low. There are many reports of Assamese tribal young girls being trafficked outside the state for business sexual misuse. From Nalbari district hundreds of girls are trafficked to Haryana. The organisation had seen numerous occurrences of human trafficking from the region. The organization during 2005-06 facilitated 20 rescue operations and rescued and sheltered 50 victims of trafficking. It was very much understood that there should be a well-designed ante trafficking program to be applied in the state to limit the danger of human trafficking. The organisation had already sheltered 125 Survivors of Human Trafficking and 72 of them were restored and rehabilitated. The association has gotten around 28 survivors from Mumbai Rescue Foundation and 10 of them Pune State Home."[49]

Objectives of the Project

[49] Available at, http://www.goldassam.org/Project15.htm (Last visited on 22 June 2017)

- To prohibit trafficking of women and children to generate public discourse through workshops, for commercial sexual exploitation, workshops and adopt other advanced actions.
- To facilitate rescue of sufferers from the place of their abuse and keep them in safe custody.

3) Assam Centre for Rural Development

Assam Centre for Rural Development prohibits child labour to a certain extent which helps to prohibit the trafficking of children. Special schools for child labour namely Gyan Setu Kendra has been operational since 2008 at Chandrapur Development Block, Kamrup District, under the National Child Labour Project. A total of 200 students were enrolled in these schools in the initial years with an average of 50 students per school. Till date, over 150 children have enrolled in other formal schools with ACRD's help.

4) Impulse NGO Network

Hasina Kharbih has made the impulse model to wipe out the human trafficking that blossom with civil unrest and absence of financial prospects in North East India. The globally perceived impulse model (some time ago known as Meghalaya Model) shapes awareness about human trafficking and conveys rehabilitation for victims, especially concentrating on women and children owing to their high helplessness.

Hasina comprehensively addresses the origin causes and the persistent tasks of human trafficking through, firstly, building a strong support system with her '5 Ps', and secondly, giving direct provisions for those in need of care, protection, and empowerment through the '5 Rs' . By creating and then leveraging networks within the community she also involves other non-profits and government bodies in the process. The '5 Ps' work around prevention, protection, policing, which includes enhancing the role of law, press, and prosecution. On the other hand, the '5 Rs' effort around reporting, rescue, rehabilitation by engaging with different stakeholders, repatriation, and reintegration. The '5 Ps' and the '5 Rs' work collectively in response and coordination, engaging a resource-sharing, response-sharing platform adding value to one another.[50]

Press Information Bureau Government of India Ministry of Women and Child Development (Trafficking of Children and Minor Girls)

[50] Available at, http://india.ashoka.org/fellow/hasina-kharbhih, (Last visited on 23 June 2017)

As per the National Crime Records Bureau (NCRB) data, the number of cases registered under the Immoral Traffic (Prevention) Act, 1956 in the North Eastern Region increased from 32 in 2008 to 43 in 2009. The State-wise details are given below:[51]

State	2008	2009*	2010* Up to the month of
Arunachal Pradesh	0	0	0 (June)
Assam	27	37	1 (March)
Manipur	0	0	2 (September)
Meghalaya	3	1	2 (August)
Mizoram	1	1	0 (August)
Nagaland	1	3	0 (July)
Sikkim	0	1	1 (August)
Tripura	0	0	0 (August)
Total	32	43	6

*Data is provisional

Certain Achievements in Curtailing Human Trafficking in North East Region

- **KOHIMA, April 13 2017-**

Dimapur police's District Anti- "Human Trafficking Unit (DAHTU) has professedly guaranteed to have uncovered and busted a noteworthy human trafficking racket working in Nagaland and captured four people. According to the discharge issued by Dimapur police, the racket was "uncovered" by the District Anti-Human Trafficking Unit (DAHTU) under Dimapur Police after two young ladies from the state, who were safeguard and kept in a safe house home at Pune, were repatriated back home. As shown by the police, the ladies police headquarters in Dimapur had gotten information from a Pune-based sanctuary home around two girls from Nagaland protected

[51] Press Information Bureau Government of India Ministry of Women and Child Development, Available at, http://pib.nic.in/newsite/PrintRelease.aspx?relid=67115 (Last visited on 23June 2017)

by Pune police from a brothal. "A group of women from police headquarters, Dimapur was likewise dispatched to Pune and the victims brought back home on 21.03.2017 after necessary repatriation procedure," it informed. Basing on the information provided by the protected young girls, the counter trafficking unit caught 4 people."[52]

- Assam, March 4 2017-

"A 27-year-old mentally unbalanced woman from Assam rescued by Delhi police, who was allegedly held confined here by three men. Subham Gosai (25), Sagar Rout (25) and Ranjan Koiri (28) have been detained for allegedly functioning an organised group involved in trafficking of girls from Assam to Delhi and other states, said Ravindra Yadav, joint commissioner of police (crime). The Crime Branch received data from Assam Police about a 27-year-old missing girl said to be in Delhi. The woman was lost from February 24 and her parents had lodged a complaint in Assam. During examination of the mobile phone location, it was discovered to be somewhere in northwest Delhi's Shakurpur area."[53]

- Minor girls from Sikkim rescued from Noida

GANGTOK- "Two minor girls, who were kidnaped from Sikkim to be sold here, were rescued and a couple was caught in this association in Surjapur area, police said. Circle Officer Arun Kumar Singh said, the girls, aged 13 and 14, were followed through electronic surveillance after police got information that they were brought here for the reason sale,. The abductors Sabir and his wife Nagma were caught, he stated, adding the couple used to abduct the girls from Northeast states to sell them in National Capital Region (NCR). Police said, Sikkim police has been informed about the girls."[54]

Assam Tea Plantations and Child Trafficking

Next to water, tea is the world's most popular drink. Globally people drink over 3 billion cups of tea every day. Consumption has grown by 60% in the last 20 years and is expected to continue to increase extensively. In 2014, 5.03 million metric tons of tea was produced globally, 1.82 million

[52] The North East Today, Available at https://thenortheasttoday.com/tag/human-trafficking/, (Last visited on 25 June 2017)

[53] *Ibid*
[54] *Ibid*

of which exported.[55] The four biggest tea growing countries (from largest to smallest) are China, India, Kenya and Sri Lanka.

Assam and West Bengal are the centres of tea plantation in India. Approximately 17% of the workforces in Assam are employed in the tea industry and around half of those who work in the tea plantations in Assam are women.[56] Men, women and children are being deceived with promises of a new life and great work opportunities and are ultimately being trafficked and exploited within cities across India because of the labour practices and working conditions on the tea plantations of Assam are fuelling unique forms of vulnerability to human trafficking. Assam itself has Assam Plantation Labour Rule (APLR) 1956 read with the Plantation Labour Act (PLA) 1951.

Here, in this particular point will make a study and examine the workers of the tea plantation in Assam, the living condition and of the workers and the management in the tea plantation. It also makes a study on the labour practices and other violations of human rights which ultimately fuelled to human trafficking especially in children and further give recommendations to the address the plight of the living conditions and to address the issue of child trafficking in the tea plantation.

Tea Plantation in Assam: It's Inception

The tea plantation in India was started in the year 1824 by the East India Company with gradually expanded and therefore the Britishers brought labourers from Jharkhand, Odisha, Chhattisgarh and Uttar Pradesh provinces. Thee tribal includes Munda, Santhal, Bhumji, Rabidas, Rajbhar, Pasi, Dusad, Goraid, Mushar etc. and their descendants were subsequently called tea tribes. They are spread across the states and have been living in an excluded environment of tea gardens without much interaction with the outside world. The tribes of Assam are educationally, socially and economically backward. Due to their exclusion from the outer world they exclusively depend on the tea garden, and rely on them for basic services, including food supplies, health care and education. Indian law has required plantation owners to provide these since adoption of the Plantation Labour Act (PLA) 1951, soon after independence. In Assam the tea estates introduced by the British were larger in size with an average of around 243 hectares.[57] After independence,

[55] 'A Report of Human Trafficking on Tea Plantation, Available at, https://in.search.yahoo.com/yhs/search?hspart=iba&hsimp=yhs1&type=meds_5307_CRW_IN&p=not+my+cup+of+tea+report+lexis+nexis (Last visited o 14 June 2017)

[56] Van der Wal, S., 2011. Certified Unilever Tea:Small Cup, Big Difference?, Available at, http://www.women-ww.org/documents/certifiedUnileverTea.pdf (Last visited o 14 June 2017)

[57] Partha Ganguli, Small Tea Growers of Assam: Theories, Practices and Challenges of an Indigenous Entrepreneurship, Available at, http://www.ijifr.com/pdfsave/22-09-2014579V2-E1-013.pdf (Last visited on 18 June 2017)

the scenario has been changed and most of the tea gardens were sold to Indian entrepreneurs Tata Tea Limited and later known as Tata Global Beverages (TGB) Ltd., which is an Indian Multinational non-alcoholic beverages Company which has a headquarter in Kolkata, West Bengal and subordinate of the Tata Group. The Tata Global Beverages owns and markets the Tetley Brand, manufacturing Tata Global Beverages the second largest player in the global tea market. The TGB in Collaboration with the International Finance Corporation (IFC) part of the World Bank Group which Sets up a company named Amalgamated Plantation Private Limited (APPL) which acquire and manage 24 tea plantations in North-East India.

Tea Plantation: A hotspot for trafficking

Several factors made the tea plantation in Assam a place for migration who depends on tea plantations alone. While the human trafficker take the advantages of those economically and socially backward groups of people. The workers are deceived with false guarantees of better jobs which only leads them to abuse and trafficking. According to the missing case compiled by the CID Assam, in 2001 the total number of missing children was 1,064 whereas in 2009 the number was 745. As per the State Crime Records data, total number of missing children in 2009 was 899 whereas in 2011 the missing number went up to 1,565. In 2011 the number of girls trafficked was more than double as compared to boys.[58] The Additional Director General of Assam Police (CID) Mukesh Sahai in one of his reports had said that in 2013, nearly 140 women/girls had been trafficked from Assam and number of missing girl child was nearly 1,500 from January 2013 up to January 2014. The number girl child traced out during 2013 was just 413.[59] Unfortunately no proper records of missing child happening in tea plantation had been made. A 31 month study made by UNICEF published in2014 from the period of January 2011 to July 2013, with a focus of trafficking in women and children identifies a minimum of 3,000 children and women were approximately 20-25% as being rescued and approximately 75-80% as missing.[60] These missing persons could be considered as potential victims of trafficking. Behind these a lot of trafficking must have been happening which lies dormant as the tea plantation in Assam have no proper

[58] UNODC, Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti Human Trafficking, 2013 http://www.unodc.org/southasia/reports/human_trafficking-10-05-13.pdf. (Last visited on 19 June 2017)

[59] Sanjoy Ray, "Tea Estate Girls Easy Prey for Traffickers", The Assam Tribune, October 21,2014, http://www.addamtribune.com/scripts/detailsnew.asp?id=oct2014/state051

[60] Not My Cup Of Tea Report, Available at file://C:/Users/HP/Downloads/not%20my%20Cup%20of%20Tea%20report%20(2).pdf.net (Last Visited on 20June 2017)

reporting systems. Once the children are trafficked they are being sent to Delhi and other parts of India for Domestic slave as well as they are sexually exploited.

In the case study of Somalia whom was born on the Nahorani Tea plantation in Assam. She was sixteen years old when she was trafficked. Two days before she was trafficked, the trafficker came to her and gave her tempting ideas that if she goes with him she will be happy and earns a lot of money. Later she behaves differently, she wear different and plays with her friends outside. It was then she failed to return the parents started to panic. Three years had passed after she had gone missing; the parents had received a brief phone call saying that Somalia will be allowed to come home. But till date there is no return.

Need Action Plan for Change: A Recommendation

The work and living conditions experienced on the tea manors are making individuals powerless to the intimidation and vulnerable for the traffickers. Breaking the poverty cycle, instructing tea garden groups on what trafficking is and enabling them to make a move are all fundamental segments in building resilient, traffic- free community. A holistic approach required keeping in mind the end goal to handle this wrongdoing, i.e. Organisations, government, law enforcement, NGOs, people group and individual all have a part to play in keeping individuals from being trafficked out of the tea ranches of Assam.

- Release a full and unedited version of report.
- Set a public deadline for the release of a detailed action plan outlining the action that will be taken to improve the social, living and working conditions of tea plantation workers. Such a plan should be developed in consultation with unions and NGO's working in the tea plantation and should include robust and ambitious goals and timelines.

The action plan should include:

- The NGO should get access to tea garden and they should be funded so that they can work systematically throughout the communities in the tea garden on the risk of individuals to trafficking and give training and awareness about the traffickers and their manifestations. These should include all the workers, staff and employers.
- The tea owners should work on improving the living condition, adequate sanitation facilities, improving educational programmes particularly to children access to education, safe drinking water and improving the health care of workers. Section 14 of the Plantation

Labour Act 1951 should be amended so that it is conformity with Right to Education Act 2009.

- There should also be coordination between Child Welfare Committee and Special Juvenile Police Unit to address the child trafficking in tea garden.
- Compulsory Birth Certificate to be issued to the children of the tea garden.

AN OVERVIEW ON MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION

- NISHITA KIRTY

Abstract

When a company is formed or incorporated the two important documents that are created are the Memorandum of Association which lays down the guiding principle behind the formation of the company including the name of the company, the registered place of work, the objects for which the company is incorporated, the liability of its members, the amount of share capital and many more other important information. and the other document is the Articles of Association which focus on the rules and regulations required for the smooth functioning, good governance and management of the company or the bylaws of the company to deal with the internal affairs of the company. This paper will focus on dealing with all the aspects of these two documents including their definition, formation and alteration as provided under the Companies Act, 2013. We will also look into some of the landmark cases such as Ashbury Railway Carriage and Iron Co. v. Riche, Royal British Bank v. Turquand etc and some of the important doctrines of ultra vires, constructive notice and indoor management.

Key Words: Memorandum, Articles, Clauses, formation of a company.

I. INTRODUCTION

Whenever a company is incorporated it needs certain basic principles as well as procedure to guide in the smooth functioning of the company like in a country there are Constitution which gives the principles of governance and regulation and procedural laws which gives the procedures to be followed while implementing laws in the country. In the same manner there are two documents which every company need to make before any other work in the company. The two important documents are the Memorandum of Association and Articles of Association. Memorandum of Association contains the principles or clauses by which the company will be guided whereas the Articles of Association contains the bylaws that all the members of the company must follow and also certain procedures in detail to run the company smoothly.[61]

Section 2(56) of the Companies Act, 2013 defines the term Memorandum of Association and sec 2(5) defines the term Articles of Association. As per sec 2(56) Memorandum of Association (hereinafter referred to as MoA) means originally framed MoA of a company incorporated or as time to time altered in accordance with this Act or any previous Act. Articles of Association (hereinafter referred to as AoA) as defined u/s 2(5) of the Companies Act, 2013 means originally framed AoA at the time of incorporation of a company or as altered from time to time in accordance with this Act or any other previous Act.[62]

To understand the MoA and AoA we need to understand the relationship between the two:

- MoA is the fundamental principle on which the company is incorporated and it is for the benefit shareholders, creditors and other public outside the company. AoA is about the internal regulation of the company and for the benefit of company and its members or members inter se.
- MoA lays down the parameters on which AoA is framed and AoA is subsidiary to both Companies Act and MoA whereas MoA is only subsidiary to Companies Act.
- MoA can be altered in certain circumstances by passing a special or ordinary resolution but AoA can be altered by passing a special resolution only.[63]

[61] Dr G. K. Kapoor & Dr Sanjay Dhamija, Company Law and Practice, 22nd Edition.
[62] The Companies Act, 2013 (18 of 2013), Universal Lexis Nexis, 2021.
[63] Kapoor & Dhamija Supra, 1.

II. MEMORANDUM OF ASSOCIATION

Memorandum of Association is one of the important documents containing the principles on which the Company is incorporated. As we discussed earlier sec 2(56) of the Companies Act, 2013 defines MoA. Sec 4 of the Act of 2013 give detailed information about the significant clauses in the MoA which are as following:[64]

- Name Clause: Sec 4 (1) (a), (2) & (3) of the Act states that a company shall state the name with which it is going to be identified and a public company shall only use the word 'limited' at the end of its name and a private company shall use the words 'private limited' at the end of its name. The name of the company is very important for various purposes such as to identify, to do the paperwork and documentation, to register it and many more. The name should be unique and should not resemble from any other names used previously and shall be approved by the Central Government. In the case of Montari Overseas Co. Ltd. v. Montari Industries Ltd.[65], the brief facts of the case was that the respondent has various subsidiary companies with the term 'montari' in it such as Montari Leasing and Finance Ltd., Montari Chem Care Investments Ltd., etc. and was incorporated on January 27th, 1983. The respondent and its subsidiaries are in the business of agro-chemicals, paints, cosmetics, pharmaceuticals, leather articles, tea, coffee, clothing carpets, inks, food articles and many more. The respondent has a turnover of Rs. 90 Crores. Whereas the appellant M/s Montari Overseas Ltd. was incorporated on April 21st, 1993 and was involved in the business of worsted yarn and sale and purchase of blends, acrylic and hosiery. The issue was regarding the use of the term 'montari' by both the parties and it was held by the Hon'ble court that the name adopted by the appellant was sufficiently close with the name under which the respondent was running his business and therefore the court asked the appellant to change the name as it was misleading for the general public.
- Registered Office Clause: The company shall also state the place where its registered office is situate for communication purposes. It shall be informed to the Registrar within thirty days from the incorporation of the company or commencement of business whichever is earlier and is provided u/s 4 (1) (b) of the Companies Act, 2013.

[64] Avtar Singh, Company Law, 17th Edtion.
[65] Montari Overseas Co. Ltd. v. Montari Industries Ltd., ILR 1997 Delhi 64.

- Object Clause: It is given u/s 4 (1) (c) of the 2013 Act that the company shall state the object for formation of the company. This clause is required because the people or shareholders invest huge amount of money as share capital in the company but it is the company who uses the money for the work it is involved in and at times can deviate from the real purpose behind incorporation of the company. Therefore, the company must state the objects behind its formation in the MoA itself and must stick to it at any cost. There is also a concept of doctrine of ultra vires which states that a company shall not go beyond its boundaries or objects s mentioned in the MoA of the company and if it does so the Act will be considered null and void. The landmark case on the doctrine is the case of Ashbury Railway Carriage and Iron Co. v. Riche[66] in which the object of the company was to carry on business as mechanical engineers and general contractors but later involved in the business of finance and it was held to be ultra vires even if all the members have ratified for it.
- Liability Clause: The MoA shall also state about the liability of its members as to limited or unlimited and whether it should be limited by shares or limited by guarantee and it is given u/s 4 (1) (d) of the Act of 2013.
- Capital Clause: As provided u/s 4 (1) (e) the capital clause must state the amount of share capital with which the company is being registered and the fixed amount of shares as well as the amount of shares the subscribers to the MoA agree to subscribe and the number of shares each subscriber intends to take and must be indicated opposite his name.[67]

- **ALTERATION OF MEMORANDUM OF ASSOCIATION**

MoA is document containing the basic principles or foundation of the company therefore it cannot be altered easily. As provided u/s 13 of the Companies Act, 2013 MoA can only be altered by passing a special resolution by the company and by following all the procedures required to be followed u/s 13 of the Act.[68] If the name of the company has to be changes it should be changed with the approval of the central government and shall be in accordance with sub sec (2) and (3) of sec for of the Act but no such approval is required in order to add or delete the term 'private' while

[66] Ashbury Railway Carriage and Iron Co. v. Riche, L.R. 7 1875 H.L. 653.
[67] Act of 2013, Supra 2.
[68] Act of 2013, Supra 2.

conversion of the company. The new name of the company must be entered into the register maintained by the registrar and shall also issue a new certificate of incorporation. It was upheld in the case of Vardhman Crop Nutrients Pvt Ld. v. Union of India[69]. The company Vardhman Fertilizers and Seeds Pvt Ltd. was incorporated on July 9th, 1987. It was involved in the business of manufacturing and marketing of Class I fertilizers, water soluble fertilizers and micro nutrients. The company also got its trade mark 'Vardhman' registered under the Trade Marks Act. Another company Vardhman Crop nutrients Pvt Ltd. was incorporated on May 29th, 2009 and started marketing and manufacturing the same products as that of the former company. Therefore case was filed by the plaintiff and stated that the company was suffering from loss of business as well as reputation because of the latter company. It was held by the court that 'Vardhman' was a registered trade mark name by the respondent's company and therefore use of the same name is undesirable and directed the other company to change the name.

The company can also change the place of registered office by the approval of the central government but the consent of the creditors, debenture-holders and other persons concerned must be taken. A company cannot change its object if it has raised money through prospectus and has not utilised the total amount of money unless a special resolution is passed by the company. A company which has not raised money through prospectus can change the object clause by passing a special resolution. The liability clause cannot be changed without the consent of the members in writing.[70]

III. ARTICLES OF ASSOCIATION

Articles of Association of a company are the rules, regulation or bylaws of the company with which the company is governed or the internal affairs of the company are taken care of. They are made for the smooth functioning as well as management of the company. Sec 2(5) of the Companies Act, 2013 defines the term AoA and sec 5 of the Act provides for the detailed information on AoA. Sec 5 also provide for entrenchment and states that certain provisions of the Articles will not be alterable merely by passing special resolution and will require a more elaborate procedure prescribed.[71] It was also held in the case of Ashbury v. Watson[72] that AoA is subordinate

[69] Vardhman Crop Nutrients Pvt Ld. v. Union of India, CWP No. 13589 of 2012.
[70] Kapoor & Dhamija Supra, 1.
[71] Act of 2013, Supra 2.
[72] Ashbury v. Watson, 30 Ch D 76 1885.

of MoA and is controlled by MoA. It should be seen by the authorities that the regulations laid down in the AoA must be in accordance with the MoA of the Company. It was stated by the court in Shyam Chand v. Calcutta Stock Exchange[73] that "Articles going beyond the MoA are ultra vires". The AoA usually contains the rules and regulations relating to:

- Share capital, shares and their value and their division into equity and preference shares.
- Rights of each class of shareholders and procedure for variation of their rights.
- Increase, alteration and reduction of share capital.
- Rules and procedures relating to transfer or transmission of shares.
- Procedure relating to allotment, making of calls and forfeiture of shares.
- Appointment, remuneration, powers, duties of directors and officers of the company.
- Constitution and composition of Audit Committee, Remuneration Committee, Corporate Social Responsibility Committee.
- Notice of meeting, voting rights of members, proxy, quorum, poll and many more.
- Audit of accounts, transfer of amount to reserves declaration of dividend etc.
- Procedure of conversion of stock into shares and shares into stock.
- Borrowing power of the company and the modes to do so.
- Issue of original and duplicate share certificate.
- Winding up of company.[74]

Two important doctrines under the concept of Articles of Association are:

- Doctrine of Constructive Notice: The MoA and AoA are the public documents and therefore any person who contemplates to enter into a contract or business with the company is presumed to have done the due diligence and gone through the MoA and the AoA of the company and understood them in true perspective. This presumption is called as doctrine of constructive notice. This doctrine is to protect the interest of the company from all others.
- Doctrine of Indoor Management: The person who are dealing with the company cannot ascertain certain questions they have regarding sanctions and approvals obtained by the directors and officers of the company from the shareholders therefore it is presumed by those persons that when they are entering into any transactions with the directors the

[73] Shyam Chand v. Calcutta Stock Exchange, AIR 1947 Cal 337.
[74] Kapoor & Dhamija Supra, 1.

directors have received all the approvals and sanctions required for the same. This rule is also called as Turquand rule because it was established in the case of Royal British Bank v. Turquand[75], the directors of the company were authorized by the AoA to borrow on bonds such sum of money as should from time to time by a resolution of the company be authorized in general meetings of the company. The directors gave a bond to Turquand without the authority from any such resolution. The issue was about the liability of company on such bond. It was held by the court that the company was liable for the bond as Turquand was entitled to assume that such a resolution was passed in the general meeting of the company before borrowing on bonds.

- **ALTERATION OF ARTICLES OF ASSOCIATION**

Subject to any provision contained in the Companies Act, 2013 or any condition given in the MoA a company can later its AoA by passing a special resolution and is given u/s 14 of the said Act. The alteration can also be that of making a public company into a private company and a private company into a public company. Alteration in article along with the copy of the approval of central government must be sent to the registrar of the companies so that it can be registered accordingly.[76]

CONCLUSION

Memorandum of Association and Articles of Association are the two documents on which the foundation of a company is laid down. With all the discussions above we understood the importance of MoA which provides for the basic clauses required by a company to establish it and AoA provides for the rules and regulation as to how these clauses to be implemented and followed. Like stated earlier Memorandum is like the Constitution of a country and Articles are like the procedural laws of the country. We also noted that how alteration can be done in both the MoA as well as the AoA as things keep changing in the company as well as in the society and the company shall be at par with it. We also discussed certain important doctrines such as doctrine of ultra vires, indoor management and constructive notice. The landmark judgements and principles laid in these

[75] Royal British Bank v. Turquand, 6 E & B 327 1856.
[76] Kapoor & Dhamija Supra, 1.

judgements also helped us in understanding the importance of having Memorandum and Articles of association of a company.

BIBLIOGRAPHY

BOOKS:

- Dr G. K. Kapoor & Dr Sanjay Dhamija, Company Law and Practice, Taxmann's (22nd Edition).
- Avtar Singh, Cpmpany Law, Eastern Book Company (17th Edition)

STATUTES:

- The Companies Act, 2013 (18 of 2013), Universal's Lexis Nexis (2021).

WEBSITES:

- www.scconline.com
- www.mca.gov.in

AN EMPIRICAL STUDY ON GENDER INEQUALITY AGAINST WOMEN AT WORKPLACE

- C DHANALAKSMI

ABSTRACT:

Gender is a common term where as gender discrimination is meant only for women because females are the only victims of gender discrimination. Gender discrimination is one of the major issues or problem arising in every sectors. Females are nearly 50 percent of the total population but their representation in public life is very low. Gender discrimination emerges when the men plays a vital role by dominating women and treating them unequally by considering their gender. Under the eyes of many people, still women's are considered as the weaker sex as well as they are not physically and mentally fit to handle both the peer and work pressure. In some places objectification occurs when someone is seen as an object or a commodity rather than a personality. Gender discrimination is not determined biologically but it is been determined socially and discrimination could be sorted out with a perpetual and proper effect. Women's are the largest untapped reservoir talent of the world. In most of the organisation the higher posts or the higher grades mostly given to the men than women without realizing that, they are violating the rights of the women. Women's also been sexually harassed by their higher employers and colleagues in the name of employment. The Laws are also implemented to protect gender discrimination and whenever the problem arises there will be justice. The present research work discuss about the

Laws under Indian Constitution, reasons, effects, causes and solution for gender discrimination. It also deals with the dowry and also inspects about the Glass Ceiling Practice.

Keywords: Gender Discrimination, women employees, workplace, sexual harassment and Legal Protection.

" Freedom cannot be achieved unless women have been emancipated from all forms of oppressions"-Nelson Mandela

INTRODUCTION:

In the course of this present days, the discrimination of women has been rampant all along despite the tremendous effects towards changing the situation. For a long time, the female gender has been left out in some of the important agendas. The discrimination cuts across all sectors like in workplace which shall be based on the employees Age, Disability, Nation and religion among which gender discrimination is persistent problem all over country. Women are mainly perceived as people who can only be entrusted with small responsibilities.

REVIEW OF LITERATURE:

Brian Welle, Madeline E. Heilman, talks concerning the stereotypes that require a feminine from being aggressive, robust and having a dominant nature. If they are going against this prevailing culture they're usually marginal and face social penalties.

Katie Scire, (2008(Raju)) "Gender Discrimination within the workplace", talks concerning the "Glass ceiling" result. This suggests that a girl cannot reach up to the upper level of management or the upper level of her career through breaking the ceiling. This term came into existence within the 1980's.

Simpson (2004)(Bizri) mentions that social perceptions of gender and gender illustration in social discourse have vital roles to play in promoting and sustaining gendered employment and also the social definition of jobs as happiness to men or girls. Thus, these biased ideologies and stereotypes mechanically limit the duty placement in workplaces supported to gender.

Morgan(Sharma) (as cited in Simpson, 2004) says that works associated with masculine identities and organizations square measure shaping the thought of being a "man".Therefore, jobs that imply a lot of typical masculine equalities related to men like aggressiveness, possessing a lot of analytical skills and physical strength attract a lot of men than girls as these jobs mirror a lot of on the thought of being a "man".

Meta-regression(Abel) analysis reveals that the calculable gender gap has been steadily(kanya; Pokharel) narrowing (Stanley 1998). However, girls systematically earn less cash than men in virtually each trade (Isaacs, 1995). Louis, Alexandros and Konstantinos (2013) according to the gender wage gap in twentysix European countries, taking into consideration the annual earnings and hourly wages.

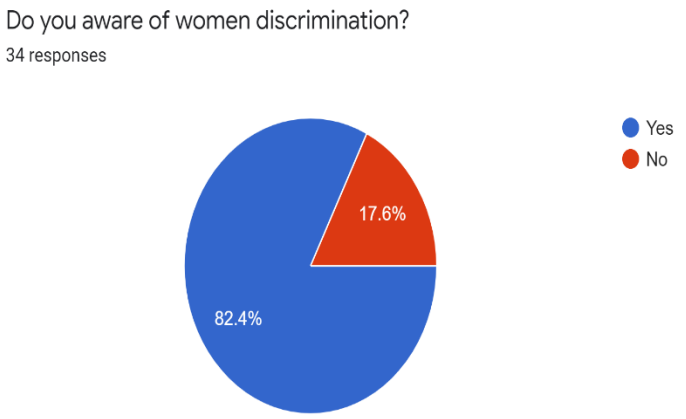
According to Ross (2008)(Bagley), discrimination is somewhere is straightforward to spot &, and there could be numerous different hypothetical analysis within the way of dealing treatment of one individual with another individual towards different sex. The most focus for the working woman is to be able & to point out that a person was always actually addressed more favourably than the females which are highly visible & observable in giving promotion & recruitment & selection also.

OBJECTIVES:

- To know about the discrimination and gender discrimination.
- To understand the concept and forms of gender discrimination against women at workplace.
- To analyse about glass ceiling practice.
- To perceive the causes and effects of gender discrimination in the workplace.
- To examine the reasons for gender discrimination against women at workplace.
- To suggest solution for gender discrimination against women at workplace.
- To know gender sensitization for law enforcement machinery.
- To study the CEDAW.
- Legal provision for gender discrimination.
- Dowry related critical study and related cases.

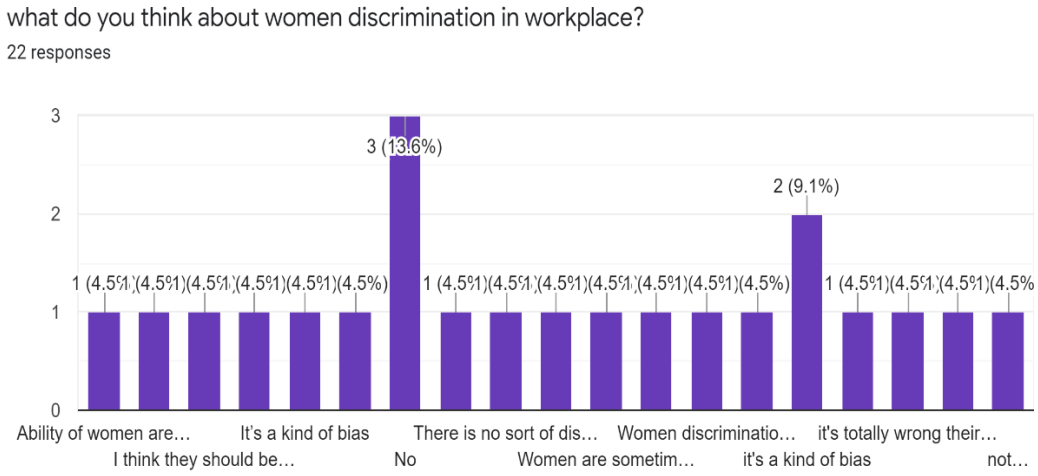
METHODOLGY:

The research method followed here is mainly doctrinal and partly empirical. The doctrine study is based on the secondary data gathered from various sources such as books and net sources. The statistical tool used by the researcher is pie chart and graphical method.



(FIGURE 1)

LEGEND: In figure 1 shows about the pie chart rate of the awareness about the women discrimination.



(FIGURE 2)

LEGEND: In the figure 2 it describes about the opinion for the reason for gender discrimination against women in workplace and how far people have cognizance about it and their opinion towards it.

RESULT:

In figure 1 shows about the pie chart rate of the cognizance about the women discrimination and how far the male and female are aware about it.

In figure 2 it describes about the opinion for the reason for gender discrimination against women in workplace and how far people have cognizance about it and their opinion towards it.

DISCUSSION:

From the survey in figure 1 we could understand about the cognizance of people about the women discrimination and who are well aware about it.

From the survey in figure 2 we could conclude that the people are aware about the reason for the gender discrimination and how it is affecting the mental and physical stability of a women.

SIGNIFICANCE:

Women occupy a unique position in the society due to the importance in the procreation of the human race. However, patriarchy and traditional patterns of life have relegated women to a position of insignificance. Women suffer this discrimination in silence. They are the victims of violence like female foeticide, infanticide, child marriage, dowry. The gender based violence haunts the women through out all stages of her life.

AIM OF THE STUDY:

This research seeks to explore about

- the problems faced by the women at workplace as well as in home by both physical and mental by discriminating them based on their gender.

WHAT IS DISCRIMINATION?

The term “discrimination” is defined as the effects of a law or established practice that confers privileges on a certain class or that denies privileges to a certain other class because of race, age, sex, nationality, religion or handicap or differential treatment, especially failure to treat all persons

equally when no reasonable distinction can be found between those favoured and those not favoured[77].

WHAT IS GENDER DISCRIMINATION?

In simple terms gender discrimination means where a person is been treated unfairly or unlawfully based on sex or gender. In workplace discrimination of gender shall prevail while issuing promotion, salary or bonus to the employees. If you look in deep the victim who are most affected by gender discrimination are women rather than man. For instance, in a enterprise men are been given higher salary then women which creates disparity between them. In some rare cases even men can be victim.

DEVELOPMENTS AT GLOBAL LEVEL:

There has been global effort with a strong support from U.N., since 1975 to understand the discrimination and restore status of women through equality, development and peace. The year 1975 was declared as the international year of the women by the United Nations. It organized 4 world conferences on at Mexico in 1975, one at Copan Hagen in 1980, one at Nairobi in 1985 and one at Beijing in 1995. The World Summit for Children 1990, set goals for health, education and nutrition for women and children. The international conference on nutrition in 1992 held on Rome, emphasized the elimination of malnutrition among women and children. The international conference on population and development in 1994 brought out a link between demographic issues and advancement of women through education, health and nutrition. The 1994 international conference on population and development placed issues of gender at the centre of discussion. Thus, several international organizations are trying to promote the advancement of women and their full participation in developmental process and trying to eliminate all forms of discrimination against women.

FORMS OF GENDER DISCRIMINATION:

At workplace gender discrimination shall be of different forms and ways. Some of them are stated below:

GENDER ENTRY GAP:

[77] Black's law dictionary (St. Paul, Minn, West Publishing co.), 7th Edition.1999, pageno.479

At the time of recruitment women are been discriminated by considering their gender. Because of this female employees are given less preference when compared to the male employees for higher post or top level position in the organisational sectors.

DISPARATE TREATMENT BASED ON SEX:

It refers to the different or unjust treatment of an employee on the basis of their sex. Employees may experience this by way of discriminatory hiring or firing practices, pay disparities, or restriction of benefits or promotions of their sex.

SEXUAL HARASSMENT:

It is an insidious form of sex discrimination that involves any unsolicited behaviour [verbal or physical] of a sexual nature that interferes with work performance, affects a person's employment, or creates a hostile work environment. Illustrations of sexual harassment and in the workplace can range from inappropriate sexual jokes to the use of sexual slurs and non-consensual touching.

GLASS CEILING PRACTICE:

Glass ceiling is unacknowledged discriminatory barrier that stops women from raising to position of power or responsibility within an organisation. It is a practice which is been performed to seal women from achieving higher position irrespective of their qualification and experience. This kind of practice is been followed to degrade women from men. For an instance, if a enterprise is in need of an employee to a higher post in that organisation it recruits a men more than a female because still in the minds of many people women are been considered as the weaker sex and assume that they will not able to handle the peer pressure, without analysing in that particular field.

CAUSES AND EFFECTS OF GENDER DISCRIMINATION IN THE WORKPLACE:

Gender discrimination in the workplace can have far-reaching effects on a person's physical, psychological, and the emotional health. Some of them are listed below:

EFFECTS FOR GENDER DISCRIMINATION:

- **Decreased productivity:**

A study by health Advocate shows that there are about one million employees who are suffering from low productivity due to stress they get from the environment they work.

- **Low self-esteem:**

Due to the discrimination issues one lacks confidences about who they are and what they can do.

- **Isolation from other co-workers:**

Workplace isolation is a type of social isolation that occurs specifically in the workplace as a result of factors like discrimination due to the gender, colour and so on.

- **Reduced job satisfaction:**

Discrimination prevents the affected gender from reaching their highest level of productivity. They are blocked out from opportunities to exercise their potential. Moreover, they do not have control over their work environment. All this leads to a lack of job satisfaction.

- **Lack of morale:**

When the working environment is hostile, employees will be less motivated to work. One would feel uncomfortable working in place where they are seen as objects and not a person. Also, they will not have the motivation to be productive if they are always criticized due to their gender. If the morale among employees is damaged, the companys productivity will be affected.

- Tension between yourself and the perpetrator of the discrimination [for instance: co-workers, supervisors]

CAUSES FOR GENDER DISCRIMINATON:

- **Underrepresentation:**

One of the significant causes of discrimination in the workplace is the underrepresentation of one gender. Some industries have low numbers of women employees. For instances, In construction and transportation industry has a very minimal number of women. In the sectors dominated by women, like early childhood education and nursing, men face discrimination as well.

- **Lack of legal protection:**

In some cases, victims of discrimination have knowledge about it but opt to suffer in silence. They don t know where to find assistance, or maybe the service is not readily available. Gender inequality lawyers are the most suitable lawyers to handle such cases.

- **Job segregations:**

There is a common perception that specific jobs are for men and others are for women. The construction industry for illustration, it is regarded as an industry for men. Because of this stereotype, it is easy to cut out women interested in the field even if they have the right qualifications.

- **Objectification:**

Objectification occurs when someone is seen as an object or a commodity rather than a personality. Although it is a part of the broader societal problems, objectification is quite prevalent in workplaces. Women are seen as objects meant for admiration and nothing else. They are never taken seriously regardless of their competence of level of education. This is the reason behind unfair promotion among women in some organisations. Men may also experience this drawback when working in female-dominated fields.

- **Lack of access to quality Health care:**

Generally, women tend to have poor access to quality medical care as opposed to their male counterparts. They cannot benefit from prestigious medical covers since they are curtailed from getting prominent jobs. Also, some employers will unlawfully dismiss women the moment they are pregnant.

REASONS FOR GENDER DISCRIMINATION:

Some of the common reasons responsible for gender discrimination at workplace are stated below:

- By discriminating women based on their gender is to prevent them from becoming financially independent.

- Education gap was considered as one of the main reasons for gender discrimination. This could be taken in to account in the period of 1980s but now-a-days education gap is also becoming narrow day by day.
- One of the pivotal reasons for gender discrimination is because under the eye of men still women are been considered as weaker sex.
- Most of the organisation sector favours men and treat women unfairly despite of their education qualification and experience.
- In male dominant it is believed that the income of women is a supplementary income which is not that much incumbent as male income because of this women are not been given promotion as well as high salary.

SOLUTION FOR GENDER DISCRIMINATION:

Gender discrimination is one of the most recurrent issues throughout the country which still prevails as an unsolved puzzle in each and every sector. Human Resources Department holds responsibility to look after and figure out the way to reduce gender discrimination in organisation sector. Human Resource personnel always to be aware whether gender discrimination is prevailing in organisation but also it is against law. Moreover it is responsibility of the management to look whether male employees are degrading female employees and making them feel uncomfortable.

Some of the points mentioned below are certain solution to reduce gender discrimination at workplace.

- HR personnel are bound to follow the transparency method while recruiting, promoting, hiring or demoting an employee in the firm.

- Women who are victim of gender discrimination must come forward and report it to the concerned authority.

- It is the duty of the employer to analyse about the discrimination laws which are applicable to their firm or company and also to set up a committee/ board for implementing anti-discrimination policy.

GENDER SENSITIZATION FOR LAW ENFORCEMENT MACHINERY:

Even today violence against women is visually treated as marginal issues by the law enforcement machinery in our country. Whether it be the police, the prosecutors or medico-legal fraternity or often, even, the judiciary. It is essential to sensitize the entire machinery to the gender issues, particularly to the domestic violence's against women. A gender sensitization module should be incorporated in all the training programmes for the police, prosecutors, magistrates, forensic and medico-legal personnel and judiciary.

The police officers, prosecutors, judges at all levels of hierarchy need to be exposed to the gender equality education which would enlighten them on existing assumptions and myths. Therefore, there is an urgent ad hoc for training of the personnel involved in the criminal justice system on the nature of violence against women in general and domestic violence in particular. The participations of victims, lawyers and social activists in such training programmes helps internalizing the gender based violence by the law enforcement agency and the judiciary. This process in the long run helps the criminal justice system to be more responsible and sensitive to the victims of domestic violence.

CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW):

The Convention on Elimination of all forms of Discrimination Against Women was adopted by the U.N. General Assembly and came in to force on 3rd September, 1981. The convention was the culmination of more than 30 years of work by the United Nations Commission on the status of women, a body established in 1946 to monitor the situation of women and to promote women's rights. Among the international Human Rights treaties CEDAW takes an important place in bringing the female half of humanity into the frame work of Human Rights concerns. It is the first significant international legal document which lays specific focus on the violence that women suffer due to legal, socio and cultural tradition. As such, CEDAW is in conformity with the provision of Indian Constitution. Consequently, India ratified the convention. CEDAW defines **"Violence Against Women"** as- any Act of gender based violence that result in or is likely to result in physical, sexual or psychological harm to women including threats of such Acts, coercion, or arbitrary deprivation of liberty whether occurring in public or private life. These institutions not

only protect women but serve as a constant remainder to the entire society that women's rights are an issue of state concern. However, the majority of the countries that ratified CEDAW have yet to incorporate their principles into domestic law and practice.

The U.N. Committee on CEDAW adopted that gender based violence is a form of discrimination which seriously inhibits women's ability to enjoy right and freedom on the basis of equality of men.

DOWRY RELATED OFFENCES AND JUDICIAL RESPONSE- A CRITICAL STUDY:

The role of the judiciary in relation to dowry related offence is discussed to assess the worth of judicial process in preventing domestic violence in general and dowry deaths in particular. The study is designed to be merely a digest of the cases decided by which have a relevance to the subject matter of the study. An attempt is also made to assess the impact of the decisions of the court on the problem of the dowry related violence.

It is not always possible to appreciate the scope of the legislation provisions[78] relating of domestic violence by simply reading it and analysing its provision. It has been recognized that the judges must be aware of the political and legal ideologies which condition their decisions and responses. If the judiciary in its anxiety to secure gender justice transgresses the limitations on judicial decision making process, then the indifference administrator may recall Jackson's reputed remark "John Marshall has made his decision, let him enforce it." Therefore, the Apex court and other High Court have to function within the constitution limitations in interpreting the law and enforcing the rights of the Individuals, particularly, women.

Case law related to dowry death:

State by Rural Police v. Siddaraj[79] is another case that highlights the plight of married women. Being extremely vulnerable at the hands of the unscrupulous husbands, who think it their legitimate right to practice polygamy and torture their wives; these women are left with no option but to end their lives. It is amazing that the court ad hoc a high degree of gravity of cruelty. Nothing can be more humiliating and insulting for a wife than her husband dumping her at her parents place

[78] 300, 304B, 306, 498A and other related provision of IPC, 1860; S.113A and 113B of the Indian Evidence Act, 1872, and relevant provisions of Dowry Prohibition Act, 1961 etc.

[79] 2000,Cri.L.J.,4220

and taking her back when her parents are able to quench his thirst for more money.[80] It happened in the case under despite the fact that she bore him a child and suffered an abortion. It makes a women a mere chattel to be used, to be exploited, and to be used as a channel for extracting more money from her parents and then to be dumped when he no longer ad hoc her. If she commits suicide who else but the husband is responsible for it? What more gravity does the judge want? Except that he himself is seen attempting to save her husband for throwing the wife into jaws of death. The judgement shows utter indifference and typical derogatory patriarchal mindset from which the judiciary cannot liberate them. Documentary proof of the demands for dowry made by husband is sufficient to prove his guilty under Sections 304B and 498A of IPC

SOME OF THE LEGAL PROVISIONS:

Our Constitution of India holds several provisions for the welfare of citizens. It provides the equal rights for both men and women of the country.

Government and Legislature of each state (Article 12):

The union and state governments, the parliament and state legislatures, and all local or other authorities within the territory of India or under the control of the Indian government.

Right to equality before Law (Article 14):

Both men and women are same under the Law remains equal and hold equal opportunity.

Discriminating a person (Article 15(1)):

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth.

Special rights for women and children (Article 15(3)):

It gives powers to the legislature to create special provisions for women and childrens.

Equal opportunity (Article 16(1)):

It talks about the right of equal opportunity in the matters of public employment. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Abolition of untouchability (Article 17):

[80] Also see State v. k. sridhar, Cri.L.J.328

Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arsing out of untouchability shall be an offence punishable in accordance with law.

Freedom of conscience (Article 25):

All persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality and health.

Equal livelihood(Article 39(a)):

That the both men and women equally have the right to an adequate of livelihood.

Equal payment (Article 39(d)):

that there is equal pay for equal work for both men and women.

SOME OF THE CASE LAWS ARE DISCUSSED:

- **Air India Cabin Crew Association v. Yeshaswinee Merchant[81],** the supreme court has held that the twin Art. 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The constitution does not prohibit the employer to consider sex while making the employment decision where this is done pursuant to a properly or legally chartered affirmative action plan. Indian judiciary has in the above case played a positive rule in preserving the rights of women in the society. Moreover, it was also held that the policy decision of reservation in favour of females is within the ambit of right to equality. This decision shows that the supreme court has taken a women friendly decision.

- **Joseph Shine v. Union of India[82],** the Constitution validity of Section 497 of IPC was challenged in this PIL filed under Art.32. the section was argued to be gender discriminatory as it only criminalised adultery committed by men and not women. The concept of gender-neutral laws was found to be absent in the aforementioned provision. The Apex Court went ahead to decriminalise it as it was destroying the dignity of women. It was observed by the judges that such provisions which place a woman subordinate to a man, in marriage or otherwise, must be done away with in order to advance equality.

[81] AIR 2004 SC 187.
[82] 2018 SC 1676

- **Vishakav. State of Rajasthan[83],** the case states that as a part of her job, Bhanwari Devi attempted to terminate the marriage of an infant and to fight the male ego prevalent in rural Rajasthan. However, she failed and the marriage was successful. She was gang-raped by the five men who sought vengeance upon the courage to protest against them and the concept of child marriage. Police and doctors subjected her to inhuman treatment by not assisting her properly. She was helpless but still determined and hopeful. A writ petition was filed by an organisation named 'Vishaka'. The PIL action sought guidelines for the elimination of sexual abuse at the workplace.

By a broad interpretation of the Constitution, it was held that sexual harassment was a clear violation of rights provided under Articles 14,19, and 21. Relying on Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW), an international instrument to which India is a signatory, the court laid down the historic Vishaka Guidelines.
These directions were made binding on all of India as law and courts had to mandatorily follow them. These guidelines were later converted verbatim into the Sexual Harassment of Women at Workplace (Prevention, prohibition and Redressal) Act, 2013 which is the most gifted piece of law acting as the saviour of working women. This case is remarkable example of judicial activism where the honourable court took appropriate measures for a healthy work environment.

- **Indian Young Lawyers Association v. State of Kerala[84],** this is a Constitution bench of SC, headed by CJI Dipak Misra, lifted the age-old ban on entry of women between the ages of 10-50, inside the Sabrimala temple where Lord Ayyappa is worshipped. The long-awaited judgement was pronounced amid protests in the state of Kerala. Devotion and faith must not be subjected to gender discrimination, as analysed by the honourable judges.

Stereotyping menstruating women in the present times would permit the religious patriarchy to flourish. The restriction on entry was a violation of the right to women, as assured by Articles 14 and 25 of the Constitution. This decision advanced gender justice and equality in the most significant manner.

[83] AIR 1997 SC 3011
[84] 2018 SCC OnLine SC 1690

- **ShayaraBano v. Union of India[85],** the case speaks about the inhuman Islamic practise of Talaq-e-biddat, wherein men could irrevocably divrce their wives by uttering the word 'talaq' thrice, was adjudged unconstitutional by a 5-judge bench of the SC. This practice was derogatory to the dignity and equality of women as it violated Articles 14,12,21 and 25of our Constitution.

CJI Khehar was of the view that no practise can be validated merely on the basis of the fact that it has been in existence for the longest time and that proper legislation against it must be put into place with immediate effect. This celebrated judgement towards gender equality by its subtle indication of the religious dogma prevalent across several religions.

- **Gaurav Jain v. Union of India[86],** In this case the PIL was filed before the Apex Court to provide clarity on provisions for the upliftment of prostitutes.

The two-judge bench of SC quoted the Fundamental Rights and deliberated that education and training be given to the fallen women and their children so that they may also lead a dignified life which they are worthy of. It was realised that they needed to be rescued, and ordered to set up a rehabilitative home for them. Society was called out to make amends and curb trafficking in women.

CONCLUSION:

"GENDER PARITY IS NOT JUST GOOD FOR WOMEN- IT'S GOOD FOR SOCIETIES" -ANGELICA FUENTES

Numbers of women's like Kalpana Chawla of NASA, Kiran Bedi is the First Indian Lady IPS Officer, Mary Kom is the first women boxer, Nora Polley is the first women tennis player, Pratibha Devisingh Patil is the first women president of India have achieved ultimately. Still there are many women's who are striving hard to come up but because of the male dominated society they are not able to overcome the obstacles surrounded by them. In order to free the women from gender discrimination a proper framework with constructive planning is required.

[85] AIR 1985 SC 945
[86] AIR 1997 SC 3021z

REFERENCE:

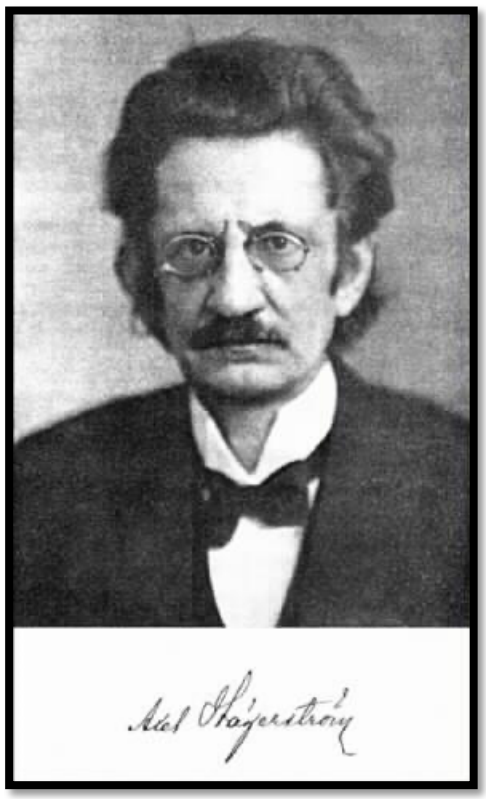
- Gender Justice and Inclusion - Poornima Jain
- Law Relating to Domestic Violence – Dr. R. Revathi
- https://www.halt.org/the-causes-and-effects-of-gender-discrimination/
- https://florinroebig.com/workplace-discrimination-women/
- Landmark Judgements On Gender Equality: The Practical Reality (legalbites.in)
- https://iosrjournals.org/iosr-jef/papers/vol2
- Abel, Martin. "Gender Discrimination Against Managers in India." AEA Randomized Controlled Trials, doi:10.1257/rct.5553.
- 2. Ali, Zahid, et al. Gender Discrimination in Workforce and Its Impact on the Employees. no. 1, unknown, Sept. 2011, http://dx.doi.org/.
- 3.ananya.GenderDiscrimination. https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf. Accessed 2020.
- 4. Bagley, Constance E. Managers and the Legal Environment: Strategies for Business. Cengage Learning, 2020.
- 5. Bezbaruah,Supriti. Banking on Equality: Women, Work and Employment in the Banking Sector in India. Routledge, 2020.
- Perez, Caroline Criado. Invisible Women: Exposing Data Bias in a World Designed for Men. Random House, 2019.

HÄGERSTRÖM'S PHILOSOPHY OF SCANDINAVIAN LEGAL REALISM

- KHUSHI

ABSTRACT

The concept of State and general law is essentially important to be understood. A jurisprudential movement initiated as a variant of realistic legal theory, Scandinavian Realism, formed practical as well as theoretical philosophy of reality, knowledge, morality and law. The research paper reviews the philosophy put forth by the founder of that movement, Axel Hägerström ((1868-1939). The paper begins with preliminary introduction to the contributions by several Swedish philosophers in Scandinavian Legal Realism elucidating what is significantly tries to impart regarding legal science and legal knowledge. The author first reviews Hägerström's philosophy of knowledge and reality discussing crucial points of 'idea-ism', rational naturalism, logical character of sensible reality, truth of judgment and empirical approach undertaken for the same. The paper further deals with moral philosophy by Hägerström. Nature of morality, conception of pain and pleasure, his views on Immanuel Kant's ideas of moral philosophy and moral nihilism as per his perspective is deciphered further. The author then reviews the literature discussing legal philosophy of Hägerström, looking into his opposition to legal positivist theories and natural right theories as well as historical analysis of legal reality and Legal Nihilism. Lastly, paper concludes after brief critical discussion based on the findings of the qualitative study.



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KEYWORDS

Philosophy, Legal, Concepts, Reality, Knowledge, Moral

INTRODUCTION

Axel Hägerström, a Swedish philosopher, founded the 'jurisprudential movement' known as Scandinavian Legal Realism. In the University of Copenhagen, he was the Chairman of Practical Philosophy from 1911 to 1933. He was of the view that metaphysical influences in legal thinking should be alleviated if human beings within a State have to decipher the legal science and value the importance of law.

Hägerström undertakes a naturalist approach to legal knowledge and law in his approach to jurisprudence. His work was further developed by his disciples, A.V. Lundstedt and Karl Olivecrona. Alf Ross, who differed from Hägerström as he appeals to legal positivism, admitted that Hägerström had opened his eyes to the emptiness of metaphysical estimations in morality and law.[87]

The legal approach is addressed from the perspective of what is dead and what is alive so far as the philosophy of Scandinavian Legal Realism is concerned. The former appears to be American approach as it claims Scandinavian Realism survives only in 'museum of jurisprudential archaeology', unlike legal positivism.[88] Easily, these ideas to could be relegated to the past, however, it continues to be reflected on to understand legal issues and future activities.

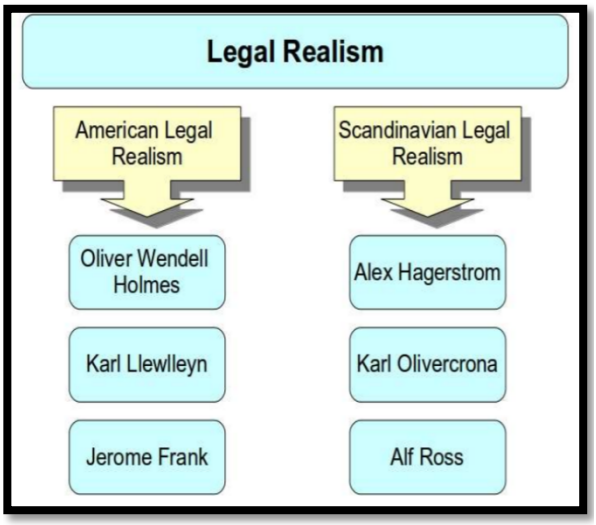
Law is undeniable cultural condition of itself. Therefore, Hägerström emphasized on the importance of law in any and every Society. He agreed that humans could never successfully place the lordship over other creations without law.[89]

[87]Stig Jorgensen, "Scandinavian Legal Philosophy," Bulletin of the Australian Societyof Legal Philosophy 8, no. 3 (December 1984).

[88], Frederick Schauer, and Virginia J. Wise, "Legal Positivism as Legal Information". Cornell Law Review 82 (1996-1997).

[89] Axel Hägerström, "Inquiries into the Nature of Law and Morals". Ed. Karl Olivecrona. Trans. Charlie D. Broad. Uppsala: Almquist & Wiksell (1953).

Scandinavian realists conceptualize the analysis of fundamental legal concepts by drawing relationship between jurisprudence and philosophy with centrality on questions of knowledge and reality to impart legal knowledge and legal science in terms of naturalist approach.[90]



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AIMS OF THE STUDY

The review addresses the following objectives:

- to understand the philosophy of knowledge and reality by Hägerström
- to look into the moral philosophy relied upon by Scandinavian realists
- to analyze the legal philosophy developed by Axel Hägerström
- to evaluate nihilist approach through the angle of legal realism

METHODOLOGY

This paper is a qualitative research based on secondary data collected by journals, websites, newspapers and books.

LITERATURE REVIEW

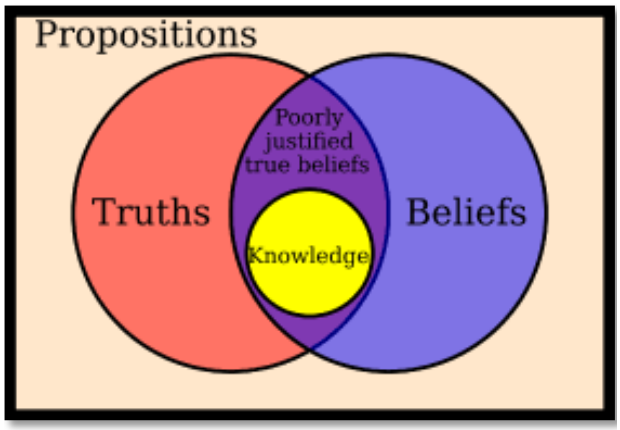
Philosophy of Reality and Knowledge

Hägerström stressed on rejection of metaphysics to provide sound to mist of words arisen out of associations and feelings.[91] He believed that the world in time and space needs to be understood by means of experience. Owing to this view, the very existence of supernatural meta-physical world was denied. The metaphysical view of Hägerström focused on realist metaphysics based on material reality of things and relationship with its properties that has separate existence from human mind, unlike the idealistic metaphysics of spiritual reality. Metaphysical reality, thus, implies logical character of sensible reality.[92]

[90] Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," Ratio Juris 18, no. 1 (March 2005)
[91] Axel Hägerström, “Philosophy and Religion”. Ed. and trans. Robert T. Sandin. London: Allen & Unwin (1964).
[92] ibid.

As he undertakes only realistic scientific approach to decipher the nature of world, naturalistic approach of Hägerström is coined as "rational naturalism" as opposed to "rational idealism" developed by C.J. Boström, a Swedish idealist philosopher.

Hägerström believed in "idea-ism" which presents concepts and ideas independent of human mind present in various things in nature that confront human beings, while he rejected "ideal-ism" that observes ideals of perfection is found in nature. Therefore, natural laws manifest the inevitable relations between events and things forming logical character of sensible reality.[93]



Source:https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.newworldencyclopedia.org%2Fentry%2FEpistemology&psig=AOvVaw3LD-ugW427kncmesmhQMSz&ust=1644920660300000&source=images&cd=vfe&ved=0CAwQjhxqFwoTCICGzJP9_vUCFQAAAAAdAAAAABAX

Ideas and concepts make a casual impact in the minds of spectator who utilize their senses. It further helps in deducing knowledge which is further expressed in the form of meaningful words in conceptual terms. Meaningful sentences then express true judgment which speaks the reality of things.

Hägerström seems to be more interested in classification than measurement of things, since, his naturalist approach is a dialogue of philosophy between a botanist representing scientists and a philosopher. Exclusion of quantitative subjects like Physics describes Hägerström's sensible reality can only be explained in empirical form devoid of mathematical concept.[94]

Truth of judgment determines reality of a thing. Scientists are in search of truth judiciously and neutrally incorporating descriptive concepts that makes them in better position than the ordinary people. Therefore, Hägerström relies upon their authority in rational naturalism.

[93]Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," Ratio Juris 18, no. 1 (March 2005)
[94]"The Realism of Axel Hägerström: Positivism and Psychology," Holdsworth Law Review 7,no. 1 (Spring 1982)

Moral Philosophy

Rational naturalism also inquires into nature of morality. Hägerström's metaphysical view shows there is no moral reality expressed in normative or moral concepts present in actions of human beings or the nature of things. He defined naturalism in non-moral conception of pain and pleasure as empirical facts as opposed to moral ethical concepts which are beyond analysis.

Hägerström subscribed to Immanuel Kant's view that it was absurd to ask 'what ought to happen' when there is only course of nature alone.[95] 'Ought' seemed to provide no meaning to the two philosophers. They are concerned with the properties, characteristics and processes of the nature as to this material information helps in understanding real constitution of the circle. However, Hägerström rejects Kant's philosophy of practical reason being the basis of positive laws. Kant was of the opinion that morality has the capacity of create rules of conduct grounded in natural rights and moral obligations which can be incorporated in law to make individuals responsible beings. Hägerström confines reason to theoretical reason so as to describe 'what there is.'

Source: https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3Dcxr9xq96D0I&psig=AOvVaw3geP9zr1i7sWeHvcO4yLrx&ust=1644919793316000&source=images&cd=vfe&ved=0CAwQjhxqFwoTCIDN3_L5_vUCFQAAAAAdAAAAABAD

Nominalism is reflected in metaphysical morality by Hägerström as it holds only moral words regulate relationship between human beings, their interaction with physical reality as well as express pain and pleasure sensations while it proposes absence of moral concept altogether. It is further clear that moral judgments do not impart moral knowledge as it is mere expression of human feelings in matter of words. According to him, moral science is only a teaching about morality rather than a teaching in morals. Moral nihilism so presented, does not

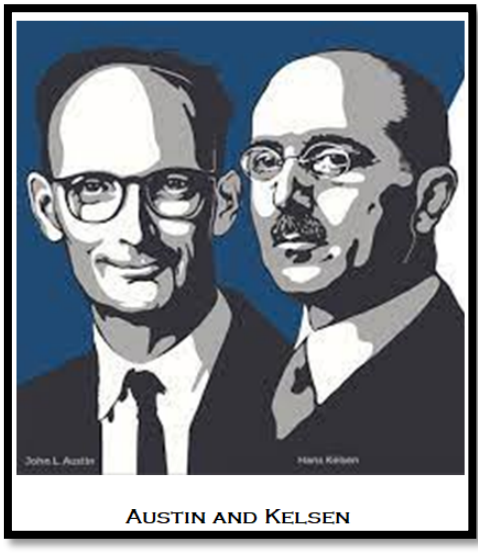
[95] Immanuel Kant, "Critique of Pure Reason". Trans. Norman Kemp Smith. London: Macmillan (1976).

discern that human beings should act immorally, as Hägerström states moral vocabulary is sufficient enough to control behavior of people.[96]

Moral nihilism of Hägerström is within contemporary phase of metaphysics introduced by Alfred Ayer. Lack of moral knowledge has political implication of strife between capital and labor as it is grounded in moral belief which drives them to fight. He suggests that no solution can be achieved by appeals to moral reasoning of universal principles. Though he sympathized with classless society of Marx, he was in favor of peaceful revolution as it would maintain appropriate social structure by means of positive law.[97]

Legal Philosophy

Declaring inherent conceptual confusion in legal positivist theories and natural right theories, Hägerström dismissed both of these theories. He agrees that law represents will of people in general and the legislator in particular, but denies that conceptual meaning of legalese used therein has will embodied in it.[98] In early writings, Hägerström subscribed to intellectual position that right and wrong is found in moral reality, however, the final versions suggest philosophical position that denies moral reality in terms of normative concepts.



AUSTIN AND KELSEN

Source: https://www.google.com/url?sa=i&url=https%3A%2F%2Fm.facebook.com%2FAustinKelsen%2Fphotos%2Fa.1854271364682352%2F1854277211348434%2F%3Ftype%3D3%26source%3D44&psig=AOvVaw2k6JLfTrq1vKl1D-GrVZSC&ust=1644919231091000&source=images&cd=vfe&ved=0CAwQjhxqFwoTCLDzg-f3_vUCFQAAAAAdAAAAABAD

Voluntarist position, supported by Hans Kelsen and John Austin, holds that right and wrong manifests only the will of the legislator and, thus, forms positive law. The coercive sanctions keep legal reality in check and hence determine legal conceptual meaning. Hägerström

[96]Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," Ratio Juris 18, no. 1(March 2005).
[97]Ibid.
[98]Patricia Mindus, "Axel Hägerström on Law-Making," Theory and Practice of Legislation1, no. 1 (June 2013): 7-32

rejected theory of Kelsen as he found it confused casual relation of social facts forming natural reality of "is" with supernatural reality imposed through authority constituting legal reality of "ought".[99] However, Hägerström supports reality of social facts constitutes law similar to Austin.

Hägerström rejects Austin's positivism as sovereign not being subject to law represents tyranny. He raises fundamental question if it really was a legal order on conceptual as well as moral grounds. Legal Nihilism by Hägerström holds absence of legal reality in normative facts of right and duties of law. His analysis for the same is substantiated by historical inquiry of origin of legal concepts in Roman and Greek laws.[100]

Hägerström also evaluates if human beings are mere instruments of legal machine lacking knowledge of its operation or that they 'know' instruments including its operation, for which 'cog' term was used. He associates himself with class of "knowing instruments" owing to the use of legal vocabulary and its power.[101]

For Hägerström, legal science helps in maintaining behavior by use of force in theory of legal rules and identifies it as a part of special science with role of ascertaining facts to a certain extent that would further lead to general principles, deductive inferences and final established results. This is due to magical use of legal vocabulary offered by legal science aids expression of human feelings put forth in well-pronounced judgments.

FINDINGS

- Hägerström rejected metaphysical explanation provided in association with feelings attached to it. His conception of metaphysics was based on reality devoid of idealistic or spiritual reality.

[99]Heikki Pihlajamaki, "Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared," American Journal of ComparativeLaw 52, no. 2 (Spring 2004)
[100]Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," Ratio Juris 18, no. 1(March 2005.)
[101]Jes Bjarup, "Reason and Passion: A Basic Theme in Hägerström's Legal Philosophy,"Rechtstheorie 11, no. 2 (1980).

- In line with 'rational naturalism' developed by C.J. Boström, Hägerström supported in realistic scientific approach as against 'rational idealism'.
- The logical character of sensible reality by Hägerström can be understood in terms of "idea-ism" opposed to "ideal-ism".
- Human beings as spectators utilize their senses to understand ideas and concepts which leave a casual impact on them. The knowledge so deduced, represented in meaningful sentences represents reality of things.

Source:https://www.google.com/url?sa=i&url=https%3A%2F%2Fslideplayer.com%2Fslide%2F15175767%2F&psig=AOvVaw1OZesoNQ6U3BzfijHyOvoq&ust=1644909913044000&source=images&cd=vfe&ved=0CAwQjhxqGAoTCOCmlovV_vUCFQAAAAAdAAAAABCHAg

- Furthermore, Hägerström's philosophy of reality and knowledge is empirical naturalist dialogue between philosopher and botanist, without including quantitative measurements.
- Reality of thing is determined by truth of judgment which is best expressed by impartial scientist forming authority of rational naturalism.
- Hägerström, in his moral philosophy, agreed with Kant that 'ought' is absurd if there is just present course of nature alone but confined himself to 'theoretical reason' as opposed to 'practical reason' being the basis of positive law.

- Hägerström supported Moral Nihilism but held that moral vocabulary would maintain control on behavior of individual and prevent them to act immorally. His metaphysical morality was a view of nominalism.
- Hägerström also pointed the political relevance of moral nihilism but believed in peaceful resolution of strife as maintenance of social structure in positive legal system is utmost priority.
- Hägerström, in his philosophy of law, did not relate to both natural right theories and legal positivist theories as it led to conceptual ambiguity.

- Though Hägerström supported the voluntarist position like Austin and Kelsen did, however, he disagreed with Kelsen to the extent Kelsen linked casual relations of social facts with 'supernatural reality' in addition to natural reality.
- Opposed to Austin's positivism which represented tyranny of sovereign not subjected to law, Hägerström supported Legal Nihilism that notes there is no legal reality in legal duties and legal rights of normative facts.

DISCUSSION

Realist movements, in general, have contributed in significant ways towards development of jurisprudence both in America as well as the Scandinavian countries. However, there are criticisms of this development too. Primary criticism of Scandinavian realism is the contradictory positions expressed by different philosophers. The disciples of Hägerström and others including Ross published contradictory propositions raising question on fundamentals.[102]

Source:https://www.google.com/url?sa=i&url=http%3A%2F%2Fchristianapologeticsalliance.com%2F2013%2F08%2F05%2Fis-naturalism-rational-the-self-defeating-epistemology-behind-evolutionary-theories-of-cognition-part-3%2F&psig=AOvVaw2lxvjeX7hmpJexc9_Ubk2O&ust=1644920456939000&source=images&cd=vfe&ved=0CAwQjhxqFwoTCLj_-7P8_vUCFQAAAAAdAAAAABAD

Another criticism is the structure laid down by Hägerström lacks in-depth analysis required to develop theory of law. Owing to the concepts of legal nihilism, moral nihilism and attributing no negative connotation to the same; the philosophy required supportive constructive with examples to facilitate reasoning.

Hägerström tried to trace back the origin of metaphysical ideas concerning concept of right. However, he failed to answer analytical question of use of metaphysical ideas in legal science.

Hägerström and his successors may educate lawyers to understand operation of legal machinery as social engineers but at the same time fails to address pros and cons adhering to strict letters of law expressed through legal vocabulary.

Apart from the mentioned criticism, the work of Axel Hägerström deserves much needed recognition and appreciation as his 'rational naturalist' approach helps in tracing the origin of reality and knowledge and helps to understand its impact on human beings as spectators. He tried

[102]ML Shankar Kaarmukilan, "American and Scandinavian Legal Realism," E-Pathshala, Law, MHRD, Govt. Of India

to analyze the theories put forth by other contemporary philosophers and jurists to explain and refine his conception of morality and law. His work proved to be monumental for not just the Scandinavian jurisprudential movement but the entire domain of philosophy of law.

CONCLUSION

Hägerström laid the foundation of Scandinavian legal jurisprudence. He supported non-cognitivism as well as moral relativism which resulted in blend of realist, positivist and psychological notion of law but in a constrained sense. His anti-metaphysical statement with departure from more pragmatic American approach formed the legal realism. His positivist idea was more logical than realist as he carefully established link between legal institutions and law with the help of legal vocabulary but influence on the mind of individual remained central throughout. It was the demystification of law and unverifiable propositions in relation to which Hägerström has displayed depth and originality in legal thinking. His clear rejection of legal concepts which did not stand up to scientific application as well as the concept of true judgment instead of value judgment continues to appeal the legal philosophy. Going by the philosophy, let duties and rights influence the conduct as it derives meaning in science which is provable.

REFERENCES

- Anthony Carty, "Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law," European Journal of International Law 14, no. 4(2003): 817-842
- Axel Hägerström, “Inquiries into the Nature of Law and Morals”. Ed. Karl Olivecrona. Trans. Charlie D. Broad. Uppsala: Almquist & Wiksell (1953).
- Axel Hägerström, “Philosophy and Religion”. Ed. and trans. Robert T. Sandin. London: Allen & Unwin (1964).
- D. J. Sherbaniuk, "Scandinavian Realism," Alberta Law Review 2 (1962): 58-75
- Frederick Schauer, and Virginia J. Wise, “Legal Positivism as Legal Information”. Cornell Law Review 82 (1996-1997).
- Heikki Pihlajamaki, "Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared," American Journal of Comparative Law 52, no. 2 (Spring 2004): 469-488.

- Immanuel Kant, “Critique of Pure Reason”. Trans. Norman Kemp Smith. London: Macmillan (1976).
- Jes Bjarup, "Reason and Passion: A Basic Theme in Hägerström's Legal Philosophy," Rechtstheorie 11, no. 2 (1980): 151-164.
- Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," Ratio Juris 18, no. 1 (March 2005): 1-15.
- Matheus de Barros, "Scandinavian Legal Realism and the Notion of Internal Point of View," Revista Eletronica Direito e Sociedade (REDES) 8, no. 3 (December 2020):297-312
- ML Shankar Kaarmukilan, "American and Scandinavian Legal Realism," E-Pathshala, Law, MHRD, Govt. Of India
- Patricia Mindus, "Axel Hägerström on Law-Making," Theory and Practice of Legislation 1, no. 1 (June 2013): 7-32 .
- Simeon Groysman, "Roman Law as Source of Theoretical Inspiration: The Case ofScandinavian Legal Realism (Bulgarian Language)," Ius Romanum 2020, no. 2 (2020):753-766
- Stig Strenholm, "Scandinavian Realism," Strani Pravni Zivot (Foreign Legal Life)1989, no. 2 (May-August 1989): 3-12
- Stig Jorgensen, "Scandinavian Legal Philosophy," Bulletin of the Australian Society of Legal Philosophy 8, no. 3 (December 1984): 2-18.
- "The Realism of Axel Hägerström: Positivism and Psychology," Holdsworth Law Review 7, no. 1 (Spring 1982): 59-72.

FAILURE OF PLEA-BARGAINING AS A.D.R. FOR CRIMINAL TRIAL IN INDIA

- AKSHAY SHARMA

Abstract:

Plea-Bargaining is concept which was not per se there in Indian Legal System, as Indian Criminal Legal System has not witnesses major significant reforms and adjudicated the Criminal matters with traditional practice but the change of time and need of an hour introduced the concept of Plea-Bargaining which was evolved after the suggestions made by the law Commissions of India in its various reports, so as to reform the traditional practice of Indian Legal System i.e. lengthy and complex court procedures to deal with criminal cases, Plea-Bargaining was enacted in the year 2005 as mentioned under Section 265A to 265L of Chapter XXIA of the Code of Criminal Procedure, 1973 to curb the overburden of Indian Courts and also to provide expedite alternative proceedings for criminal matters. India has borrowed this concept from United States where the US Legal System follow this effectively and majority of the Criminal matters get resolved through dispositions by using Plea-Bargaining as ADR mechanism for Criminal matters. This Article pertinently emphasizes up on the failure of Plea-bargaining in India as ADR for criminal trials by critically analyzing lacunas in the procedural part as defined under Section 265A to 265 L of Chapter XXIA of the Code of Criminal Procedure, 1973 i.e. the scope of discretion of judges under this Chapter of the Code. We herein deliberately focuses up on factors affecting applicability of this Chapter by examining landmark judicial pronouncements out of which some opined against this Concept to deal with Criminal matters and some recent developments which admitted the sanctity of Plea-Bargaining in Indian Legal System and a comparative study of the subject matter to analyze intervention of Court, finality of decision under Plea-bargaining and the procedural difference between India and United States Criminal Legal System.

Introduction:

At the outset of this article it is pertinent to understand that despite of many reforms has been introduced under Indian Legal System specially enactment amendments in Criminal Procedure, Criminal Legal system of India is still struggling with the rigidness of old school procedures. As we know India is celebrating "Amrit Mahautsav" i.e. 75th Independence Day but criminal law in India has still not witness major amendments or reforms under Criminal Legal System and dealing

cases of 2022 with traditional statutes i.e. Code of Criminal Procedure, 1973, Indian Penal Code, 1860 and Indian Evidence Act, 1872. It is not right to say that Indian Legal System has not witnessed significant amendments and reforms under Criminal Law like Criminal Law (amendment) Act, 2005 which introduced and enacted the concept of Plea-Bargaining under Code of Criminal Procedure, 1973, but due to the traditional approach in its procedure it deceived the purpose of its enactment. Generally special laws and procedures were enacting to provide expedite justice in the matter, to furnish court with fast track procedures and significantly to reduce the burden of court. The purpose of this article is to centralize the attention towards burden of court even after enactment of special laws i.e. Plea-Bargaining, further we discuss the challenges for the applicability and acceptability of Plea-Bargaining in India and lastly why Plea-Bargaining failed as an ADR for Criminal Trial India by specially emphasizing the comparative study f the concept of plea bargaining in India and in US.

The concept of plea bargaining is where a harmonious accord is reached between the prosecutor and the defense attorney, and the defendant pleads guilty in exchange for sentence diminution. "As Black's Law Dictionary defines it, plea bargain is an agreement reached between the plaintiff and the defendant intending to arrive at a resolution of the case without ever requiring going to trial"[103]. This concept of plea Bargaining was not per se there in Indian Legal System, Plea bargaining runs much deeper. It was deliberated for the first time in the Law Commission of India's 142nd Report, presided over by Justice MP Thakkar, but significantly in 154th Report of the Law Commission, Under the Chairmanship of Rtd. Justice K Jayachandra Reddy, which clarified how exactly the provision of plea bargaining would operate in the Indian Criminal Legal system. Prior to the enactment of the 2005 Amendment under CrPC, the final discussion over the issue was undertaken under Malimath Committee Report in the year 2003. The disposal of criminal matters in the Courts take considerable time and that in many trials do not commence for as long a period as 3 to 5 years after the accused was remitted to judicial custody. Many accuseds in plethora of criminal trials are unable to secure bail, for one or another reason, and have to deteriorate in jail as under-trial prisoners for the number of years. Though not recognized so far by the criminal jurisprudence, it is seen as an alternative method to deal with huge arrears of criminal cases. To reduce the delay in the disposal of criminal trials and appeals as also to alleviate the suffering of under- trial prisoners, it is proposed to introduce the very concept of plea-bargaining as recommended in the 154th Report

[103] Henry Campbell Black, Black's Law Dictionary, 7th Edition.

of Law Commission of India on the Code of Criminal Procedure. The Committee on Criminal Justice System Reforms under the chairmanship of Dr. (Justice) V.S. Malimath, formerly Chief Justice of the Kerala High Court, has also endorsed the Commission's recommendations[104]. It means negotiations between parties to the matter i.e. Accused, Prosecution and Vitim at pre-trial stage during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor along with the consent of victim. The benefit of plea-bargaining would, however, not be admissible to habitual offenders. It is widely felt that criminal cases in the Courts fail because statements by witness are reneged either out of fear or allurement. To prevent the evil of witness turning hostile, it is proposed to amend provisions i.e. Section 161, 162 and 344 of the Code, and to insert new Sections 164A and 344A in the Code of Criminal Procedure, 1973. The amendments to the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 inter alia provide that (i) Statement made to Police officials by any person at the time if investigation, if reduced to writing, is to be signed by that person and transmitted to the Magistrate; (ii) Recording evidences of the material witnesses by Magistrate in all offences which are punishable with death or imprisonment for the term which may extend to 7 years or more during investigation (iii) Statement of the witnesses duly recorded before the Magistrate under oath, in the discretion of the Court, be treated as evidence; and (iv) Summary trial in the matter of perjury and enhance punishment pronounced in the consequence of such summary trial.

Applicability of Plea-Bargaining in India:

As now plea-bargaining as an concept is not new in our legal system, conceptually we all have idea about the mechanism and procedure laid down under Chapter XXIA of Code of Criminal Procedure, 1973 but the question arises whether a mere understanding of any subject matter is sufficient to take its benefit while dealing with case study? There may be more than one answer to this question, but practically we should analyze the applicability of the subject matter into our legal system to know its effectiveness in the criminal procedure. Despite the fact that the concept of Plea-bargaining enacted in the year 2005 in Criminal law to reduce the burden of court, parties to the matter and courts are still following the lengthy and traditional procedures in the criminal

[104] Justice Sunil Ambwani (Rtd.), Plea-Bargaining in India, www.livelaw.in, 2021.

matters. To know further in detail following are the factors onus the failure of Plea-Bargaining as an ADR for Criminal Trials[105]:

Nature of Offence:

Plea-Bargaining has its narrow approach in India, as not all criminal offences can get benefit of this procedure but only those which has been categorically defined under the provisions of Chapter XXIA of Code of Criminal Procedure, 1973. There are three main category mentioned under Section 265A of this Code which states nature of offences comes under the ambit of this Chapter i.e. Where the maximum punishment is imprisonment for 7 years; Where the offenses don't affect the socio-economic condition of the country; When the offenses are not committed against a woman or a child below 14 are excluded. These categories stated under the said provision narrow and restrict the applicability of Plea-Bargaining as it facilitates only those cases which are punishable up to 7 years of imprisonment out of which many offences can be compound under Section 320 of this Code. Such narrow approach of any enactment results into its failure.

Veto power of Victims:

Unlike other Countries like US, Victim has a pertinent role in plea-bargaining proceedings. The victim has the power to refuse or veto if unable to reach a mutually satisfactory disposition. There is one saying *"too many cooks, spoil the broth"* which means more the people more the confusion, as in India all the parties to the case i.e. Prosecution, Accused and Victim get involved in the plea-bargaining proceeding which ultimately linger on the negotiations and failed to get expedite disposition. The concept of plea-bargaining has been introduced to facilitate accused and the prosecution as well to get away from the lengthy and complex criminal proceedings, even proceedings under plea-bargaining provides certain relaxation to the accused from punishment not pardon his offence so, it must be the responsibility of prosecution to negotiate on this from the accused not the victim.

Complexity in Procedure:

the legislative intended to enact simple and expedite procedure for this chapter but the procedure established is practically complex in nature as unlike US accused in India firstly have to file the Application under this chapter and then initiate negotiation with the prosecution and the victim and if the negotiations not workout then the proceedings again turn it into court proceedings, if the

[105] Lokesh Vyas, Concept of Plea- Bargaining under Indian Laws, https://blog.ipleaders.in/plea-bargaining-practice-india, 2018.

negotiations initiate prior to filling the application of plea-bargaining as followed by US legal system then in that case proceedings considered to be effective, expedite and importantly achieve the purpose of enacting this Chapter.

Discretion of the Judges:

This is one of the biggest challenges that the Indian legal system witnesses in many provisions where the scope of discretionary power of the judges are higher which sometime considered to be arbitrary, as we have already discussed that the concept of plea-bargaining has been introduced to reduce the burden of court as by resolving criminal matters out of the court where the involvement of court is minimal and parties to the case itself negotiate, but if we analyze the proceedings under Chapter XXIA of Code of Criminal Procedure, 1973 the court has its intervention in the proceedings at every stage, especially if we look into section 265E disposal of the case, Section 265F Judgment of the court, Section 265G Finality of Judgment etc. these are the provisions which reflect the excessive intervention of the court which deceived the purpose of the enactment of Plea-bargaining as a ADR for criminal Trial. Unlike US the court in this chapter has every power to approve or reject the negotiations made between the parties to the case.

Finality:

Section 265G deals with Finality of the judgment which states "that no appeal shall be against judgment pronounced under this provision but Special Leave Petition (Article 136) or writ petition (under Article 226 or 227) can be filed against such decision"[106] though it has been mentioned under this section that no appeal shall lie against the order under this section but the alternative remedies which has been given under this section restricts the finality of the decision, in India parties to the case avail all there remedies even if they know that there case is not as strong as to get any relief. As like US there must be no alternative remedies to be given in the special procedures like Plea-Bargaining, such alternative remedies results into complexity and time consuming proceedings.

Comparative Analysis with US:

It is needless to mentioned that India has borrowed the concept of Plea-Bargaining from United States legal system and it is very much evident through statistics that the proceedings of Plea-Bargaining in US is way better than India, US has more than 90 percent success rate in resolving criminal Trials through Plea-Bargaining proceedings. The foremost reason of success of this

[106] Section 265G, Code of Criminal Procedure, 1973, Universal's, LexisNexis, 2022

concept in United States is that US enacted this concept purely as Alternative Dispute Resolution mechanism; Apart from this following are the factors which make Plea-Bargaining as an effective mechanism in US:

- It is a pure contractual agreement between parties where Court has no intervention.
- There is no involvement of Victim in the disposition of case through Plea-Bargaining.
- Once the agreement has been finalized between the accused and the prosecution, matter becomes purely of contractual nature.
- Negotiations between the parties initiate at the very first place prior to the Application of Plea-Bargaining.
- There is no categories of offence has been mentioned which means all the offences under US criminal system has subject to resolve through Plea-bargaining, which broad the ambit this concept.
- There shall be no appeal or any other alternative remedies have been given under US legal system against finality of agreement under Plea-Bargaining.
- Court has no discretion in these proceedings either to approve or reject the negotiation made between the parties.

Judicial Pronouncements:

The methodology of adjudicating the hearing and deciding the criminal cases involving heinous offences requires no invasion. Neither the State or the prosecutor nor even the Judges can bargain up on that evidence would not be led or appreciate the consideration of getting sentence by pleading guilty. In the case of **State of Uttar Pradesh v. Chandrika**,' the Supreme Court observed:

"It is settled law that on the basis of plea bargaining Court cannot dispose of the criminal cases. The Hon'ble Court has to decide it on merits. If accused confesses his guilt, appropriate sentence is required to be imposed. Further, the approach of the Court in appeal or revisions should be to find out whether the accused is guilty or not on the basis of evidence on record. If he is guilty, appropriate sentence is required to be imposed or maintained."[107]

In **State of Gujarat v. Natwar Harchanji Thakor**, a Division Bench of the Gujarat High Court dealing with the concept of plea bargaining observed:

[107] B M Prasad and Manish Mohan, Code of Criminal Procedure, 1973, Ratanlal & Dhirajlal, 20th Edition, Lexis Nexis.

"We are tempted to mention here that law should be stable but not standstill. The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases, and considering the present realistic profile of the pendency and delay in disposal in Join the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. However, keeping in mind the huge arrears and long time spent in trials and resultant hardships to parties and particularly, the accused and the victims of the crimes, the benefit of "plea bargaining as an alternative method to deal with the dispute or question of offence requires serious consideration, which would not be admissible and available to the habitual offenders."[108]

Conclusion:

The concept of 'plea bargaining' is not recognized and is against public policy under our criminal justice system. Section 320 Cr. P.C. provides for compounding of certain offences with the permission of Court and certain others even without permission of the Court. Except the above, the Supreme Court in some cases held that the concept of negotiated settlement in criminal cases is not permissible, but after facing burden of plethora of Criminal Trials Hon'ble Apex Court admitted the sanctity of the Chapter XXIA of the Code and featured the need of Plea-Bargaining in its various recent pronouncements, Apart from judicial approach towards the subject matter Legislative has completely failed to appreciate the fact that if such enactment has been introduced to reduce the burden of the court then its provision must narrow the scope of discretion of judges and less the intervention of court under this Chapter but the ambit of discretion given to the judges under this Chapter deceive the very purpose of this concept, as at every stage of the proceedings mentioned under Chapter XX1A of the Code judges have power to proceed as per their discretion, it is pertinent to mention that Indian legal system should follow the mechanism of Plea-bargaining practiced in US legal system as it is to gain the amount of success of resolving criminal trial out of court and to treat Plea-bargaining as ADR for criminal trial with no intervention of court.

[108] Sudipto Sarkar, Code of Criminal Procedure- an encyclopaedic commentary on Code of Criminal Procedure, 1973, Vol.2, 11th Edition, Lexis Nexis.

RIGHT TO LIFE AND MEDICAL TERMINATION OF PREGNANCY

- EMILYA ROSE BENNY

Introduction

MTP, which stands for Medical Termination of Pregnancy, is a procedure of terminating pregnancy using medicines, otherwise, the surgical process is needed. It is also known as induced abortion or intentional or voluntary termination of pregnancy. Right to MTP of pregnant woman and right of foetus to being born alive stands as a controversial topic. When the Constitution of India guarantees right to life, how violation of one's right may be become protection of others and this is the reason to point out the same. Where the legal status of foetus is proved, termination of pregnancy shall be deemed to be illegal. Law allows certain exceptions to legalise the abortion.

Right to Life

Right to life is enshrined in Constitution of India under Article 21, it provides that, no person shall be deprived of his life and personal liberty except according to the procedure established by law[109]. Right to life apart from its grammatical meaning includes right to grow, to being born alive, right to physical and mental health, right not to be born, right to privacy. i.e, more than mere animal existence. Article 21 also guarantees right to liberty, it includes right of reproductive choices (right to abort). Right to life is regarded as an inalienable human right under Article 3 of Universal Declaration of Human Rights (UDHR) and Article 6 of International Covenant on Civil and Political Rights (ICCPR). Inalienable right is the right which is self-acquired by human being from the beginning of formation and not to be offered by anyone. No person has right to take away or abridge this right. Under International law, the unborn child is protected, and it was not permissible at this late stage to attempt to allow a liberal abortion agenda under the Convention for the Rights of the Child.

Legal status of Unborn child

Some studies in the medical field arrived at a conclusion that, foetus at 12 weeks or more can be regarded as human being[110]. A life is evolved biologically by the process of fusion of sperm & ovum (fertilisation), forming an embryo, itself has to be considered as human being with all rights

[109] INDIA CONST. art.21
[110] Soroush Dabbagh, Fetus as Human Being :Where is the Cut off Point?, J Med Ethics Hist Med 1,2(2009)

and dignity as normal human being. Like any other, it has the right to peaceful environment, growth factors and to being born.

Legal status of an unborn child is very evident from the Sec 312[111] of Indian Penal Code, 1860. The very purpose of the provision is to protect the right of the foetus to live. It clearly states whoever (including the pregnant woman herself) causing miscarriage is punishable for imprisonment and also fine. The same is subjected to certain exceptions considering the, physical mental condition and age of the woman. Unlike physical infirmities of baby and its probability of survival and physical health of pregnant woman, the mental health of the woman is not much easy to determine and prove beyond reasonable doubt before the court, it is determined from the facts and circumstances of the case.

The Transfer of Property Act, 1882 protect the legal status of foetus, it characterizes child in womb as a person. Under Section 13 of the Act provides that, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property[112]. Unborn child is deemed to be a person and the transfer of immovable property made in respect of that person is legally valid. The Code of Criminal Procedure, 1973 protect right to life of unborn child. It guarantees the right of child to being born alive by prohibition of capital sentence of pregnant woman to protect the life of innocent baby. Section 416 provides that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life[113]. Legal status of unborn child is different in US and in Common law, the fetus has not been recognized as a person with full rights. But there are certain instances shown that foetuses have been given separate legal personality. It was estimated that 375,000 children were born annually in the United States suffering from the effects of illegal drugs taken by their mother. As a result, some states have held women criminally liable for any use of illegal drugs that harms their fetus.[114]In land mark judgment(*S Jefferson v. Griffin Spalding County Hospital Authority*, 1981

[111] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).
[112] The Transfer of Property Act, 1882, No. 4, Acts of Parliament, 1882 (India).
[113] The Code of Criminal Procedure, 1973, No. 2 Acts of Parliament, 1974 (India).
[114] Alka Kuthe, Divyangee Kuthe, Legal Rights Of The Fetus,8 New Indian Journal of Pediatrics, 3 (2019)

Georgia) Supreme Court held that an expectant mother in her last weeks of pregnancy did not have the right to refuse surgery or other medical treatment if the life of the unborn child was at stake.

When any form of cruelty towards foetus is criminalised under Law, it is evident that the legal status of child in womb is upheld under law and hence it is undoubtedly entitled to right to life enshrined under Article 21 of the constituition. Thus the expression 'person' made in Article 21 include foetus.

RIGHT TO MTP

Health of the new born totally depands upon the genes, physical and mental condition of carried woman. If the termination is not allowed, the child may result in with physical or mental deformity. Thus right to life couln't be guaranteed to child by preventing medical termination and so it is a matter of right of Pregnant women. A woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating[115].Women has right to undergo medical termination of pregnancy under Section 3(2B) of Medical Termination of Pregnancy (Amendment) Act, 2021. The legislative intent was to provide a qualified right to abortion and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.

Medical Termination of Pregnancy is allowed for the pregnancy whose length not exceed 24 weeks. This is so because there is a clear medical consensus that an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same. Medical termination of Pregnancy is not an absolute right guaranteed under any law. It is given on reasonable apprehension of grave danger to health either to pregnant woman or the foetus, considering the condition of woman whether a rape victim, minor, pregnancy occurs as a result of failure of any device or method etc… MTP shall not be regarded as a matter of self-preservation or as an exception to right to life. The privilege of self-preservation can be exercised only when the lives of two or more equally innocent persons are in jeopardy and not all of them can be saved. In the exceptional cases under sub clause b of Section 3(2) of Medical Termination of Pregnancy (Amendment) Act, 2021 , the mother would have a privilege to defend her own life through termination of pregnancy or to choose to give up her life to save the child (if that is

[115] Bhupinder Kumar v. Angrej Singh, (2009) 8 SCC 766.

possible medically)[116]. In the case of *Suchita Shrivastava v Chandigarh Administration*[117], a three-judge bench of the Supreme Court delivered a landmark verdict in which they held that a women have right to reproductive choices under right to liberty guaranteed under Article 21 of the Constitution of India.

Under Section 3(1) of the Act Right to termination is allowed only within the limited time period (20 weeks) under section 3(2)(a) and (b) of the Medical Termination of Pregnancy Act 1971. Medical Termination of Pregnancy (Amendment Act) 2021, has modifies Section 3 of the Act to extend the upper limit of medical termination of Pregnancy upto 24 weeks from 20 weeks. However the medical termination is allowed beyond the time fixed by the Act considering physical and mental health condition of woman, risk of termination, best interest of women who were mentally retarded, and probability of child to live without the support external machineries.

The Supreme Court allowed for the termination of a 22-week old pregnancy considering probability of danger of the physical and mental health of pregnant woman in *Mrs. X v. Union of India*[118].In *Alakh Alok Srivastava v. Union of India*[119] W.P. (C) No. 565/2017, where the petitioner was a 10-year-old rape victim with a 32-week pregnancy, the Court did not allow termination. The Medical Board opined that the continuation of the pregnancy was less hazardous for the petitioner than termination at that stage.

Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother is guilty of the offence of child destruction, if it is proved that the act was not done in good faith for the purpose only of preserving the life of the mother[120].

RIGHT TO MTP AS MUTUAL RIGHT TO LIFE

Termination is allowed in pregnancies were beyond 20 weeks and the fetuses had various medical conditions and anomalies, resulting in a high risk to the fetus and the mother in, *Meera Santosh Pal v. Union of India*[121]. In *Suchita Srivastava & Anr v. Chandigarh Administration*[122], the woman is mentally retarded had already been pregnant for more than 19 weeks and there is a medico-

[116] Cry For Life Society v. Union of India, (2018) 14 SCC 75.
[117] Suchita Shrivastava v Chandigarh Administration, (2009) 9 SCC 1.
[118] Mrs. X v. Union of India, (2018) 14 SCC 75.
[119] Alakh Alok Srivastava v. Union of India, 2018 (7) SCALE 88.
[120] 11 Lord Mackay, Halsbury's Laws of England 628 (2006).
[121] Meera Santosh Pal v. Union of India, (2017) 3 SCC 462
[122] Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 9 SCC 1

legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same. Supreme Court ruled that it was in the best interests of a mentally retarded woman to undergo an abortion. Expert Body's findings which show that the victim had expressed her willingness to bear a child. In *Mamta Verma v. Union of India and Others*[123] the Hon'ble Apex Court had occasion to consider the question of illegal termination of pregnancy, during the 25th week of a pregnant woman, after discovering that her foetus was diagnosed with a defect that leaves foetal skull bones unformed and both not treatable, certain to cause infant's death during or shortly after birth, and the condition also known to endanger mother's life, permitted to conduct medical termination of pregnancy.

CONSTITUTIONALITY OF MTP ACT

Section 3 of MTP Act allows termination of pregnancy by medical practioner or practioners. It is important to discuss the rights guaranteed by the constitution of India, Constitution guarantees equal rights to all person. But the same has two dimensions, rights of mother and rights of child in womb. Right to life shall be applied equally under Article 14 of the Constituition. Explanation to Section 3 allows termination of pregnancy, where it occurs as a result of failure of any device or method used by any woman or her partner. It is easy to prove before the court that the pregnancy was unintended, it was resulted by the mere failure of any sterilization method or contraceptive devices. Thus the explanation is not found satisfactory which could be misused and being misused as a defense. This unfair exception will result in the grave violation of child's right to life and is unconstitutional. In *Indulekha Sreejith v. Union of India and Ors.,* the Kerala High observed that if the foetal abnormalities diagnosed are not lethal, without any threat to the life of the mother, the reproductive choice of the mother which is a facet of the fundamental right guaranteed to her under Article 21 of the Constitution, will have to give way to the right of the unborn to be born.

A Public Interest Litigation filed in the Supreme Court challenging the constitutionality of Sections 3 and 5 of the MTP Act. The petitioners argued that these provisions are in violation of Articles 14 and 21 of the Constitution of India. The prayers of this petition sought to widen women's access to safe abortions and grant them greater reproductive choices. It also asserted that the State has a positive obligation under Article 21 to guarantee the right to health. In *Swati Agarwal & Ors. v. Union of India*, constitutionality of section 3(2), 3(4) and 5 of the MTP Act was challenged under

[123] Mamta Verma v. Union of India and Others, (2018) 4 SCC 289

Article 14 and 21 of the Indian Constitution, on ground that it curtails the personal liberty and privacy of the mother[124]

Accidental Pregnancy and Abortion

According to a 2016 study published in The Lancet by the Guttmacher Institute and the World Health Organization, an estimated 56 million abortions took place globally each year between 2010 and 2014. This corresponds to approximately 125,000 abortions per day. Six out of 10 of all unintended pregnancies end in an induced abortion. Around 45% of all abortions are unsafe and it's a striking fact that developing countries bear the burden of 97% of all unsafe abortions[125]. Accidental pregnancy or unintended pregnancy or otherwise unwanted pregnancy have no significant space in the 21st century. Sex education has developed across the world even though in different rates. Medical Termination of pregnancy shall not be entertained as a matter of right for careless sexual relations, unwanted pregnancy. In S. Khushboo v. Kanniammal & Anr, Supreme Court held that girls should take adequate precautions to prevent unwanted pregnancies and the transmission of venereal diseases.

Woman forced to undergo through an unwanted pregnancy infringed her right to dignity, sexual and reproductive freedom under Article 21 of the Constitution of India and International Covenant of Economic, Social, and Cultural rights. Right to MTP for whom forced to undergo pregnancy is different from accidental pregnancy and her right to MTP. Article 6 of ICCPR clearly provides right to life shall be protected by law and no one shall be 'arbitrarily' deprived of others right.

DOCTRINE OF SELF PRESERVATION

This concept was established by the English court in the well know Mignoet's case or Queen v. Dudley and Stephens (1884). The question is, how far the necessity of preservation of one's own life justifies the causing harm to an innocent person. It was held that there was no such necessity as could justify the person in killing an innocent and therefore they were guilty of murder. Dr. H.S. Gour deduces three principles from the above judgment

i) Self-Preservation is not an absolute necessity;

ii) no man has a right to take other's life to preserve his own life;

iii) there is no necessity that justifies private homicide[126].

[124] Lisa Coutinho, Constitutionality of abortion laws in India, Legal Service India (Apr. 9 2021, 4.32pm), https://www.legalserviceindia.com

[125] Abortion, WHO, 2021 https://www.who.int/news-room/fact-sheets/detail/abortion

[126] S.N. Misra, Indian Penal Code 193-194 (Central Law Publications 2018)

Neither right to abortion nor reproductive choices are absolute right. Medical termination of pregnancy is legal only when it is strictly complied with Section 3 of the Medical Termination of Pregnancy Act. Otherwise, abortion will amount to murder, where self-preservation or necessity can't be claimed as a defence under any law. What make it difference, killing a child in womb and child born outside, when the law itself recognizes foetus as child. Abortion does not come within the recognized exception to the right to life. Abortion itself is a form of aggression against the child. It can be said that rather than by law, abortion is supported for an overwhelming practical considerations even though there are differing views internationally in this aspect.

CONCLUSION

Rt. Hon'ble Lord Denning in his book "The Closing Chapter" says thus:- Life is the immediate gift of God, a right inherent by nature in every individual, and it begins in contemplation, at law as soon as the infant is able to stir in its mother's womb. Such a child was protected by the law almost to the same extent as a new-born baby. If anyone terminated the pregnancy and thus destroyed the life of the child he or she was guilty of a felony punishable by life imprisonment. The legislative intent was to provide a qualified right to abortion and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. Constitution of India guarantees equal protection of law irrespective of the age.

BAIL AND ITS PROCESSING UNDER CRPC: A CRITICAL STUDY

- DIKSHA BISHNOI

ABSTRACT:

The concept of bail arose from a conflict between 'police control' and limiting the freedom of a guy who is alleged to have committed a crime and the presumption of blamelessness to back him up. The word 'bail' comes from the old French verb 'baillier,' which literally means 'to deliver or convey.' Bail is the process of releasing or putting at liberty a person who has been arrested or detained on the basis of security or surety for his attendance on a specific day and location.

As such, bail is the release of a detained individual to his sureties in exchange for security for his attendance at a certain location and time, subject to the court's jurisdiction and decision. Because the individual caught or detained is placed in the care of those (surety) who acquire themselves or advance toward becoming bailers for his proper presence when necessary, the surety is called 'bail.' Surety must be those who have the expertise to bail out a person who has been apprehended and must appear in court on a specified date. The individual who has been apprehended or detained is bailed, or put at liberty until the date fixed for his appearance, based on the duties of those sureties. Allowing bail has the effect of releasing the detainee from jail or guardianship, but also of releasing him from the care of the law and entrusting him to the authority of his sureties, who will definitely deliver him to appear in court at a predetermined time and location. The main end result is that it is interested in the sureties grabbing the detainee whenever and wherever they are released by handing him over to the power of law, with the result that he (the detainee) will be held.

KEYWORDS: Sovereign, guarantee, Magistrate, anticipatory bail, without warrant.

INTRODUCTION:

The United States' bail rules evolved from a lengthy history of English statutes and methods. During the provincial period, Americans relied on the bail system that had been established in England many years before. When the settlers declared independence in 1776, they never again relied on English law, instead devising their own arrangements that were essentially identical to

the English tradition. Understanding the significance of the American sacred bail arrangements and how they were designed to supplement a larger statutory bail system is essential in order to grasp the value of the English framework and how it developed until the time of American sovereignty. In mediaeval England, methods for ensuring that those accused of wrongdoing would appear for trial began almost as soon as the criminal trials themselves. The terms under which a plaintiff may be detained before trial or dismissed with guarantees that he would return were controlled by the local Sheriffs until the thirteenth century. The sheriff, as the crown's territorial representative, had sovereign authority to release or detain suspects. At the end of the day, sheriffs might use any criterion and assess any element when determining whether or not to release a defendant on bond. The purpose of this article is to look at a critical research on bail and how it's handled in a CRPC.

Object and purpose of Bail:

The issue of keeping a charged individual in custody before to, or throughout, a trial isn't one of discipline.

- To avoid a recurrence of the offence for which he is charged; and
- To ensure his attendance at the trial.

Nonetheless, every criminal's survival is predicated on a suspicion of blame at first sight, and there is a presumption of innocence for the blamed for the charged. Bail satisfies the requirement for the assumption of purity. In the interim, the conditions of bail, such as appearing in court on a predetermined date and time, satisfy the requirement of a reasonable suspicion of guilt against the accused. There are a variety of reasons why a bail is granted. This could be for a variety of reasons, including making an appearance in front of a judge, demonstrating advance, pending reference or revision, or providing proof, among others.

RESEARCH METHODOLOGY:

For this study, only secondary sources-doctrinal research have been referred to, secondary sources includes books, articles and journal publications, various websites ,blogs and online available materials have also been referred this study.

Research Question:

What role does the judiciary's discretionary power play in bail decisions?

History of Bail

In medieval England, methods for ensuring that those accused of wrongdoing would appear for trial began almost as soon as the criminal trials themselves. The terms under which a litigant may be detained before trial or dismissed with guarantees that he would return were directed by the local Sheriffs until the thirteenth century. The sheriff, as the crown's territorial representative, had sovereign authority to release or detain suspects. At the end of the day, sheriffs might use any criterion and measure any factor when deciding whether or not to release a defendant on bail. This broad specialisation was not properly regulated in most cases. A few sheriffs took advantage of the bail system to make their own arrests. Similarly, the absence of points of constraint on the sheriffs' energy was cited as a significant grievance, leading the Westminster Statute. The Statute of Westminster, passed in 1275, abolished sheriffs' discretion in determining whether offences were bailable. The bailable and non-bailable offences were specifically documented by the Statute. The sheriffs tasked the expert with determining the amount of bail and weighing every major consideration in order to arrive at that figure. The basic notion of what charges would be eligible for bail remained the Statute of Westminster. In any event, the Statute was a long way from a general bail ideal. Although a few offences were categorically exempt from bail, the legislation' restrictions were preserved to the sheriffs' abuse.

Meaning of Bail:

Bail is a monetary payment made in exchange for a man's timely attendance in court in order to be released from legitimate guardianship or detention. In precedent-based law, a denounced individual is said to be confessed to bail when he or she is released from the custody of court officers and entrusted to the care of people known as his or her sureties, who will undoubtedly

deliver him or her at a predetermined time and place to answer the charge against him or her, and who, if they fail to do so, will be forced to relinquish the amount specified when the bail is granted. As a result, the customary and consistent origination of bail in a legal method entails the release of a man from guardianship or jail and his conveyance under the supervision of sureties who try to produce him in court on a specific date. Bail is a term used in criminal law to refer to the act of releasing, releasing, or conveying a person who has been accused of a crime from detention or care into the custody of another in exchange for his or her attendance at a certain time and place to answer the allegation leveled against him or her. These individuals are referred to as his or her sureties.

Definition of Bail:

Bail is the sum of money paid by a defendant to ensure that he or she will appear in court at a later date. During an indictment or a detention hearing in federal court, a judge or magistrate sets bail for most serious offences. Bail is normally established by a schedule for minor offences, which shows the amount that must be paid before any court appearance (arraignment). The amount of bail is established by the judge during the suspect's initial court appearance for more severe offences.

Categories of Bail:

Bail arrangements can be divided into two broad groups.

There are two types of cases:

- Bailable
- Non-Bailable.

The concept of bail was discussed in the last lesson. It might be provided by the constable in command of a police station where the accused is being held, or by the court. The discharge might be obtained if the accused signs a bail or even if there are no sureties.

The accused may be released on bail in non-bailable cases; however, no bail can be granted when the accused is found to be guilty of an offence punishable by death or indefinite detention.

Be that as it may, the run does not make a difference to

- a individual under sixteen years old,
- a lady, or

- a wiped out or sick individual.

When reasonable grounds for the accusation cease to exist, the accused is entitled to be released on his own recognisance; he can also be released for similar reasons between the conclusion of the case and the delivery of the decision. When a man is released on bail, the request should be in writing and include the reasons for the release. If the Court orders it, an individual who has been released on bond may be arrested. Similarly, the High Court or the Court of Session may grant bail to an individual or reduce the amount of bail.

When the bail bond is completed, the accused is eligible to be released from custody. The Court may request more bail if the amount of bail set is shown to be insufficient. Once a surety has been recognised, he is able to petition the Court for his release, and the blamed is then required to find new sureties. If a non-bailable offence occurs, bail may be granted using the following name and conditions:

- Anticipatory Bail (before arrest)
- Interim or Ad-interim Bail
- Bail after conviction

ANTICIPATORY BAIL :

Anticipatory bail - a phrase not found in any Indian statute - refers to a pre-capture agreement reached by a court that states that if a man is apprehended, he would be granted bail. The request's 'anticipatory' designation may deceive, since it isn't a request that permits a guy to be released on bail before he is apprehended, as bail cannot become effective until a man is apprehended. However, the main contrast between a plea for bail and one for anticipatory bail is that the former is granted only after capture (and so becomes notably agent), whereas the latter is granted before capture and thus becomes agent from the moment of detention.

The law concerning Anticipatory Bail:

If a guy is being held for a non bailable offence in India, anticipatory bail must be requested (as under s. 438 of the Criminal Procedure Code). A non-bailable offence is one for which the police will not release the arrested person on bail if they are not called (aside from under certain

exceptional conditions not managed here). Area 438 of the Criminal Procedure Code (CrPC) of 1973 contains the provisions for anticipatory bail.

The area is modelled as a bail-giving course for those who have been apprehended.

1. Any individual who has reason to believe that he may be apprehended on suspicion of committing a non-bailable offence may apply to the High Court or the Court of Session for relief under this section, and that court may, if it thinks fit, arrange for his release on bail in the event of such apprehending.
2. When the High Court or the Court of Session renders a ruling under sub-area (1), it may include such conditions as it sees suitable in light of the facts of the case, including
    i) A condition that the individual should make himself accessible for cross examination by a cop and when required;
    ii) A condition that the individual should not, straightforwardly or by implication,- make any actuation, danger or guarantee to any individual familiar with the actualities of the case in order to prevent him from revealing such certainties to the court or to any cop,
    iii) A condition that the individual might not leave India without the prior authorization of the court;
    iv) Such other condition as might be forced under sub-area (3) of segment 437, as though the bail were conceded - under that segment.
3. If such individual is from there on captured without warrant by an officer accountable for a police headquarters on such allegation, and is arranged either at the season of capture or whenever while in the guardianship of such officer to give bail, he might be discharged on bail, and if a Magistrate taking perception of such offense chooses that a warrant should issue in the principal example against that individual, he should issue a bailable warrant in similarity with the bearing of the court under sub-segment (1)."

Subsection (1) of Area 438 primarily defines what anticipatory bail is, who can apply for it (those securing capture for non-bailable offences), and to whom it is to be attached (the Court of Sessions or the High Court). Subsection (2) describes how the Court can add specific riders to a request made under Section 438. These are denoted as sections 438(2) (i), 438(2) (ii), 438(2) (iii), and 438(2) (iv) (iv). Subsection (3) requires

i. The police to issue bail if the arrested individual was apprehended without a warrant.

ii. The court will issue a bailable warrant (in light of an anticipatory bail arrange)

It should be noted that the individual capturing the capture is required to attend the final hearing..

An Anticipatory bail can be granted

It can be provided when a man is apprehended for a non-bailable offence (see the First Schedule of the CrPC for a list of offences listed in this manner). It is granted when the court believes that there is a reasonable possibility that the accused has been dishonestly involved and that his flexibility will not impede the investigation of the wrongdoing. However, bail granted under section 438 may be revoked if the examination is delayed or if the apprehended individual violates a condition of the request.

CONCLUSION

According to the preceding mentions, bail plays an important role in a criminal case since it is the ultimate goal of the accused. Bail is the gathering's privilege. Anyone who has been arrested and is now incarcerated requires bail at any time. To set free, or transport from captivity, or out of care, on the undertaking of another individual or individuals that he or they would be in responsibility of the presence of the individual bailed on a specified day and location. When bail is granted, the accused person is allowed to go free until the trial.However, in the event of a non-bailable violation, there is no specific mechanism under Bangladesh's Cr.P.C. If appropriate arrangements are adopted in Bangladesh, the broad populace's pain will be lessened, and judges will not be swayed by the power of a political party or controlling gathering to supply their needs. As a result, if there is an incidence of a non-bailable offence, we must provide a specific bail agreement. For example, according to Section 339(c) of the CrPC, a Magistrate cannot go above the time limit of 180 days to end the trial, but a Session Judge has 360 days to complete it.

If the trial is not completed within this time span, the accused, despite the fact that he is charged with a non-bailable offence, may be released on bail. Much of the time in Bangladesh, we observe as far as feasible for completing the trial, but it isn't kept up. However, because of the phrases "could be" in the region, the destitute masses are not discovered to benefit from this arrangement. This term actually limits the authority to the court's or the Judge's decision to release the individual on bond. So we recommend replacing "might be" with "ought to" in that area so that the Judge/the

Court will undoubtedly give such a man whose time for testing has passed by bail to the indicated time go. It is frequently observed that the arrangement of anticipatory bail is avoided by the best political pioneers and different fat cats in Bangladesh, yet it is accessible only in exceptional cases by the exceptional energy of the words "in any case" in section 498 of the CrPC.

REFERENCES

BOOKS:

1. The code of criminal procedure. By S.N. Mishra
2. Ratanlal & Dhirajlal The code of criminal procedure
3. Anticipatory bail Legal Provisions by Shodhganga

WEBSITES:

1. https://lawrato.com/indian-kanoon/criminal-law/crpc-438-section-438-of-the-criminal-procedure-code-anticipatory-bail-568
2. https://www.shareyouressays.com/knowledge/anticipatory-bail-section-438-of-crpc-explained/119371
3. https://www.shoneekapoor.com/what-is-anticipatory-bail/
4. https://en.m.wikipedia.org/wiki/Anticipatory_bail
5. https://www.lawctopus.com/academike/anticipatory-bail-india-critical-analysis/
6. https://www.lawyersclubindia.com/articles/anticipatary-bail-cr-p-c-some-important-case-laws-1663.asp
7. https://indiankanoon.org/search/?formInput=438%20anticipatory%20bail
8. https://www.legalbites.in/crpc-notes-bail-provisions-bail-bonds/

CHANGING PERSPECTIVE: SOCIETY AND CRIME

- SAHANA ARYA

Abstract

In the modern period, people have neglected and have ignored or have forgotten their moral values. It is therefore important to understand the place of morals and the place of law. Society is changing and so is the mindset of the people. The malice in an individual's mind is slowly growing with the introduction of various new technologies and with the leniency in the legal system. It is therefore important to focus that a crime committed should be adjudicated keeping in mind the crime without ignoring its intensity while awarding justice and punishment to the wrongdoer.

Keywords: moral values, society, malice, legal system, intensity, justice, punishment.

Introduction

With the time changing and the society developing and new technologies being introduced, the crime rate in the society too increases. The law therefore needs to be kept updated. Every few years, the intensity of committing a crime only increases and interpretation of law and jurisprudence comes under stress. One such case that had brought disgust and even the thought of the crime had brought shame to the society was the case of T.K Gopal vs. State of Karnataka[1]. In this case a man allegedly raped an infant who was one and a half years old. Yashoda, the victim, lived with her mother Uma and her father in a rented house in a village called konehalli. The accused was a mistry working in that village. Uma was a maid servant and also worked as a mason labour for the accused. Her husband on the other hand worked as a waterman in the water supply department. The accused with his associates would visit Uma for lunch everyday between 1:30 to 3:00 Pm. On the 22nd of June 1991, the accused went to Uma's house at 3:00 pm and expressed no desire to have a meal but indicated to her that he would like to rest for a while. Uma did not express any objections and planned to go to her neighbours house to grind some rice. When she came back home, she saw her daughter lying under the private parts of the accused. She immediately rushed and pushed the accused away. When she saw her daughter, she was bleeding from her lips and

from her private parts. Yashoda was immediately taken to the hospital, whereupon the hospital intimated the police. The police further, filed a case under section 376 of the IPC[127].

The Trial Court and the High Court awarded the accused a rigorous imprisonment of 10 years with a fine of rupees 1000 which the accused failed to pay and was again sentenced for a rigorous imprisonment for a period of three months by the Addl. Sessions Judge, Tumkur.

Law and Morality

What is legally right need not be morally right too, and visa-versa. Law and morality share a very unique relationship. A lot of positivists strongly contend that law must be studied separately. Whereas on the other hand, the law-makers opion that law and morality aren't too different from each other. In my opinion, morals are the basis of law. Since memoir, there wasn't any distinction between law and morality. All the rules which have been made, are made naturally out of the supernatural fear[128]. With the development of society, those rules were converted into laws which contributed to the development of the society. Therefore, in my opinion law and morals came from the same source. Their development may have been influenced by various sources but the point that their origin came from the same source is to be noted.

In the above case of T.K Gopal vs. State of Karnataka (Supra) the crime committed was neither morally nor legally right. Even before the laws were codified such as the present, no person would want to commit a crime as such. This is because of their conscience, conscience is nothing but their moral values. In the above case it can be noted that, if the law lags behind popular standards, it falls into disrepute; if the legal standards are too high, there are difficulties of enforcement.[129]

Justice

Justice delayed is justice denied. A State has two major responsibilities- War and administration of Justice. If a State is incapable of performing either of the two activities, it fails to be called a State. In modern times, it has become a very common practice to have granted another date to hear the case. Nowadays, what is given by the courts to the people is not what can really be called justice but merely justice according to law[130]. Justice in the present has been divided into 4 categories: (a) where the court intends to uplift the lower strata of the society without causing any

[127] Punishment for Rape (https://indiankanoon.org/doc/1279834/)
[128] V.D Mahajan's Jurisprudence & Legal Theory; Law and Morality
[129] A Textbook of Jurisprudence
[130] V.D Mahajan's Jurisprudence & Legal Theory; administration of justice

hindrance or injustice to the upper class. This can be termed social justice. (b) Economic justice which follows the principle of equal pay for equal work. (c) Political justice where all the citizens are given adequate political rights and a say in the functioning. (d) where law should be made based on the public opinion and their needs. Which can be termed as legal justice.

The court in the above mentioned case provided justice after 4+ years. A delayed justice is equal to having not been provided one. The State earlier, believed in the retributive concept before the system of codified law came into existence. It is important to understand that the ratio of the crime committed should be proportional to the justice provided.

Punishment

The concept of punishment was formulated keeping in mind the idea of reducing criminal behaviour and protecting the society. Punishment plays an important role in providing justice to all those who demand for it. This concept of punishment has five theories: deterrent theory, preventive theory, reformative theory, retributive theory and the theory of compensation[131].

(a) Deterrent theory:- Punishment is before all things deterrent and the chief end of the law of crimes is to make the evildoer an example and a warning to all that are likeminded with him.[132] Deterrent theory of punishment does not only want to prevent the crime from happening the second time, but to create fear in criminals who are likeminded to not commit it again. To quote, a judge once said; "I don't punish you for stealing the sheep but so that sheep may not be stolen." A criminal when punished should in this case act as a deterrent to others who share a common mind.

(b) Preventive theory:- The object of preventive theory of punishment is to prevent the wrongdoer from committing the crime again. Imprisonment, exile or death sentence are examples of the preventive theory. Paton writes, "The preventive theory concentrates on the prisoner but seeks to prevent him from offending again in the future. Death penalty and exile serve the same purpose of disabling the offender."

(c) Reformative theory:- the main object of this theory of punishment, like the name suggests, is to reform the criminal. This theory believes that the object of punishment is to bring a change in the criminal's action and mind, so he does not commit such a crime. The main aim here, is to reform the criminal, bring about a change in his mind, re-inculcate the moral

[131] V.D Mahajan's Jurisprudence & Legal Theory
[132] Salmond on Jurisprudence

values in him. Salmond opined that, if criminals are to be sent to prisons to transform them or reform them to be better citizens, prisons must be converted into comfortable dwelling places.

(d) Retributive theory:- The retributive theory is based on the principle of 'eye for an eye' and 'tooth for a tooth'. The main reason for such a theory of punishment to have been practiced in history is so that the wrongdoer understands what he did wrong by making him experience the same. The then State believed that the wrongdoer can only understand the wrong if he undergoes the same pain caused by him.

(e) Theory of Compensation:- according to this theory of punishment, preventing the crime is not enough, but compensating the victim for everything caused is also important.

In the above mentioned case of T.K Gopal Vs. State of Karnataka, the court awarded the accused 10 years of Rigorous Imprisonment and asked him to pay rupees one thousand as compensation to the victim. The case therefore, relied on two theories: preventive, as they imprisoned him to prevent such a crime and the theory of compensation.

My analysis

In my opinion in the case of T.K Gopal Vs. State of Karnataka, the punishment awarded was not sufficient. It is important to understand that the justice provided should be directly proportional to the crime committed. Was raping an infant of the age of one and a half years, then getting a rigorous imprisonment of 10 years and having to pay a compensation of rupees one thousand is sufficient? The question however that striked my mind was, when the law gave the court the discretion to award the accused life imprisonment, why did the court not use its power? The crime that was committed was not just legally but morally wrong too on all grounds possible.

A crime which is committed is not just directed to an individual but to the whole society. When an individual is murdered, its not just the individuals family that questions their safety but the whole society does. It is therefore important to make the whole society for whom laws are made to feel safe where they reside. It is an open secret that we have taken the law and the legal system for granted in the present scenario. As we know, if we commit a crime there are many ways to get through it rather than going through trials and being punished. Morals in the present have been ignored to such an extent where raping, molesting and committing such crimes does not seem wrong.

According to me a perfect system of criminal justice can not be based on one theory of punishment, rather it must adopt all the theories based on the intensity. Awarding a person a punishment of rigorous imprisonment of 10 years and compensation of just rupees thousand is not sufficient to someone who has raped an infant who is defenceless. The State should have directly awarded him with a death sentence so he could be a deterrent to others. It is important to make it clear that the commission of every offence should be made a bad bargain for the offender.[133] The same way, the reformative theory too should be given its due place. If the courts feel that the accused is a juvenile and the crime committed is due to manipulation caused by the external sources and can be worked on, reformative punishment should be awarded. When we talk about the retributive theory of punishment, the Supreme Court in the case of T.K Gopal said that the law requires that a criminal should be punished and the punishment prescribed must be meted out to him, but at the same time, reform of the criminal through various processes, despite he has committed a crime, should entitle him all the basic rights, human dignity, and human sympathy. I personally find it very ridiculous when the criminal has committed a crime of high intensity and awarded punishment on the theory of compensation, theory of prevention and the theory of reformation.

The best case to explain my above mentioned point is the Delhi gang rape or commonly known as the Nirbhaya case. The actions that caused the death of Nirbhaya was done by the juvenile, who was awarded a punishment of compensation and sent to the juvenile home for his reformation. Whereas the court in such a case should have applied the theory of retribution or in other words applied the principle of the rarest of the rare doctrine. In all the above mentioned instances it is clear that we have taken the law for granted and it is high time that the legal system takes some strict action to inculcate fear in the general public so we do not commit such crimes. It is important the legal system identifies the loopholes and works on them and simultaneously applies laws which are codified for a reason and not assume and adjudicate matters with sympathy or empathy. If the justice provided is not equal to the crime committed it is equal to no justice being provided.

Reference

1. V.D Mahajan's Jurisprudence and Legal Theory; Fifth Edition
2. Salmond on jurisprudence; Twelfth Edition

[133] Salmond on Jurisprudence

3. A Textbook of Jurisprudence
4. https://www.latestlaws.com/latest-caselaw/2000/may/2000-latest-caselaw-289-sc/
5. https://indiankanoon.org/doc/1279834/

COMPARATIVE ANALYSIS OF PRESUMPTION OF LEGITIMACY IN HINDU AND MUSLIM LAW

- HIMANGI NAGAR

ABSTRACT

In various actions and processes, the question of whether a kid is legitimate or illegitimate arises. It usually comes up in suits to determine a person's land ownership or in proceedings to entice a person to support an illegitimate child of which the alleged father, but it can also come up in other types of cases, such as a divorce action or a nullification of marriage because the child was not born from his nether regions. In general, the law's policy is to pronounce a kid legitimate when there is a certainty.

Keywords: legitimacy, Hindu, Muslim.

CHAPTER – I

INTRODUCTION

"Maternity is always certain. Paternity is a matter of inferences."

In India, a woman's fidelity and a child's paternity are highly prized and considered honorable. In a society like India, the presumption of legitimacy not only decides a child's future, but the absence of such legitimacy can lead to societal harassment of the mother associated with the child. The issue of children's rights has arisen as one of the most hotly debated topics in the 21st century. *Section 112* of the *Evidence Act*, *Section 16* of the *Hindu Marriage Act*, *1955*, and a part of *Mohammedan law* talk about the concept of presumption of legitimacy of a child.

Children are generally physically, intellectually, and financially reliant on others. Taking care of children's rights at every step has taken a back seat in this age of globalization, where things are changing at a quick pace. This impacts their entire value system and their current social and economic necessities. The main issue before courts and framers of law while deciding such cases is the aftermath which has to be faced by the parties concerning the societal prejudice related to illegitimacy and unchastity.

With the advancement in medical science, it is now more accessible for one to prove legitimacy through DNA tests. However, it is only allowed at the courts' discretion. The non-inclusion of medical technology has been a considerable debate over the years, especially since it is rarely allowed in cases where the child is born during wedlock and cohabitation of both partners.

In the present paper, the researcher aims to analyze the presumption of legitimacy as read under the Hindu and Muslim personal law applicable in the country. The paper also looks at various legislations regarding the presumption of legitimacy to ascertain a relative position and gain a different perspective. The researcher has analyzed several case studies to understand the evolution of *presumption of legitimacy* over the years.

RESEARCH METHODOLOGY

The given research topic demands doctrinal research. It is qualitative research based on existing data. Several research papers are scrutinized to observe the evolution of the concept of *presumption of legitimacy* under several jurisdictions. All the data collected from published sources and case laws have then been scrutinized to analyze the interpretation of the concept under the Hindu and Muslim law.

RESEARCH OBJECTIVES

Following are the objectives of this research:

- To analyze the presumption of legitimacy under the Hindu and Muslim Law.
- To study the implications and applicability of the laws concerning the issues at hand in the modern era.
- To present a comparative study on the legal framework of both the laws regarding the presumption of legitimacy.
- To give suitable suggestions to improve the current socio-legal situation to make it in the parties concerned.

RESEARCH QUESTIONS

Following are the questions of the research:

- What are the views expressed by the personal laws on maternity, paternity, and illegitimacy, and how are they different from those under the *Indian Evidence Act, 1872*?

- Which personal law has a broader scope of presuming legitimacy among the two?
- Whether the differences between both the laws interfere with the welfare of the children associated with the matter?
- Whether or not there is a need for change in either of the given laws?

LITERATURE REVIEW

The following literature is reviewed to help the researcher better understand the subject to conduct a comparative study on the Hindu and Muslim law regarding the presumption of legitimacy.

A paper titled ***California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy***[134] talks about the Californian Evidence Code and the rule defined in the case of *Jackson v Jackson*[135]. It further elaborates the facts of the case mentioned above and the evolution of law ever since. The article presents a socio-legal perspective of the issue and recommends the legislature address the lack of a definite period till which the biological paternity of the husband shall determine whether he has to support his wife. The article showcases a detailed case study and discusses the vividity of the matter at hand. In the present study, the researcher will look at the socio-legal aspects of legitimacy in a society as diverse as India.

Published by the *Michigan Law Review Association*, the article titled ***Bastardy: Presumption of Legitimacy***[136], analyses the concerned concept by various case studies and the interpretation made by the Supreme Court of United States on the matter. The case studies give an insight into the essentials as considered by the U.S. courts while considering legitimacy in the pre-medical advancement era. The article helps in understanding the judicial perspective before the medical advancement and henceforth the evolution in the coming years.

Another article named ***Evidence. Presumption of Legitimacy***[137] talks about the judicial interpretation put forth by the English Courts through case studies. The author comments on how the presumption of legitimacy used to be almost absolute at one point and how it has been *"slowly yielding to probability."* The paper concludes that even though the presence of the substantial

[134] William P. Hoffman Jr., *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN L. REV. 754 (1968).
[135] Jackson v. Jackson, 67 Adv. Cal. 243, 430 P.2d 289, 6o Cal. Rptr. 649 (1967).
[136] The Michigan Law Review Association, *Bastardy: Presumption of Legitimacy*, MICHIGAN LAW REVIEW 150, 150 (1915).
[137] Columbia Law Review Association, Inc., *Evidence. Presumption of Legitimacy*, COLUMBIA LAW REVIEW 30 734, 735 (1930).

probability of the husband as the father cannot be denied, beyond that probability, the presumption has no valid ground and should not be allowed to *"distort the facts."* The paper points out the need to change in the legal framework as it might be discriminatory and thus defeats the child's welfare in due process.

Authored by Caesar Roy, the 2012 article named ***PRESUMPTION AS TO LEGITIMACY IN SECTION 112 OF INDIAN EVIDENCE ACT NEEDS TO BE AMENDED***[138] talks about *Section 112* of the *Indian Evidence Act, 1872* – its implications, definitions, applicability, and how it should be amended as per the medical advancements. The author stresses the modernization of medical science and its ability to prove the paternity of a child. It further notes the difference between legitimacy under personal laws. The article is directly related to the study and thus gives a broad scope of learning.

Another paper, titled ***The impact of Legislation on Marriage and Divorce under Hindu and Muslim Laws***[139], talks about the Hindu and Muslim marriages and to what extent the respective personal law influences them. The article studies the effect of Hindu and Muslim laws on marriage, i.e., changing concepts of marriage, marriage under the modern law, and divorce under both the laws, respectively. It is related to the study since it talks about the legitimacy and legitimation under the Muslim laws (*Ikrar-e-Nasab*) and summarizes the issue with the help of a detailed case study review. The researcher in the following paper will pen down the judicial perspective of personal laws through a similar method.

CHAPTER – II

2.1 THE HISTORY AND EVOLUTION OF PRESUMPTION OF LEGITIMACY

Section 621 of the *California Evidence Code* reads:

"Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."[140]

California has had a varied history of presuming legitimacy, especially when proving legitimacy through blood tests. In the notorious case of *Berry v Chaplin*[141], Charlie Chaplin was held to be

[138] Caesar Roy, *PRESUMPTION AS TO LEGITIMACY IN SECTION 112 OF INDIAN EVIDENCE ACT NEEDS TO BE AMENDED*, JOURNAL OF THE INDIAN LAW INSTITUTE 54 382-399 (2012).
[139] Nanda Chiranjeevi Rao, *The impact of Legislation on Marriage and Divorce under Hindu and Muslim Laws*, ACHARYA NAGARJUNA UNIVERSITY, 2011.
[140] CAL. EvID. CODE § 621 (West r966).
[141] Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (2d Dist. 1946).

the father of an illegitimate child even when the blood tests showed that he could not be. It was sustained that blood tests are not conclusive evidence in matters of concluding paternity. The rule has now been modified in the *Uniform Act on Blood Tests To Determine Paternity*.

After that, in cases that lack a conclusive presumption of legitimacy, blood tests are allowed as conclusive evidence. However, it was still not allowed in cases where the other essentials – proof of marriage, cohabitation, and the absence of impotence – are present since the physical proof of legitimacy is deemed unnecessary[142].

In the case of *Jackson v Jackson*[143], The lady left her husband less than four days after their wedding, and the wife gave birth to a child roughly nine months later. As part of the divorce deal, the husband was compelled to pay medical costs and child support and pay for the children's schooling. Blood tests were administered, where the possibility of the husband being the biological father was ruled out.

When the case moved to the Supreme Court of California, in a 4-to-3 decision, it was ruled that the blood tests should have been admitted. However, the majority reinstated the rule of *Kusior v Silver*[144], that the blood tests cannot be considered conclusive evidence of presumption of legitimacy.

Blood tests are excluded from conclusive presumption procedures because biological paternity is immaterial when the presumption prevails. However, the presumption only applies if the conception happened when the husband was cohabiting with his wife; the time of conception is a factor. The assumption does not apply when the husband can establish that he was infertile during the time of probable pregnancy, according to *Hughes v. Hughes*[145].

A statute of limitations would eliminate the existing injustice of denying a spouse irrefutable proof of nonpaternity—blood tests—in some situations when paternity is the decisive issue.

2.2 HINDU LAW AND PRESUMPTION OF LEGITIMACY

Section 16 of the *Hindu Marriage Act, 1955*, stood amended vide *Amendment Act of 1976* and the amended provisions read as under:

[142] See *Supra note 6.*
[143] See *Supra note 2.*
[144] Kusior v Silver, 54 Cal. 2d 603,354 P.2d 657,7 Cal. Rptr. 129 (196o).
[145] Hughes, v. Hughes, 125 Cal. App. 2d 781, 271 P.2d 172 (4th Dist. 1954).

"Legitimacy of children of void and voidable marriages - (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate...

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be theirs would have been incapable of possessing or acquiring any such rights because of his not being the legitimate child of his parents."

The Supreme Court held in *PEK Kalliani Amma v. K Dev*[146] that subsection (1) of section 16 stands alone because of the terms "notwithstanding that a marriage is null and invalid under section 11, this provision is independent of section 11." The amended clause, which was intended to give legitimacy to children born of an invalid marriage, will apply despite section 11's provisions, which have the effect of nullifying only marriages that took place after the Act went into effect and that is in violation of section 5.

According to a legal fiction, children born of a void marriage must be treated as legitimate for all purposes, including succession to their parents' property. The net effect is that any child born before or after the modification date benefits legitimacy.

The offspring of a voidable marriage for whom a decree of annulment may be given under section 12 is covered by subsection (2). Even if either partner challenges the marriage's legitimacy and is not annulled, it would be considered valid. It would be a void marriage, and the parties' children would be orphaned. The children born of such marriage are the children of either side by operation of law. Under paragraph (3), such children are not permitted to claim any rights in or over the property of anybody other than their parents.

Section 16(2) requires proof of conception before the deeming rule may be used. The issue was claimed to be different under the Evidence Act, which did not need proof of conception but did require proof of conception.

There is no provision in the *Hindu Marriage Act*, the *Indian Evidence Act*, or any other legislation that empowers a court to make a directive compelling a party to matrimonial or other cases to submit to a blood test. The opposing party cannot claim that he would challenge the law's

[146] PEK Kalliani Amma v. K Dev, 1996 AIR 1963, 1996 SCC (4) 76.

conclusive presumption of paternity by establishing directly by a blood test that the spouse is not the kid's biological father since this would effectively nullify the present provision of *section 112*. In *Gautam Kundu v. State of West Bengal*[147], the Supreme Court established the following rules for the admissibility of paternity tests:

1. Blood tests cannot be ordered as a matter of course by Indian courts.
2. When such prayers are requested to conduct roving investigations, the request for a blood test is denied.
3. The husband must show non-access to dispel the presumption arising under section 112 of the Evidence Act, which requires a solid prima facie case.
4. The court must carefully consider the repercussions of conducting the blood test, including whether it would brand a youngster as a thug and his mother as an unchaste woman.
5. No one can be forced to provide a sample for testing.

In *Gautam Kundu*[148], the Supreme Court also concluded that "the purpose of *section 112* of the Act was to combat the evil of illegitimacy and protect blameless infants from being "bastardized. "

2.3 MUSLIM LAW AND PRESUMPTION OF LEGITIMACY

The Muslim Personal Law has introduced 'acknowledgment of paternity, which is the declaration made by the father that a child is his legitimate child. However, it is not a process of legitimizing an illegitimate child[149].

Legitimacy refers to a child's legal status under Islamic law. If the legitimacy of a child is questioned but not contested, the father's acknowledgment of the child, whether verbal or implied, confers legitimacy on the child. Thus, if the illegitimacy of a child is proved, no acknowledgment can do the opposite. Therefore, it is safe to say that there is no legitimation under Muhammadan law.

In Islam, there is no such thing as legitimacy. It can only be shown via many (*Sahi nikah*) or even irregular marriages (*fasid nikah*). Adoption, on the other hand, cannot establish it.

[147] Gautam Kundu v. State of West Bengal, AIR 1993 SC 2295.
[148] *Ibid.*
[149] See *Supra note 6.*

To a mother, a kid is always genuine. As a result, Islam forbids any other criteria for legitimising an illegitimate kid. Maternity is always sure, whereas paternity might be disputed. As a result, an illegitimate child has the right to inherit the mother's property in almost all circumstances.

In *Mohammad Khan v. Ali Khan*[150], the Madras High Court held that the doctrine of acknowledgment could only be applied in cases where the factum of marriage or the precise time of marriage could not be established, and not in cases where the child's parents' lawful union could not be established, such as in cases of incestuous intercourse or an adulterous connection, and where the marriage required to make the child legitimate was disproved.

The status of legitimacy is conferred on a child by a Muslim who has reached the majority and is of sound mind and expresses or implies doubt in his legitimate child or that the child's mother is his legally wedded wife.

According to *Mohammad Azmad v. Lalli Begum*[151], the recognition might be vocal or implied. A Mohammedan's acknowledgment of a child as his child can be inferred from his open treatment of him as such, without the necessity for proof of an express acceptance.

Mohammad Alladad v. Mohammad Ismail[152]is a landmark case on paternity recognition. Moti Begum was married to Ghulam Ghaus in this instance. However, the actual date of their marriage concerning the birth of their first son, Md. Alladad, remained unknown. Moti Begum and Ghulam afterward had four more problems, one of them was Md. Ismail. Moti Begum cohabited with Ghulam Ghaus for a significant period during which Md. Alladad would have been born, according to the facts on the record. Ghulam Ghaus always treated her as his rightful wife, and there was never any obstacle that would make their marriage illegal.

Following the death of Ghulam Ghaus, Mohd. Alladad claimed to be the eldest son of his father and sought an inheritance. However, Mohd. Ismail and the other three children of the late Ghulam Ghaus maintained that Mohd. Alladad was born before Moti Begum's marriage to Ghulam Ghaus, and it was unknown who was Mohd. Alladad's father. Ghulam Ghaus recognised and regarded Md. Alladad is his son, according to the facts. Mohd. Ismail and the other children of Ghulam Ghaus received similar recognition.

[150] Mohammad Khan v. Ali Khan, AIR 1981 Mad 209.
[151] Mohammad Azmad v. Lalli Begum, (1881)9 IA 8.
[152] Mohammad Alladad v. Mohammad Ismail, ILR (1888)10 All 289.

The whole bench of the Allahabad High Court found no proof that Mohd. Alladad was *Zina'*s offspring (illicit intercourse). Despite the lack of proof of Mohd. Alladad's paternity, the presence of a marriage at the birth of Mohd. Alladad may be presumed because Ghulam Ghaus' marriage to Moti Begum was lawful, and they lived together for a long time. Furthermore, Ghulam Ghaus always accepted Moti Begum as his wife and Mohd. Alladad as his son, Mohd. Alladad inherited with Mohd. Ismail and the other deceased children.

CHAPTER – III

CONCLUSION & RECOMMENDATIONS

In India, a woman's loyalty and the paternity of her kid are highly valued and respected. In a nation like India, the presumption of validity not only determines a child's destiny, but the lack of such legitimacy can result in societal harassment of the child's mother. The question of children's rights has become one of the most contentious issues in the twenty-first century. The issue of presumption of legitimacy of a child is discussed in *Section 112* of the *Evidence Act, Section 16* of the *Hindu Marriage Act, 1955*, and a section of *Mohammedan law*.

The Hindu law mentions the presumption of legitimacy under Section 16 of the Hindu Marriage Act, 1955. However, in Muslim law, the concept does not hold any ground. There is no such thing as legitimacy in Muslim law. However, case laws show in both the laws that it is up to the court's discretion as per the facts of the case.

In the case of *A.G. Ramachandran And Anr. v. Shamsunnissa Bivi*[153], it was held that Section 112 of the Indian Evidence Act, that "…S. 112 of the Evidence Act, is very general in its terms and it applies to all person including Mohamedans who may have a personal law of their own relating to legitimacy as there is no provision exempting them from the application of S. 112." Therefore, both the personal laws shall be subjected to the applicability of Section 112 of the Evidence Act.

Personal laws shall consider adding provisions regarding the inclusion of DNA and Blood Group tests in case of insufficient evidence to establish presumption. This will reduce the chances of discrimination against husbands concerned with such cases and, therefore, shall revive the purpose of the legitimacy tests – welfare and maintenance of the ones in need.

[153] A.G. Ramachandran And Anr. v. Shamsunnissa Bivi, AIR 1977 Mad 182, (1977) 1 MLJ 482.

CINEMATOGRAPH FILMS UNDER THE INDIAN COPYRIGHT ACT, 1957: AN ANALYSIS

- ANIRUD CHATHANATH

Abstract

"Cinematograph film" means ***any work of visual recording and includes a sound recording accompanying such visual recording*** *and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.*[154] *The ambiguity surrounding copyright protection of cinematographic films stems from a lack of understanding about the subject matter. The copyright protection granted to the producers of the cinema is very narrow as it only protects the medium and not the content. According to the Look and Feel test, the Courts consider a film to be copied if there is a considerable similarity between the Plaintiff's and Defendant's film. Because remakes of original films cannot be made without the producer's permission, the current state of cinematographic film protection is favourable to film producers. Despite the fact that the original recording is not used in the remakes. The current research analyses the numerous judgments taken in this situation in order to compare and contrast the two approaches. "Dramatic work" includes any recitation, choreographic work, or entertainment in a dumb performance whose scenic arrangement or acting form is established in writing or otherwise, but excludes cinematograph films.*[155] *The research focuses on what constitutes copyright infringement of dramatic works in order to bring in greater clarity to the understanding of the subject matter of copyright.*

Introduction:

The issue of cinema protection and piracy came to the forefront primarily in the post-TRIPS Agreement era. The liberalisation of the economy, combined with the establishment of the WTO, prompted countries such as India to make significant changes in intellectual property laws,

[154] Section 2(f) of the Indian Copyright Act, 1957
[155] Section 2(h) of the Indian Copyright Act, 1957

including addressing the issue of film piracy.[156] In recent years, there has been significant growth in India's entertainment sector, particularly in the film industry. Despite periods of economic slowdown, the industry has continued to grow. According to Shubha Gupta, in the early days of film, the laws of censorship and finance were considered more important; however, later on, issues of intellectual property in general, and copyright law in particular, came to be more important legislations.[157] It is worth noting that almost all film production companies are now required to handle intellectual property issues as a major concern in the film production process.[158]

A "cinematograph film" is any work of visual recording that includes a sound recording that is accompanied by such visual recording, as well as any work that is the result of any similar recording process and a video film.[159] The term 'visual recording' refers to any recording from which moving images can be obtained, as well as storing the recording on any electronic medium.[160] As a result, a cinematograph film is a recorded work with moving visuals/images.[161] It's worth mentioning that the recording has always been considered part of the definition because the content belongs to the producers.

Cinema or audio-visual production raises some of the most challenging and complex issues for municipal regulations in many countries. Employers in common law countries have the copyright to "cinematographic work" under their legislation. "Co-authors" have copyright to cinematographic works under the civil law system's copyright legislation.

"Authorship of a cinematographic work excludes authors of novels, scenarios, music, or other works," according to Article 16 of Japan's Copyright Law. "The original work forms an audio-visual work," according to Article L. 113-7 of the French Intellectual Property Code, "and

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156 Shubha Ghosh, "A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India", 1(2) Queen Mary Journal of Intellectual Property, 2011, pp.146-162, at 157

157 supra n. 1, at 149.

158 Helena Axelsson and Andreas Knutsson, "New Challenges for IP in the Film Industry: A Study on how the Swedish Film Industry manages Copyrights", at 11, available at: https://pdfs.semanticscholar.org/d425/89a1b03c64875a348e5d98c8c12fc0589293.pdf

159 Section 2(f), the Indian Copyright Act, 1957

160 Section 2(xxa), the Indian Copyright Act, 1957

161 Available at:http://copyright.gov.in/Documents/Manuals/CINEMATOGRAPH_MANUAL.pdf. last visited on 19- 11-2021 at 4:47 p.m.

authorship of an audio-visual work belongs to those who have carried out the intellectual production of the work." According to Article 15 of China's Copyright Law, "the screenplay, director, cinematographer, lyric writer, and composer of the work should enjoy the right of authorship."[162]

Although French courts were first hesitant to protect cinematographic outputs as works, a cinematograph film was found to be deserving of protection as a series of photos in 1905. Although the first case to identify a cinematograph film as a series of images was ruled in 1912 in the United Kingdom, this was widely accepted before the Copyright Act of 1911.[163] A dual system for the protection of cinematographic productions existed under the Berne Convention Act of 1908: original cinematographic works were protected as an independent subject matter, while unoriginal cinematographic products were protected as a sequence of photos.[164] It is believed that the judicial opinion in India has been in favour of allowing the cinema which is only inspired from other protected works to be non-infringing, such cinema are held to be non-infringing of any copyright.[165] The principle of substantial taking/copying underpins copyright infringement legislation. Thus, if the defendant can prove that the copying is not substantial and his treatment of the work is different from the way plaintiff has treated the work no case of infringement is proved.[166] The current study investigates how Indian courts have shifted their approach to copyright protection for cinematograph films from medium-based protection to content-based protection, as well as the reasons behind the transition. The potential missing linkages have been found as well.

The Medium Based Approach:

[162] Li Weimin, "Study on the Relationship between the Original and the New Cinematographic Works", 6 China Legal Sci., 2018, at 58.
[163] Pascal Kamina, "Film Copyright in the European Union 19, 2002" at 12 cited from Makeen F. Makeen, "The Protection of Cinematographic Works under the Copyright Laws of Egypt and Lebanon", 55 J. Copyright Soc'y U.S.A., 2008, at 228
[164] Id., at 229. Makeen F. Makeen
[165] Rachana Desai, "Copyright Infringement in the Indian Film Industry", Vanderbilt Journal of Entertainment Law & Practice, 2005, at 269
[166] Ibid

When the Bombay High Court resolved the case of ***Star India Private Limited v. Leo Burnett (India) Pvt. Ltd.,*** the question of film copyright came up for consideration.[167] The court assumed that cinema is the visual recording of material, and that the maker owns only the recording, not the substance. The producer's protection is restricted to the medium, i.e. the fact of recording, because the content is developed by content creators. Phonograms are based on the same idea. It's worth mentioning that, in both cinematograph films and sound recordings, the strategy was to safeguard the fact of recording rather than the content in the producer's favour.

While outlining the legal position on cinema protection, the court contrasted section 14 clauses (d) and (e) on the one hand, and sections (a), (b), and (c) on the other. For literary, artistic, dramatic, and musical works covered by clauses (a), (b), and (c), the right holder has a clear reproduction right, i.e. the right to replicate the work (c). This privilege is not included in clauses (d) and (e), which deal with movies and phonograms, respectively.

The right to make film and phonogram copies merely means that the rights holder can restrict others from making copies of the recording. Only when the recording is really copied through the duplicating process or when the fact of recording is recorded is infringement committed.

The right to make copies is not violated if the subsequent productions are recorded separately notwithstanding any semblance with the previous motion picture. As a result, the owner of a cinematic or phonographic right is only protected on the surface, that is, the fact of recording. Literary, artistic, theatrical, and musical works, for example, have a unique position in which the content is granted additional protection.

The Bombay High Court made a similar observation in the case of ***Zee Entertainment Enterprises Ltd v. Gajendra Singh and Others***[168]. Clauses (d) and (e) were distinguished from clauses (a), (b), and (c), with the court observing that the author can prevent others from recreating his work in any media for works other than film and phonograms. Manufacturers of film and phonograms, on the other hand, are not mentioned. This right does not extend to the producer of the film towards

[167] (2003) 27 PTC 81 (Bom)
[168] 42007 (6) Bom CR 700

restricting others from shooting a movie based on similar content because the exclusive right to cinema is only in the recording. He can only prevent others from making actual copies through duplicating. The same argument for such an interpretation was provided in Star India Private Limited.

It is self-evident that an audio-visual work is only protected against unauthorised reproduction through the mechanical process of replication. The film's concept, storyline, format, and relationships between various parts are not protected. In light of the foregoing viewpoints, it is reasonable to assume that the skill portion of the film, which includes camera methods and editing, and which can change a poor work into a classic work, is not protected by the law.[169]

The Content Based Approach:

In ***Shree Venkatesh Film v. Vipul Amritlal Shah***[170], the court held that manufacturing remakes infringes on copyright as long as the criteria of substantial similarity between the works is met. Even if the law defines cinema as the recording of other people's content, the point of view is still acceptable. The term "need for likeness" refers to the similarity of scenes. It indicates that piracy could be regarded even if the film isn't a carbon copy. The Court brought out a definition of the phrase ‘carbon-copied’ and elucidated that in the instance of motion pictures, there are categories of plagiarism that are admissible as per the law that varies from Section 14(d) of the Copyright Act, 1957 wherein the physical form of the film is recreated as it is.

The Court gave the term "copy" a broad definition, which the court believes is consistent with Indian law. As a result, the Court held that a film can be said to have been copied if a prudent person finds a film to be significantly like another film.

In England, the carbon-copy aspect was applied in the first ***Norowzian v. Arks***[171] but it was not approved by the Court in the second ***Norowzian v. Arks***[172] when it was observed that an audio-

[169] Chintan Chandrachud, "A Dual System of Copyright Protection for Films: Should India Go the Norowzian Way? 5(3) Journal of Intellectual Property Law & Practice, 2010, at 164.
[170] Civil Suit No. 219/2009, Calcutta High Court, 1 September 2009.
[171] [1998] EWHC 315 (Ch)
[172] 1999 FSR 79

visual work will get film copyright as well as protection as dramatic work.[173] In the first case, the issue before the court was whether the storyline of 'Joy' was protected as a dramatic work. If yes, whether the dramatic work may be considered to have been copied.

The court decided that because the film itself was not reproduced, it was not a matter of copyright infringement in film. The court ruled against the claimant on the storey underlying the film and whether it is covered by copyright as a dramatic work.[174] The court determined that a film is distinct from a dramatic work in that it can incorporate dramatic elements but cannot constitute a dramatic production in and of itself. The Court of Appeal, on the other hand, overturned the decision. According to Lord Justice Nourse, a film can be regarded as a dramatic production for the purposes of the English statute of 1988. A dramatic work is described as an action piece that can be performed in the sense that it can be performed. This, he claims, is the interpretation of section 1(1) of the Act (a). The Judge observed that a cinema because of its innate ability to be performed can be categorized as a dramatic work. This emerged as the dissenting opinion in the first ***Norowzian v. Arks*** case wherein cinema was excluded from the definition of a dramatic work.

As can be seen from the following, films now have better protection against unauthorised duplication as a result of the court's ruling in the Norowzian case in England, which encompasses protection as a film as well as protection as a dramatic work.[175] However, Norowzian permits film directors to claim copyright on a subject in the dramatic work category provided they employ creativity and associated abilities in many parts of the filmmaking process, such as synchronising the sequence and editing. It should be noted that such a potential only exists in the context of movies that can be deemed artistic.

The views of the English court do not appear to apply in India because the definition of dramatic work in section 2(h) of the Copyright Act, 1957 clearly excludes cinematograph films from its

[173] https://www.pbookshop.com/media/filetype/s/p/1366698014.pdf
[174] Norowzian v. Arks Ltd & Anor (No. 2) [1999] EWCA Civ 3014, available at: http://nipclaw.blogspot.com/2008/09/copyright-norowzian-v-arks-ltd-anor-no.html
[175] P. Kamina, Film Copyright in the European Union (Cambridge University Press, 2002) at 37 cited from Chintan Chandrachud, supra n. 15, at 166.

ambit.[176] The Calcutta High Court found films to be authorial works in Shree Venkatesh Film, however the ruling makes no mention of the film being a dramatic production. The opinion appears to be in accordance with the Berne Convention, which requires members to protect cinema as a work of authorship.[177]

As a result, the Calcutta High Court's decision had two separate outcomes. Firstly, cinematographic films are eligible for the same degree of protection as any copyrightable work but this does not find mention in any statute. The key reason could be the Norowzian perspective of cinema as a dramatic work. Second, there was no mention of the criterion of originality for film protection, meaning that it is not a requirement.

Section 13(1) of the Act of 1957 defines a "cinematograph film" as "a work in which copyright exists." Furthermore, Section 13(4) of the Act of 1957 indicates that the film's underlying content has a distinct copyright from the film's copyright. It's worth noting that the 1955 Copyright Bill was referred to a Joint Committee which concluded that a film as a whole has a distinct copyright which is independent of its constituents.

Film- a novel endeavour of creativity

The law on cinematographic films and the extent of copyright protection for the same continued to be ambiguous for a long time after the judgement delivered by the Calcutta High Court. 2 judgements of the court subsequently helped clear the air on the same. Despite the lack of theoretical reasons, cinema copyright legislation went from a strictly medium-based approach to a content-based approach, as previously stated. Despite the fact that the word "original" does not appear before the word "cinematograph" in Section 13(1)(b) of the Indian Act, the court in ***MRF Limited v. Metro Tyres Limited***[178] decided that it is still required under sub-section (3)(a).

[176] According to Section 2(h) of The Copyright Act, 1957, the definition of 'dramatic work'has an inclusive part which includes any piece of recitation, choreographic work or entertainment in dumb show, and it has an exclusive part which provides that dramatic work does not include a cinematograph film.

[177] Arpan Banerjee, "Film Copyright Infringement: Bypassing the 'Carbon Copy' Handicap", 5(1) Journal of Intellectual Property Law & Practice, 2010, at 17.

[178] CS(COMM) 753/2017, 1st July, 2019

Sections 13(f) and 2(d) of the Copyright Act defines 'cinematographic film' and 'author'. The phrase "to make a copy of the film" in Section 14(d)(i) does not simply entail duplicating a physical copy of the film, according to the court. Furthermore, because the extent of protection for cinema is the same as for any other creative work, the court determined that the R.G. Anand test[179] would apply in the context of film. As a result, the court recommended evaluating the content of the two works to see if there was any copying.

The court found that the Bombay High Court's decision in ***Star India Private Limited v. Leo Burnett (India) Pvt. Ltd[180].*** recognised a limited scope of the producer's copyright rights in a cinema, and that it also violated the Berne Convention by prohibiting cinematograph work from being treated as original work. In the case of ***Yash Raj Films Pvt Ltd v. Sri Sai Ganesh Productions & Ors[181]***, the Delhi High Court backed up the aforementioned premise. The lawsuit revolves around the "Band Baja Barat" cinema.

In this lawsuit, the plaintiff alleged that the original film's storyline, plot, and presentation of the theme were all plagiarised. It was stated that the idea, concept, storyline, character sketches, storey, script, shape, and expression, among other things, had been copied and that the works were strikingly identical. The effect of such blatant copying is copyright violation. Individuals who have seen both films will have the distinct impression that the defendant's work is a carbon copy of the plaintiff's work, according to the plaintiff. As a result, the R.G. Anand infringement test conditions have been satisfied. According to the Delhi High Court, the defendants violated the plaintiff's copyright in the film.

The verdict upholds the MRF Limited decision, albeit with a new interpretation that departs from earlier Bombay High Court decisions. The strategy for cinematograph films has shifted from medium-based security to content-based security. As a result of the foregoing, the current state of cinematograph film protection favours film producers, as even remakes of films (assuming the film is original) require the consent of the producer.

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[179] The Supreme Court in R.G. Anand v. M/s. Delux Films, AIR 1978 SC 1513

[180] (2003) 27 PTC 81 (Bom)

[181] CS(COMM) 1329/2016, 8 July, 2019

Remakes do not duplicate any aspect of the original recording. In the case of ***Gramophone Co. of India v. Super Cassettes Industries Ltd.***[182], the Delhi High Court ruled that remixes, which are also known as cover versions, are recordings of any previously released song. In this rendition, different voices and musicians are employed. As a result, a cover version isn't considered an exact replica of the original recording." On the basis of the preceding observation and analogy, a person can make the argument that remakes of movies should be permitted as they cannot be considered as plagiarism.

CONCLUSION

The discussion so far on film copyright shows a change in the Indian court's approach to protecting film. However, it should be noted that the content-based approach not only protects the recording in the favour of the filmmaker, but also includes the content of the film that is not essentially owned by a filmmaker in terms of copyright law. It's also clear from the Act's clause that separates copyright in films from copyright in the underlying content.

Non-original films (e.g., films about wild animals, non-creative interviews shot in a routine manner) will not be protected This does not appear to be a smart idea, as films deserve protection as well, at least on the basis of a medium-based approach. Furthermore, if film protection needs to be broadened, a dual protection system that includes protection for cinema under the dramatic work category, similar to English law, could be considered.

[182] 2010 (44) PTC 541 (Del)

INDIANS AND TAXATION: CRITICAL STUDY OF HISTORY AND PRESENT

- SHIVANSH PARASHER & UPKAR KUMAR

Abstract

In the introduction the research paper starts with a basic question but the very essence of any research based on tax law, i.e. "what tax, why is it needed, who brought the system and why, why was the tax collected for the first time, what is the mythological approach as to taking 'KAR' derived out of peoples profit?" along with the same we will briefly discuss about the regions where there were no Britishers but were envisaged under some other foreign ruler and the tax process levied by them on common homosepians.

Recently after disclosure of the budget of year 2022, by finance minister Smt. Nirmala Sitaraman in the house of people, often known as lok sabha, "TAXATION of crypto money" has turned itself into a topic of another realm each and every investor in crypto is thinking about the same, market crashed prices of many prominent digital coins shattered to bits. The following research paper consists of a brief understanding as to how the taxation process was executed in ancient era, and British rule tax process which still caries on in India.

This research also includes a critical analysis of different countries and their taxation process in history, and how they are different from taxes levied in India, along with the comments of prominent jurists on the punishments on default of fine.

This research in its last segment includes a segment where the writer talks about the evolution and need of acts such as GST its merits along with demerits and lastly a critical analysis from writer's own perspective.

INTRODUCTION

"If I were a taxpayer within the jurisdiction of a local board or a municipality, I would refuse to pay a single pie by way of additional taxation and advise others to do likewise unless the money we pay is returned four-fold": Mahatma Gandhi[183]

The basic question that pops up talking about the very complex law of taxation is that 'what actually is tax and urge to have need about it?' so as to answer the same, Taxes are a amount of money or to say necessary contribution levered on government and our collected by agencies like RBI in India and internal revenue services in United States of America.

Tax becomes absolutely necessary for public to give taxes to the elected nominated dictatorship or a monarch government for betterment of national as well as regional infrastructure expansion and other public works along with services.

There are various taxes explained further in research, which can be noted as important taxes, income tax, payroll tax, corporate tax, sales tax, property tax, tariff, estate tax, and etc. These are common types of taxes but these taxes and their types can have variation depends on the country.

In Modern day India, taxation process is shifting swiftly towards digitalization from long ques and paperwork and jogging between chambers, there are many examples in field of taxation that prove that total digitalization can be done, the most recent example can be taken of Shri Arvind Kejriwal chief minister Territory of Delhi, where he has ordered departments to approach door to door for better communication, between public departments of the region and public, also various states have implemented online filling of income tax and income tax return. The step of digitalization of these things saves huge amount of time and sweat of a person, which eventually enforces him to be efficient in his day to day job, also digitalization has it's ways to align with the middle class of the society.

"For evolution of something, something is to be done first said Martin Luther king Jr." the same quote can be applied to many retrospective scape, similar is the context of taxation system.

HISTORY OF TAXATION IN INDIA

Long time ago, in the year 1789, Benjamin Franklin wrote, "In this world, nothing can be said to be certain except Death and Taxes." Taxation is a highly debated topic since its existence. A well-designed tax system can minimize efficiency

[183] https://www.financialexpress.com/india-news/middle-class-burdened-with-tax-what-mahatma-gandhi-would-have-done-if-he-faced-similar-situation/879090/#:~:text=%E2%80%9CIf%20I%20were%20a%20taxpayer,'%20%2C%20compiled%20by%20RK%20Prabhu.

loss and boost economic growth. Various factors like the resources determine the capacity, check & balance of the country. Law establishes from whom a tax is collected.

History of taxes in India jumps long back to time immemorial, there has always existed an urge to serve the crown and the king. The taxes charged were taken such that it would not affect the Public much but would fulfil the dire need to run a vast kingdom. In all this the revenue collector of the king acted as a queen bee and the 'Praja' in better words would act as the supporting bees, bringing in the nectar of plants without actually hurting them[184] without actually being obnoxious in form.

In India, we find evidence of taxes dating back not just 200 years, but over 2000 years. This was during the reign of the Maurya Empire, in Arthashastra by Chanakya and in that there are many philosophies regarding tax system and government managing finances have values and taxation should not be painful process for the people. There say that never lives in a place where there is greedy ruler (-high taxes-). The Arthasastra offers 'gadget of taxation' in a difficult and well-deliberate way. This become written someday in three hundred B.C, while the Maurya Empire excels upward push to power. The State now no longer handiest amassed earnings tax however additionally levied water rates, octroi duties, tolls, and customs duties. Imagine bullock carts having to pay toll fees!

For a very long time, taxes have been a component of our civilisation. Early rulers utilized taxes to provide protection, better infrastructure, and a higher standard of living for their citizens. Informal style to collection of taxes and they would collect taxes in the form of gold coins, animals, crops, raw resources, and personal services, among other things, etc.

Manu Smriti (Laws of Manu), the Hindu Code of Law, was written by Manu, who is regarded the first man in Hindu mythology. This literature contains abstract of both secular and religious laws, as well as information on taxation. A king, according to him, has the authority to tax his subjects. He should, however, do so in such a way that the subjects do not feel compelled to pay taxes. Manu even defined multiple tax rates for different professions and income levels, much like our current tax structure.

So clearly, taxes aren't a current phenomenon. For eons, nations and states have run their operations with cash amassed from taxpayers. Even today, the government's primary source of revenue is the taxes we pay in the form of direct & indirect tax.

Names of some medieval prominent taxes and translations are:-

[184] Mahabharat XII 88.4

Names of taxes	Translations
Sulka	Custom duty
Niskarmya	Export
Vyaji	Tax on crown goods
Vartani	Road tax
Prakriya	Royalty
Parswam	Surcharge
Senabhaktam	Army maintenance tax

However the taxes differed from place to place dynasty to dynasty some prominent examples are mentioned below:-

Body tax – In some parts of south India there were unique tax collection system exists and basically lower caste men had to give the tax for hair & women had to give the tax for her breasts. After the Nangeli tribe revolt the king made the decision for dispose this tax system immediately.

On religious issues- the Islamic rulers imposed Zakat (a tax on Muslims) and Jaziya (a ballot tax on conquered non-Muslims) and taxes on pilgrimages were imposed. In India this exercise started out inside the eleventh century, and many such other taxes were imposed to ridicule the pockets of people who are far way from royalty.

In the Greek mythology just like ancient Hindu mythology people valued idea of state and decentralized power, but when the influence of middle east expanded and reached this civilizations of the Greek the urge and idea of building an Empire with Central control and no decentralized power was not efficient for governance of a nation.

About 6000 years ago a land no known as Iraq were farm lands visual over seen by the tower established in centre of the city, this tower was known as zigurat resided a local authority which one every city had.

The above mention local authorities were better known as deities and allegedly were the first kings of the land, with absolute authority to impose tax, in any of the form may be grain or service this is when the written records were started to be kept, in forms of ledger to have a better record as to proper examination of distribution of wealth.

There have been many evidences in many text in words of many prominent researchers who are found that many cities depict many gods and during the war when cities fight the gods fight when

they win the gods win the party losing is also a God, that's how people felt in medieval age. Many religious preachers made the audience believe that the king is the sole representative of the god on earth, absolute authority to royalty and luxuries which were driven out of people's pocket in name of tax. Similar happenings were recorded in ancient India where many prominent cities preached, different gods and fort name of gods and collected taxes in name of god.

In my personal opinion this was nothing but an act of Misguidance which was let out to benefit the crown to fill their riches and to loot peoples pocket in order to fulfill personal luxuries have horses chariots elephants gold reserve diamond reserve silver reserve and many more reserves kept in the results of the king. In study by Hindustan Times in the year 2017 report of Pre independence period came out which shows Hyderabadi Nizam had almost three rooms full of diamonds and many other rooms filled of gold and silver it was also mentioned that Hyderabad Nizam used a diamond which is the biggest diamond in the world till date as mere paper weight. The question to arise is that was that was that property collected on his own hard earn money or collected by the collectors in name of tax?

In India the old system followed was the Raja mandali, which means being autonomous but still having the interdependency of the other kings, turn into when the kings started to have tributes from the subsidiary kingdoms or is being a modern day gangster could be called as production money but the tax laws never made it look like it. Idea evolve from ancient Persia and was first used by the Gupta Empire and the Mauryan empire but it has always been easier medium to enjoy taxes was to have tributes from the neighbouring kingdoms. Later in history Mughals and other sultans of Delhi and remaining parts of India apart from the Mughal rule always encouraged to have collectors for the collection of Central tax.

The modern day taxation system started with the allowance of rule of East India company as expanded. East India company allowed many princely states to thrive. But also made sure that they paid revenue in forms of taxes, the Britisher's created many laws in their regime with is still modified and followed in past and present British colonies and prominently in India were famously income tax act sales tax act royalty tax out of which the pensions of retired kings were given, accepted the existence of East India company and after the revolt of 1857 who are acknowledged the crown.

Critique on British raj

In the lights of the event of the mutiny of 1857, displayed to the world on a large scale that the company Raj is accepted no more, the loot the tantrums of making the farmers plant Indigo and charge a sum over it, to export the same to London just to manufacture and in order to bring it back to the lands of India on which the raw material was produced and sell it on the rates which are four times higher than the actual making cost. After the transfer of powers to the British crown taxes which were highly inappropriate were imposed the seller of any commodity asked to pay 30% tax on whatever he earns, which would eventually lead to scarcity of funds to the family of that common sales person. The crown oppressed the Indian audience by imposing many ridiculous taxes such as salt tax which was broken by the "father of the nation" by a peaceful rally called Dandi March, Britishers were the only one responsible for the concept we modernly know as toll tax.

Many taxing advances have occurred in the past during wars. The Napoleonic War in 1798 prompted the adoption of income tax in the United Kingdom. During the Civil War, the United States enacted the first income tax. Central excise was introduced by the British in 1894, and all types of tax related work was controlled by formal way and so they can escape also.

TAXATION AND FREE INDIA

After India got independence in the second five year plan and for tax system which is properly designed Nicholas kaldor was brought to India in the year 1957. He was delegated the work to research analyse conceptualize innovate and present a new systematic formation of taxation system in India. Under his recommendations many taxes were imposed to crub down the social inequality in rich and poor, taxes were named as wealth tax gift tax and many more.

Later after these tax being imposed a direct tax committee sat down which laid down many recommendations suggestions and innovative ideas as to modernise the tax system, finally a conclusion was brought up by the name of income tax act 1961 which is followed till date.

This concept maybe modern but its roots still lie in Arthshastras, Manusmritis and many ancient sources.

The various tax which are levied in India and a brief discussion:

In India taxes are majorly seen of 3 types with the further classification ofcourse:-

1. Direct tax- Amount paid by individuals organisations companies directly to the government in name of tax is called direct tax. Some examples of tax include capital gain tax personal income tax marginal tax agriculture tax etc.

2. Indirect tax- Service Tax which is incurred indirectly by the government of India are provided by firms and servicing companies in lieu of monetary benefit. The Central Government via the Finance Act, 1994 governs the taxability of services provided by an individual or a company under Section 66B. Service tax is charged at the rate of 15% currently. The taxability arises once the value of services exceeds Rs. 10 lakhs during the financial year[185].
3. Goods and sales tax- Tax lavid on supply of goods and services is an indirect tax known as goods and service tax. It is the only tax which is applied on every step of production process.

The tax generated from supply of goods and services is taken by the central government, however tax on goods such as petroleum products alcoholic drinks or any electricity related product is collected by the state.

Along with the above fact, the tax is divided into five slabs -- 0 per cent, 5 per cent, 12 per cent, 18 per cent, and 28 per cent[186].

Essentials of GST:-

1. It is a destination-based tax on consumption of goods and services. It means that the tax would accrue to the taxing authority which has jurisdiction over the place of consumption (often called 'place of supply')[187].
2. It is levied at all stages till consumption. It means that GST would be levied at all trading, manufacturing, storage, distribution, wholesale/retail stages upto the final consumption but credit of taxes paid at previous stages would be available as setoff. Thus, the concept of taxing merely the value additions is retained in GST and there would be no cascading effect of taxes. The final burden of tax will have to be borne by the final consumer[188].

Tax Collection Bodies:

[185] https://www.indiatoday.in/information/story/list-of-taxes-that-every-indian-pays-from-gst-to-income-tax-1430531-2019-01-14
[186] https://www.indiatoday.in
[187] https://blog.ipleaders.in/gst-all-you-need-to-know-about-it/
[188] https://blog.ipleaders.in/gst-all-you-need-to-know-about-it/

There are majorly 3 bodies that overlook the process of taxation in India, namely the **central government** responsible for collection of income tax, along with custom duties, and central excise duty. The **state government** being responsible for collection of taxes on agricultural income, professional tax, value-added tax, state excise duty alongside stamp duty. Local bodies such as municipalities become responsible for collection of taxes such as property tax, water tax, other taxes on drainage and small services[189].

TAXATION AMENDMENT BILL 2019

Anything related to tax or any changes in taxation is brought by the union by a finance bill to be passed in the parliament. What could have been the exact reason to bring in the taxation amendment Bill many speculator say that, after the deduction of tax rate in corporate taxes (25%) and way less for new companies (17%) is to be necessarily be passed by the parliament, so the amendment bill is brought up.

The central government presented the bill of taxation amendment on 25th day of November, which the lok sabha passed in the year 2019 on the day of 2nd December, and this act majorly amends various diversity of the income tax act of 1961 and the finances act of 2019.

Income tax act is a direct tax which is paid directly to the central government on the profit or salary incurred, Direct taxes can be classified into two types i.e one paid by an individual and one by a corporate tax which evaluates the earnings of companies firms and etc.

In the session of 2019 of the parliament the union government presented this bill in the name of finance bill, finance bill in India is known by 3 names money bill finance bill 1 finance bill 2, of which in constitution the mention of finance bill comes under article 110. The government proposed this bill to impose new taxes to modify the old structure of tax collection and to amend the previous existing loss.

Before the bill a payi of income tax had to pay 7% surcharge if he had his income was falling under the slab of rupees 1 crore to rupees 10 crore and if his income is more than 10 crore then the surcharge amount to 12% along with it the domestic companies with annual turnover of rupees 400 crore the income tax @ 25% and for other domestic companies the tax rate was 30%.

Prominently after the bill passed the bill provided domestic companies with 22% tax which was earlier 30%. And earlier deductions which were made to encourage the companies which were

[189] https://www.aegonlife.com/insurance-investment-knowledge/tax-structure-in-india-explained/

opened in backward areas or if we're established under the SEZs scheme attained undue benefits from the government. The central government of term 2019 to 2024 brought down the tax rate for the new companies 25% unless they don't claim benefits. Any company setup after September 30th of 2019 is considered a new company and any company registered even on 29th September is considered under as old company and has to pay 22% tax. Even the Sar charge was revised by this bill sur charge earlier of 30% has been curbed down to 25% for new companies who had to pay sur charge of 25% has only to pay 17% charge.

This will brought up minimum alternate tax which did not apply to the companies falling under the new tax system.

CRITICAL ANALYSIS & CONCLUSION

Many mythological tales have evidenced that Lord Krishna fought his maternal uncle in revolt against the irregular income tax, which was charged from peasants. Charity is embedded in Hindu culture but forced paid system was not followed in India before formal & informal taxes introduced, the above makes sense that the reason of being Indian we generally escape & do tax evasion, without any proper justification to it. The most promising path emerged through this study for long-run growth performance in Indian states is to lower the total tax burden and shifting from income and commodity taxes to property tax for revenue generations[190].

There is no problem having taxes because it is understandable that a country needs funds to prosper, but to be prosperous does it become necessary to pressurize and to socially humiliate the citizens In name of tax, still many national exist which charge irregular taxes throwing burden on the hard bread earner.

In the latest budget of India people were keen to here about, the relaxations to be granted after a hefty lockdown, mostly the people turned towords the trade off digital currency were absolutely stunned when tax of 30% on crypto income was imposed.

In simple words for illustration if someone pays rupees thousand and earns 500 out of it he eventually has to pay 1500×30/100 which sums upto rupees 450, leaving someone who has invested time and his own money is not let to enjoy his personal income which was about to be banned a few days back.

[190] https://journalofeconomicstructures.springeropen.com/articles/10.1186/s40008-020-00215-3#Sec8

A tax needs to be present in a country to facilitate and not to do any social injustice, whatever tax policy our leaders choose, it should be based on a clear understanding of the facts — not erroneous but widely repeated myths[191].

[191] https://www.robesonian.com/opinion/columns/141120/tax-debates-feature-many-myths

PSYCHOLOGY AND CRIME: AN IN-DEPTH STUDY

- NAMAN K MANKAD & PALAK GHADIYA

Introduction:

Psychology and crime are interdependent on each other. Basically, the crime affects the mental health of the person. Since the late 19th century, when modern psychology began to emerge, psychologists have investigated numerous elements of crime and criminality. At the time they were creating their foundations, the founding fathers of psychology gave courses on criminal psychology and considered delinquency. From Freudian psychodynamics to neuropsychology, through learning theories and memory studies, nearly every psychological theory has been used to the study of crime and its prosecution.

The causes of crime, psychological aspects of criminal investigations, criminal assessment, court psychology, interventions to reduce offending and help offenders cope with prison, and victimology and the nature of criminal activity have all been covered in these theories, with an emphasis on behavioural differences between offences with the same legal definition.

In the last four decades, forensic psychology has expanded to include psychological aspects of crime and criminals. As a result, any discussion of psychology and crime must now include discussion of psychologists' professional activities in a range of legal, investigative, penal, and therapeutic settings. When analysing writings on psychology and crime, the influence of the legal context and culture, as well as the local institutional frameworks, must always be kept in mind.

Access to prisoners for research reasons, for example, is currently extremely tough in the United States, but much easier in poorer countries. As a result, there is a bias in what is actually investigated, depending on where the studies are conducted. What constitutes a crime and how it is handled with differs greatly from one jurisdiction to the next.

These differences have ramifications for how easily results can be generalised or applied in practise outside of the setting in which they were discovered. Furthermore, numerous studies of the psychological dimensions of crime are conducted under the auspices of other disciplines, such as criminology, sociology, and even law.

As a result, the quality of knowledge and the veracity of arguments in writings on psychology and crime differ. The great popular interest in crime, both in actuality and fiction, broadens this qualitative range even further, resulting in a variety of criminal opinions with no basis in systematic research or, in many cases, objective proof. The goal of this bibliography is to compile a list of the most important crime-related psychological literature.

Because of the widespread interest in this subject, it's worth revisiting some of the early underpinnings that continue to plague public discourse before moving on to the fast expanding field of current significant studies.

The fundamentals of the person's whole and sole understanding depends on the mindset he perceives. The crime affects the mindset of the person in a negative manner and so, the psychology plays a vital role.

WHAT IS PSYCHOLOGY?

The study of the mind and behaviour is known as psychology. It includes the biological, social, and environmental elements that influence how people think, act, and feel.

People can gain insights into their own actions and a better knowledge of other people by gaining a broader and deeper understanding of psychology.

TYPES OF PSYCHOLOGY:

The study of abnormal behaviour and psychopathology is known as abnormal psychology. This specialised area is linked to psychotherapy and clinical psychology and focuses on the investigation and treatment of a variety of mental diseases.

Biological psychology (biopsychology) is the branch of psychology that explores how biological processes affect the mind and behaviour. This field is closely related to neuroscience and uses techniques like MRI and PET scans to examine brain injuries and anomalies.

Clinical psychology focuses on evaluating, diagnosing, and treating mental illnesses.

The study of human thought processes such as attention, memory, perception, decision-making, problem-solving, and language acquisition is known as cognitive psychology.

Group behaviour, social impacts on individual behaviour, attitudes, prejudice, conformity, hostility, and related subjects are all covered in social psychology.

WHAT IS CRIME?

A crime is an act that warrants public condemnation and punishment, which is usually in the form of a fine or imprisonment. A civil wrong (a tort) is a legal action brought against an individual that requires compensation or restitution.

Criminal offences are usually pursued by the State or the Commonwealth, whereas civil actions are usually brought by an individual. Individuals can also initiate criminal procedures, but this is extremely uncommon.

Assault, for example, can be both a crime and a civil wrong at the same time. The police can charge the victim with assault, and the victim can file a civil lawsuit to seek money (or other compensation) for any injuries sustained.

It is not always straightforward to determine whether or not something is illegal. A person who takes money without authorization commits a criminal offence, while a person who does not repay money commits a civil offence (not a crime). Although a civil action can be brought to collect the funds, the borrower can only be charged with a criminal offence if there is fraud involved.

It is entirely up to the authorities to decide whether or not to charge a wrongdoer with a crime. A victim of crime cannot compel the police to pursue an offender, but a private prosecution is feasible, though uncommon. If you're thinking of doing this, you should seek legal advice.

<u>INTERDEPENDENCY OF PSYCHOLOGY AND CRIME:</u>

Psychology encompasses the study of the mind, behaviour, and attitudes, among other things. Individual traits including personality, logic, thought perceptions, intelligence, imagination, memory creativity, and so on are studied.

Crime, according to psychologists, is a learned behaviour that a criminal acquires via his interactions with various people. They, like sociologists, try to explain crime in terms of the environment.

As previously stated, Lombroso attributed criminality to atavism, implying that criminals have a terrible ancestral heritage and that criminality is passed down through the generations. Goring made similar claims, claiming that criminalistic qualities are ingrained in criminals through genetics and instinctual patterns, and that external factors are therefore irrelevant.

However, subsequent study by psychologists and sociologists has proven beyond a shadow of a doubt that one criminal is distinguished not by genetics but by psychological pressures functioning in delinquent families. The youngster unknowingly imbibes criminalistic features from the delinquent parents' family past and grows up to be a confirmed criminal.

Furthermore, children who are taken away from their parents at a young age are more likely to turn to crime due to a lack of sufficient parental care and affection, which leads to emotions of inadequacy, frustration, and shame.

Sutherland commented on this, saying that the resemblance between father and son in terms of criminality is not due to contagion, but rather to a peculiar human psychology of learning, observation, and association that causes them to engage in criminal behaviour when placed in situations conducive to it.

The primary premise is that, like all other forms of behaviour, criminality is learned through direct interaction with other criminals, rather than being invented by each criminal individually. Personal interactions with other people are used to teach behavioural skills.

According to psychological studies on youthful aggression, there are two basic trajectories that violent careers take. Before they reach adolescence, some children begin to act violently. They have a higher chance of becoming repeat violent offenders.

Children who turn to violence in adolescence are more likely to correct their ways sooner or later. Birth issues, poverty, anti-social parents, bad parenting, hostility, scholastic failure, psychiatric disorders, alienation from family, school, and other factors can all contribute to violence.

The change in the mindset along with the following things:

1. Past events
2. Constant hatred
3. Present circumstances
4. Criminal records
5. Attitude and nature
6. Narrow-mindedness

The mindset basically shapes the person's image in one's mind. Alongwith, the psychological terms that person holds as an individual. The social as well as individual pressure created on the mind of the person when the crime took place talks about it all.

The person's mind get affected by the small-small events taking place around him/her.so, the crime, when taking place ultimately effect the person's mind and his psychological behavior changes from normal to abnormal.

The psychology is considered as the one of the most important contributing discipline of the individual and society as a whole. The person with good mindset and the psychological approach lives ten times a better life than the poor ones. Sometimes, in case of victim, the mindset or psychological approach changes with the chain of events taking place in his/her surroundings/ in personal life.

The social psychology as a whole, denotes the common mindset of the people living in the civilized society. The work they do, the people they meet, the habits they possess, have an long lasting effects on the people's mindset. An individual is the collection of virtues and customs of society. But, the society is the collection of the people. So there is always the interdependency of the psychology and crime.

Crime makes the difference in the routine of the person. Whenever the routine of the person changes, his foresightedness towards the problems and solutions to them decreases. So, the psychology and crime are interdependent and has the vast areas to cover as a whole.

TECHNO-NATIONALISM & TECHNO-GLOBALIZATION: A PERSPECTIVE FROM NATIONAL SECURITY ACT

-DIBYA PRAKASH LAHIRI

Abstract:

Techno-nationalism and Techno-globalism are two of the most important and well-known concepts that have come to a rise with the global perspective and development. The world of technology, along with the growth of technology into the borders is an interesting and a recently developed idea of growing a united world. These two terms are helpful in terms of making the Government's realise their strength and the power of the National Security of one's nation and where one can bring about a change. Indeed, National Security Act of India (NSAI or NSA), 1980 is important in ways that techno- nationalism has to be well mentioned and there is a dire need to increase the scope of National Security of India which will quintessentially of global acceptance and international dimensions to it by looking into dynamics nature of technology. The quintessential law which helps in growing and letting a country have their legitimacy ensured is through the national security laws of the land. For a country like India, the National Security Act, 1980 plays the role of providing the validation to Techno-globalism and Techno-nationalism. This chapter seeks to create an understanding between the rise importance of Techno-Nationalism & Techno-Globalism and how it is going to be affecting the future prospects for country like India. The chapter concludes with the suggestions and ideas through which India, can improve its power both quantitatively and qualitatively along with an opinion on finding ways, which can help in improving the condition.

Keywords: Techno, Nationalization, Globalization, NSAI

National Security Act, 1980

The Government of India, after 33 years of Independence came up with a legislation to procure the security and systematic control over the National Security of the country which was known as National Security Act of 1980.[192] The Government states that the major purpose of the Act is to

1 Dullbonline. (2020, October 28). *A. K. Roy v. Union of India, Air 1982 SC 710.* One Stop destination for DU LLB students. Retrieved November 2, 2021, from https://dullbonline.wordpress.com/2020/08/17/a-k-roy-v-union-of-india-air-1982-sc-710/.

provide for detention which is preventive in nature and in certain cases, for matters connected with other ideas.

The proceedings of the advisory board has been clearly established under Section 11 of the Act and they do not have formal judicial proceedings or criminal trials. The system is quite contrary as it does not have any procedure for evidence and prevents the accused from getting a counsel which is the clear-cut violation of Principle of Natural Justice.

The constitutionality of the National Security Ordinance was challenged in the case of A K Roy v. UOI.[193] The ordinance is meant to provide the best quality of services with which they are able to question the legitimacy of the ordinance and is not in violation of the Basic structure of the Constitution. In the case of AK Roy, the petitioners argued that the preventive detention takes away the rights of the detainee and prevents their Rights of Article 21 and 22.

The Supreme Court reminded that it cannot give or extend the Right to seek legal counsel for people under detainment. However, the Court did not consider that while the Constitution does not grant the right to legal representation to detainees, it does not expressly bar this right either.

The National Security Act of India has been amended five times over the past few years with major changes coming in to the understanding of detention and changes in the detention period of the detainees. However, there has to be more concrete steps which are to be taken up by the policy makers to bring the anarchic law in terms with the circumstances of modern times with reference to Techno-globalism and techno nationalism.

Techno-globalism:

Techno-globalism does away with the top-down approach implicit in Techno-nationalism. The foundation of Techno-globalism is based on robust global knowledge and innovation networks. It is built on the imperative of strong interaction between the internationalization of technology and the globalization of the economy. It encompasses the widening cross-border interdependence between individual-based sciences and economic sectors. It signals the change of 'geography' of science, technology and innovation, from advanced nations to talent rich emerging economies. Techno-globalism serves different purposes like for creating private good by transnational

[2] *Constitution of India*. CAD. (n.d.). Retrieved November 2, 2021, from https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2020.

companies but increasingly as the world faces grand challenges of climate change, depleting fossil fuel resources, water crisis, ravaging of biodiversity, global health, etc., there is an increasing demand on techno-globalism directed towards creating a public good or global good.

As defined by Rotsios, "Techno-globalism is the process of globalization which extends its influence of sphere of inventions and innovations, in a narrow- is the process of production, transfer and diffusion of technology that is becoming more international." [194]

The term "Techno-globalism" means a strong interaction between the internationalisation of technology and the globalisation of the economy. Techno-globalism has created a widening of cross-border interdependence between individual technology-based firms as well as economic sectors.

Techno-globalism means a strong interaction between the process of technological internationalisation and globalisation of the economy.[195]

Techno-globalism, as the concept itself has developed the dependence of the firms on one side of the border to the other side of the border which caters to services and requires an overall interaction. One can say that Techno-globalism intends to open up the borders unlike techno-nationalism which intends to secure them.

The times for globalisation has invited the dependency on multi-sourcing innovation from various places. The times have gone wherein there was need for only one source to Research and Develop. With the drastic changes and improvement brought, the costs of Research and Development has increased as well as the pressure to reduce the penetration time in the international market. The diffusion of multi-sourced ideas which are both organisational and geographical, have resulted in increase in patterns for innovation.

Techno-globalism, with its rise in the past 20 years has been highly effective in terms of providing job creation as well as acting upon the need to provide immediate results. With the drastic shift in the demography of the western countries, it made a favourable source for the giant companies to increase their Research and Development. With a high number of talented and potential candidates in the country, more than 135 companies have established their R & D centre in the country. Tata Motors has spent over 3,100 crore on Research and Development, followed by General Electronics

[3] L R, "Innovation and Globalisation: A Systems of Innovation Perspective" [1995] The Handbook of Globalisation, Second Edition

[4] Mashelkar RA, "Research Papers" (*RAMashelkar*2004) <http://www.mashelkar.com/work/research papers?start=11> accessed October 31, 2021

(GE) of a sum of 3,000 crore.[196] The investments brought in by these companies distinctively shows that the process of Techno-globalism in India brought a silent revolution and made India, one of the greatest dominators of the global market. Apart from the development in the field of Research and Development, what has become a gain for India is its rise in demand for the semi-conductors, that play an important role in the development of Electronic equipment, goods and devices. The demand for the semi-conductors rose to 1.5 million chips annually which generates an income of 2.1 billion dollars.[197]

Essentially Techno-globalism has been effective and influential in terms of providing a country like India to become and better in terms of global relations. As successful it has been to open the different borders and creating an interdependence channel, one must also note that the concept of Techno-globalism is a challenge which possess a threat to the people of the country. The places where India has established its power and dominance in the market can fringe upon and may result in the shift by introducing newer competitors to the market. It need not be necessary that Techno-globalism helps in securing the national safety of the country. A completely different concept from the Techno-nationalism, it can be said that one must find ways to make the two terms go hand in hand and create a better descent.

Techno-nationalism:

Technology denial over the years has been affected through several instruments such as Wassenar Arrangement, Nuclear Suppliers Group, Australia Group, etc. India's technology denial share ranged from a high-performance supercomputer to cryogenic engine used in the space launch vehicles.

Techno-nationalism, as an idea does not have one school of thought but rather has invited various experts in the field of science and technology to give their opinions on the definition of the concept.

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[5] Motors G, "GE Annual Report 2020" (*General Electric*) <https://www.ge.com/investor-relations/annual-report> accessed October 31, 2021

[6] Edgerton D, "(PDF) the Contradictions of Techno-Nationalism and Techno ..." <https://www.researchgate.net/publication/250147633_The_Contradictions_of_Techno-Nationalism_and_Techno-Globalism_A_Historical_Perspective> accessed November 2, 2021

[7] Talbot S and Drouin D, "La Dependance-Independance a L'egard Du Champ Et L'utilisation Du Feedback De Performance En Activite Physique" (1986) 11 Canadian Journal of Education / Revue canadienne de l'éducation 20

[8] *Chinese state capitalism*. Chinese State Capitalism | Center for Strategic and International Studies. (2021, October 19). Retrieved November 2, 2021, from https://www.csis.org/analysis/chinese-state-capitalism.

David Edgerton, one of the leading experts om the field of Techno-nationalism, defined it as "Techno-nationalism is a way of understanding how technology affects the society and culture of a nation."

The Analytical School of thought, led by Maurice Charland excruciates "the use of technology to advance nationalist agendas, with the goal of promoting connectedness and a stronger national identity."

French scholars utilised the technology in hand to standardise and efficiently handle various tasks themselves, which gave rise to the Techno-Nationalism.

Techno-nationalism is built on the premise that the world has entered a new era of systemic competition between the West's increasingly short-sighted laissez faire model and China's state-centric capitalism.

The concept of Techno-nationalism has been approached in different ways in different countries. Since the concept is known to have given an identity to each country with what they specialise in, there are various associated terms for the same. Cotton Textiles and Steam power are associated with Great Britain, Chemicals with Germany, mass production and conceptualisation in the US as well as the electronic consumption good for Japan.

Rise of Techno-Nationalism:

Techno-nationalism is not process which can be seen for the establishment of an institution on the first day. It is rather a process with time and understanding to initiate a sense of nationalism amongst the people. The best idea of following the concept of Techno-Nationalism was given by Beijing wherein it sought for all the industrial companies to buy their electronic devices from the country itself and not from foreign resources. The idea was to mainly give a qualitative approach towards the economic building and self-reliance which is quintessential.

What led to this techno-nationalistic approach by China was the barricade being put on the 5G networks and the ownership of the bandwidth by United States of America.

Techno-nationalism builds itself on the ground that the world has entered a new era of systemic competition between the West's increasingly laissez-faire model which is both short sighted and ineffective and China's state-centric capitalism..

Most of the democracies and some dictatorships are looking to implement technology-enabled mechanisms which are not only effective but also empowering the vastly different standards

around data privacy, surveillance, transparency, censorship. digital money and intellectual property.

Important Factors effectively giving rise to Techno-nationalism are as follows:

The Industrial policy revolution:

As history speaks for itself, the industrial policies proposed by various countries to boost their economies and develop an ideal situation which will boom their nation's earning has mostly been unsuccessful. The bureaucratic process, red-tapes, corruption, lack of empathy towards the working style of the industries has really made the plan a contradiction of what the idealists have always desired.

Contrary to the opinion which has been yielded in the past, the industrial policy of the revolution came into existence with the idea behind the country outgrowing their policy and understanding. The past 15 years has boomed the economy of countries such as China, USSR and United States. China, one of the front-runner of the policy, decided to build the bullet trains. With a belief to make one of the most powerful and outsourcing trains which can run up to 250-300 km/hr, the country was easily able to secure the best method of its own industrial function and

To counter the ideal situation which was existing at that point of time in the country, it became essentially important for the system such as BEIDOU and Huawei to the Microsoft and Apple exists in America.[198]

Huawei has reported a sum total of investment of 4.5 billion Dollars with the help of state support to set its footprints across 170 countries along with employing of 180,000 workers and 10,000 engineers. Huawei also was able to invest sum of 15 Billion Dollars in the year 2018.

Role of Human Capital:

The capitalisation of Human resource as a method of strategic tactic for countering the ongoing cold-war has been used by both China and USA where they are inscribing the Talent Pool, Networking, Research and Development to convert the Human source into assets.

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[9] Winfrey, "Apple: The inside Story of Intrigue, Egomania, and Business Blunders" (1998) 41 Business Horizons 88

[10] *Chinese state capitalism*. Chinese State Capitalism | Center for Strategic and International Studies. (2021, October 19). Retrieved November 2, 2021, from https://www.csis.org/analysis/chinese-state-capitalism.

The competitive landscape which arose out of Techno-globalism came with the existence of the Microsomes which are manufacturing chips. Two Chinese government-backed companies, Quanxin Integrated Circuit Manufacturing (QXIC), and Wuhan Hongxin Semiconductor Manufacturing Co. (HSMC), have used the various financial incentives and subsidies provided by the Government to hire engineers from Taiwan and Hong-Kong, where the best of the brains have invested themselves into Taiwan Semiconductor Manufacturing Co.(TSMC). It is said that by 2025, China will hire up to 3000 Taiwanese engineers for the purpose of establishing the best outcome resource factory.[199]

The Chinese economy seeks to revive itself when it comes to competing with the countries such as United States, Poland, Russia and other powerful entities of Japan.

To counter the Chinese Microsomes and hiring of their native engineers, the Taiwan Government is seeking to plant an improved version of all the schemes with which they will be able to provide for the quality work as well as enjoy quantitively.

Rise of Digital Threat to the system:

The rise of technology led to countries shifting their systems from the physical to digital form. The shift was on a massive scale which included the storage and transfer of data in the finances, bank records, privacy of the security codes, scientific upgradation which required a drastic change and security as the security systems were easily decoded. The case of data breach of 3 billion users of Yahoo in countries such as United States, United Kingdom, Japan, India and Germany led to an important factor for the data system of these countries. Many of the discrete information were leaked of the leaders of the country which acted as a threat to the national security. Thus, the countries decided had to establish their own security system that would prevent their sovereignty from getting harmed.

Rise of Cyber warfare and threat to defence structure:

With the drastic transition made over the period of time, which is also called the digitisation of the structure and the system, the modern warfare and the defence security system has drastically

[11] "China's Increase in Demand for Resourceful Engineer" *Global Times* (January 25, 2020) <https://thediplomat.com/2020/09/can-china-become-the-world-leader-in-semiconductors/> accessed October 31, 2021

moved towards the digital space wherein the data and the codes to any action have been safely stored. However, with a well-known fact that the not everything is a safe and secured space like any other system. The breach of any of the above security system can result in controlling and harming the countries and wage wars. Not only damaging, but the security codes can result in the leakage of the security system which can be misused by any of the nemesis to that country. Countries such as USA have claimed the threat which is possessed by the Cyber hackers is of a huge level and needs to be understood and tackled with advanced system and a systematic transition is required to securitise the defence mechanism.[200]

Involvement of the Academic Institutions:

Techno-nationalism needs the importance of growing and constantly renovating the idea of preventing any losses with which their economy can be hindered for self-sufficiency. The universities, colleges and academic excellency institutions seek to provide for the quality of education and work which helps not only in policy making but also elaborating on the constant functioning and relieving the burden and dependency on hiring people from the outside.

Global Scenario:

Techno-Nationalism in Japan:

The country has been quintessential in terms of exceeding and developing itself in all the magnitudes. With the rise of the Meiji period, the Japanese culture and its nationalistic approach was at its with the supremacy of Japan reigning over the western counterparts. The Japanese believed "The Japanese are the epitome for culture and progress in the society. The only place where the East is not superior than the west is science and technology and for that, we shall make and take the requisite steps and propagate a new dawn for the East." With that effect, Japan with its Nationalistic policy, they were able to industrialise themselves in the field of steel and wood

[12] Fowler M and 7 D, "Techno-Nationalism Isn't Going to Solve Our Cyber Vulnerability Problem" (*Help Net Security*December 3, 2020) <https://www.helpnetsecurity.com/2020/12/07/techno-nationalism-cyber-vulnerability-problem/> accessed October 31, 2021

[13] *The Hacked & The Hacker-for-hire: Lessons from the Yahoo data breaches (so far)*. The National Law Review. (n.d.). Retrieved November 2, 2021, from https://www.natlawreview.com/article/hacked-hacker-hire-lessons-yahoo-data-breaches-so-far.

energy with its efficiency and effectiveness. Cut to a century later, Japan developed its military strategy and usage of modern warfare technology in their Japanese-Self Defence Forces(JSDF) which ensured stability in their Techno-nationalism as they focused on creating a strategy which shall help them in countering any effective attack from their "nemesis." Japan accordingly, with its national vehicle company, Mitsubishi developed its tanks as well as military vehicles which were technologically much advanced compared to other countries which ensured the stability. The utility of Technology has been increased to digitise their policy and the function of their military vehicles and scientific researches have been made distinctively.

Techno-Nationalism in Canada:

Being one of the fastest growing economies of the world and already a developed country, Canada is known to have been a place where Techno-nationalism was used in its truest sense to unite the country and create a sense of Canadian Pride amongst the citizens. With its self-governance provided by the British Parliament in 1768, it became a necessity for the Governors and the rulers of the Autonomous state of Canada to take part and develop a strategy which will help them in ruling with much more efficiency. The state of Canada was divided and there was barely any connection from the West of Canada to the East of Canada. In 1881, to bridge the gap, the Autonomous Government passed the Canadian Pacific Railways which would not only connect both the sides. Thus, CPR was the only means and one of the original concepts of railroad networks in Northern America.[201] This made Canada a united state which connected in Montreal in the West to Brunschwick. The idea was to create a sense of common unity amongst the people of Canada as well as give out the best possible mode of conducting themselves. The CPR celebrated its 170th Birthday and it is considered to be one of the first of Techno-nationalism concepts to unite the country and give an impression to the other commonwealth countries to create their own path.

In the landmark case of ensuing to protection of data and privacy, the Canadian Competition Commission fined a sum of 6.9 million Canadian Dollars against Facebook for "false privacy claim and threatening the security of the citizen."[202]

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[14] "Canadian Pacific Railway- Our History" (*Canadian Pacific Railway*October 29, 2019) <https://www.cpr.ca/en/about-cp/our-history> accessed October 31, 2021

[202] *Facebook v/s Canadian Competition Bureau* (2020) Government of Canada Government of Canada (Canadian Competition Bureau)

11 Li, C. (1994). Yinand of east - the institute of current world affairs (ICWA). Retrieved November 2, 2021, from http://www.icwa.org/wp-content/uploads/2015/09/CL-12.pdf.

Techno-nationalism in Indonesia:

The south-eastern island country in Asia is known to have been one of the best destination for holiday and travels in the world and is known for the beauty, However, a lesser known idea which is quite canny to think of, Indonesia has been one of the front-runners in the field of Techno-nationalism in the third world countries. In 1976, the Indonesian Government launched the Industri Pesawat Terban Nusantara or the IPTN, which was for space travel and research technology.[203] The Government owned industry was successfully able to launch its first license based helicopter in 1981 which was exported to countries like US and USSR for the development of their own national helicopters. With the immense success rate and efficiency in manufacturing, a further investment of 2 billion dollars was made by the Government to the company.

The IPTN was also growing on a larger scale which would amplify itself to all the citizens of the country. Not only becoming the most powerful tool secure their legitimacy in the world with an identity, the Indonesians became so proud of their company that they started identifying themselves as the "Westerners of the east." [204]

The Indonesians also started investing in the field of global development and technologies through aircraft building and manufacturing. At the 20th Science congress held in Helsinki, Indonesia was able to identify itself through the idea of creating the best possible space-crafts and one of the fastest growing tech-industries which helped them to associate with the Chinese and American scientific research study.

The Techno-nationalism also monetarily helped Indonesia as it helped the country in space missions as well as collaborating with the European Union in 2005.

Techno-Nationalism in China:

Techno-nationalism was on quite a rise in the Chinese economy with the establishment of ideas and inferences that were quintessential in holding the power of the state and to secure the action

12 Buck, J. H. (1967). The Japanese self-defense forces - JSTOR. Retrieved November 2, 2021, from https://www.jstor.org/stable/2642617.

203 Aerospace I, "Pt. Dirgantara Indonesia (Persero)" (*PT. Dirgantara Indonesia (Persero)*2019) <https://www.indonesian-aerospace.com/> accessed October 31, 2021

204 Amir S, "Nationalist Rhetoric and Technological Development: The Indonesian Aircraft Industry in the New Order Regime" (*Technology in Society*June 27, 2007) <https://www.sciencedirect.com/science/article/pii/S0160791X07000279> accessed October 31, 2021

of people. China took its stimulation from the fact that Techno-nationalism plays an important role in strategically growing a country's power both Internally and externally.

To strengthen the National security on digital platforms, the Chinese Government decided to put a ban on the online social media platforms such as Facebook, Twitter, YouTube and WhatsApp with the fear that they might result in harming the national security and data leakage might harm their citizen.[205]

To further strengthen the action on Techno-Nationalism, the Chinese Government also imposed a fine of 1.3 billion dollars on one of the biggest vehicles company, Didi, for violating the privacy of the citizen and asking them to remove any such action which might result in harming the privacy of the consumers as well as chances of data leaks.

With the drastic change coming in the structure of the global technology, a clear distinctive change was observed. With China's growing influence in Africa and a 7 trillion dollar worth corridor route throughout Europe and Africa, the Techno-Nationalism has drastically brought in the changes as well as provide for the quality of work and understanding which is going beyond the presumptive ideas of destroying the world's economic policy. The rapid changing alliances and shift taking place has become quintessential for the Indians to look at. With the Techno- Nationalism rapidly changing the face of South-East Asia, this is an important ideal which must be looked at with a deeper point of how not only National security of the country is on the line but also the economic relations with other country. The rise and direct inclination towards the Chinese regime, the Indian Government must also focus its shift towards the global development and the economic rule which it needs to look at. The growth is inevitable if the Indian Government strategizes itself towards the development and understanding with its capability to far off places.

Thus, the Techno-nationalism process brought about a drastic change in the structure of its global diplomacy and gave them an opportunity to change and shift their alliances, which helped them grow diplomatically. Interestingly, the fact is that India's development of Techno-nationalism, which has been growing over the past decade, has been able to attract a lot of diplomatic ties with which there is an increase in the global reputation as well as strengthening the economic growth.

Techno-nationalism in India:

[205] Eurodop, "The Chinese Legacy" (*Eurodop*) <https://www.eurodop.it/prodotti/jinghe-gou-qi-igp.html> accessed October 31, 2021

With one of the fastest growing nations, India has become quintessentially a contestant in becoming the front-runners of the 4th Industrial Revolution around the world through the economic, technological and nationalistic approach. As said by M.A Shelkar "Techno nationalism is driven by the denial of technology.", India has been the front-runner in developing its technology with the idea of becoming self-dependent and sufficient. India, in its various fields of Science and Technology, is famously known for the Super-computers which are based on micro-chip technology. India began its journey of Supercomputers in the year of 1987 with the denial of a super-computer. The then Prime Minister, with the cabinet approval passed the Centre for Development of Advanced Computer (C-DAC) which would work on establishing a centre that would produce the best of the Super-computers with efficiency and effectiveness.[206]

In 1991, India was able to develop its first Super-computer PARAM 8000 which boosted India's identity with the front-runner of Super Computer, challenging countries such as United States and the European Union. The importance of PARAM became so important and the technique with which it rose to the ideal, in the year 1991-92 itself, India exported PARAM 8000 to countries like USA, Germany and Russia to research upon the development of such a highly efficient Super Computer. India, over the period of 3 decades, drastically shifted its gear towards develop the micro-chips that are used both in the field of Information and Technology as well as in the field of Scientific travel. The micro-chip industry, with its necessity to become self-sufficient by looking at the infringement of privacy made by the Chinese micro-chips in the security system of other countries. The micro-chip has various purposes added to its efficiency which helps in the growth and development of semi-conductors which are used in cars, space vehicles, electronic goods and other day to day needs of both consumers and the Government. What counted in as one of the important aspects of India's self-sufficiency is the responsibility to manufacture the chips at a minimum cost. With Intel and Bharat Micro-chips technology coming in to effect, the concept of "Atma-Nirbhar Bharat" has led to a change in the structure of the Chip industry as well as has secured its position on global level to provide for the best quality and understanding of Techno-Nationalism.

[206] India Gof, "Extraordinary Gazette of India, 1987, No. 893 : Directorate of Printing, Government of India : Free Download, Borrow, and Streaming" (*Internet Archive*August 25, 1987) <https://archive.org/details/in.gazette.e.1987.893> accessed October 31, 2021

The landmark case of Tik-Tok in 2019, led to the Madras High court in ordering the ban of the app which was posing as a threat not only to the national security but also in terms of promoting the "pornography culture" in India.[207] In June 2020, post the security reasons, the Government of India banned Tik-Tok and 59 others posing a threat to the national security. And to ensure its ability to establish a safe and secure platform to enjoy the same concept, mobile applications such as Moj and MX Takatak were let in and used in place of Tik-Tok.

The Government of India, was also able to find out that the Chinese owned "WeChat" has been responsible for data breaching as the company was collecting data from India and selling it to the Chinese Government which helped them in keeping an eye on the people of India. This could have lead to bigger disasters and as a result can cause harm and hindrances to the people as well as the sovereignty of the country.[208]

However, Techno-Nationalism in India needs it legitimacy through correct legislations and actions which would channelise India's structure and aim to secure efficiency and self-sufficiency. Apart from holding policy, it is also the need of the hour to provide for the best possible action that will help the Government and all stakeholders in containing and securing the idea of Techno-Nationalism, either in the field of Science and Technology or in Communication and broadcasting.

Issues and challenges for National Security in Techno-globalism & Techno-nationalism

One of the greatest challenge to the idea of Techno-Nationalism is the idea of pursuing it at the same time ensuring the globalisation should ensure that there remains a sufficient balance. However, the following are the issues which pertain Techno-Nationalism and its linking to the country's security and Techno-globalism:

Lack of Proper Definition:

Techno-Nationalism has been defined by various school of thoughts that have been adopted by Government of various countries. The definitions have varied and fitting in accordance to the opinion and the shoes of the leaders that have perceived those definitions similar to their lines. However, with a country like India, which has multi-diverse understanding and various branches

[207] Muthukumar V. Telecom Regulatory Authority of India & Ors." (*Global Freedom of Expression*July 12, 2019) <https://globalfreedomofexpression.columbia.edu/cases/muthukumar-v-telecom-regulatory-authority-of-india-ors/> accessed October 31, 2021

[208] Goldkorn J, "India Permanently Bans TikTok and WeChat" (*SupChina*January 28, 2021) <https://supchina.com/2021/01/27/india-permanently-bans-tiktok-and-wechat/> accessed October 31, 2021

of thoughts that opine on one issue, certainly need a broad and a general idea which can be seen, read and understood by the people. The quintessential idea is to develop a definition which is in accordance to the environment present in the Indian Peninsula and that has roots deep-stated to our core values. The lack of proper definition of Techno-Nationalism has led to the difficulty of subjective opinion of the individuals and not leading to any conclusive factors. This is another reason why National Security Act of 1980 cannot adapt itself to these ideas. In fact, it can also make the Information Technology Act, 2000 focus on a proper definition of Techno-Nationalism and Techno-Globalism.

Economic growth underlying the essence of Techno-nationalism:

Often one does not realise that the Economic growth is an important factor for the growth of a nation as it secures the stability and removes many a hindrances that arise from within. With the belief of creating a mutual trust amongst each other, the concept of national security of these nations tend to move towards a softer side. In India, to improve the economy, many a times the overlook has resulted in internal disturbances and posing a threat to the country's sovereignty. Be it 2008 Mumbai attacks, 2006 Delhi Blasts etc. One must ensure that the overlook through Technological growth and securing the position first of safety and then move forth with the Economic growth and security.[209] However, it must be seen that the extreme securing of the safety of the nations through modern warfare, technological warfare might result in the anarchic system around the world. The balance and combination which shall help in both perspective must be looked at, as it secures any potential threat to the nation and has not been looked upon.

Difference in ideological approach:

Differences in ideological values may also prompt the resurgence of competitive techno-nationalist policies. As previously noted, and as a recent study suggests, policymakers in different ideological systems seek to implement technology-enabled mechanisms that enforce and empower vastly different standards around data privacy, surveillance, censorship, transparency, digital money, and

[209] Mahadevan, P. (2019, June 28). *A decade on from the 2008 mumbai attack: Reviewing the question of state-sponsorship*. ICCT. Retrieved 2021, from https://icct.nl/publication/a-decade-on-from-the-2008-mumbai-attack-reviewing-the-question-of-state-sponsorship/.

intellectual property.[210] The approach of the leadership towards the Security system during the tenures of different political parties in the country has resulted in a disbalance.

Limiting of Technological Growth with Nationalistic conservatism :

As mentioned in the Techno-globalism section, the growth of the nation has risen on various multitudes with each and every country taking help and steps part by part and not solely depending on one country. With vast majority of changes and globalisation process, the concept of Techno-nationalistic policies hinder the global growth and affecting the distribution of wealth. The idea of moving technology, hand-in-hand with the Techno-nationalism idea must be seen with understanding, which has not been seen by any country, yet. The Nationalistic conservatism aims to prevent trading and utility of foreign goods in their native country. This shall act as hindrance

Anarchic National Security law present in India:

National Security Act, 1980 remains to be the main legislation that ensures the national security of the country which is supplemented by other smaller acts. However, to fight and understand the modern day cases, it needs to live up to the expectations and regulations that cater the modern day problems.

Several countries such as the United States of America, Germany as well as Canada have brought in major changes to their national security act. The laws are not only regularly keeping up with the changes made, but also include the actions to the threats posed by the Digital platforms on the internet and prevent any harm made to their Sovereignty.

United States senate inserted Section 105A to its National Security Act to handle the National Intelligence Program which will help in dealing cases that will help in dealing the online threat to the national security of the country.[211]

Germany, in its latest amendment brought in the Information Technology Security Act, 2021 which has come in handy and has been influential in terms of dealing with actions such as internet

[210] Initiative for U.S.-China Dialogue on Global Issues, "Chained to Globalization: Why It's Too Late to Decouple" (*Initiative for U.S.-China Dialogue on Global Issues*2020) <https://uschinadialogue.georgetown.edu/publications/chained-to-globalization-why-it-s-too-late-to-decouple> accessed August 10, 2021

[211] "National Security Act, 1947" (*50 USC Ch. 15: National security*2018) <https://uscode.house.gov/view.xhtml?path=%2Fprelim%40title50%2Fchapter15&edition=prelim> accessed August 15, 2021 .

threat to the Sovereignty of the country and makes it a punishable offence for the ones who have violated and tried to pose as a threat to the security of the land.[212]

Canada passed its National Security Act in 2017 which dealt with the threats which were posed both physically and virtually as well as punished the ones with severe effect. [213]

Way forward to address issues includes the following:

Need for a definition:

Techno-nationalism is an idea which has been establishing as a security and providing the best possible solution to protect the Sovereignty and integrity of the country. For countries that have adopted the definition have to stuck to the concept of Techno-nationalism as well as work towards it. India needs to define the idea of Techno-Nationalism and Techno-Globalism both philosophically and pragmatically which will make it easier for the people of the country to understand and develop their opinions. The idea will also make it easier for the Legislators and the Government to put forth the idea and find the ways with which they can suit and frame their policies in accordance to the need of these words as well as formulate legislations. The definition should be crisp, clear and easy to understand and give a way out for creating a balanced view.

Striking a balance between Techno-nationalism and Techno-globalism:

Techno-nationalism and Techno-globalism are two terms that cannot go hand in hand as they propagate a vision which aim to secure to different positions for a country. However, with an age rising, there is dire need to strike a balance between the two ideas. The common grounds are much needed which will help in creating an atmosphere that will help in securing the safety of the nation through Technology i.e Techno-nationalism and move forward with the idea of the trading with the world. The need is to provide concrete solutions to preventing the domination of one philosophy over another. A slight preference can be given to securing the national security of the country, however, must not exaggerate the idea on others.

Constant Monitoring of the mobile applications to avoid the data breach and privacy:

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[212] Germany Gof, "Germany: Electronic Securities Act Enters into Force" (*The Library of Congress*2021) <https://www.loc.gov/item/global-legal-monitor/2021-06-29/germany-electronic-securities-act-enters-into-force/> accessed September, 2021

[213] Branch LS, "Consolidated Federal Laws of Canada, National Security Act, 2017" (*National Security Act, 2017*October 28, 2017) <https://laws-lois.justice.gc.ca/eng/acts/N-16.56/index.html> accessed October 31, 2021

[213] Yue CS and Pangestu ME, "Rise of East Asian Regionalism" (*Universitas Indonesia*November 24, 2005) <https://scholar.ui.ac.id/en/publications/rise-of-east-asian-regionalism> accessed October 31, 2021

Techno-nationalism as an idea does not only mean the ways to secure one's nation safe through various modes, but also by identifying the systems which might infringe upon the internet safety of the users and rooting them out of the system. This requires constant monitoring of the system and keeping a constant check on the software, applications and their data as to where it is going. With constant monitoring, one needs to legitimise the IT Act,2000 with the National Security Act.[214] However, there is a need to change the NSA and bring a revolutionary legislation which can combine with the other acts and make a stronger system. The Data privacy bill and other legislations, policies must be secured by the Government to ensure the rights of the citizen are not hindered as well as keeping an interest in creating better space that shall help in the growth of security service systems in the country.

Usage of modern-day technology to improve the condition of Techno-Nationalism:

The development of technology has become quintessential in the modern-day times wherein there has been drastic improvement made. The technologically advanced devices such as drones, space satellites are useful to keep an eye out on the space and on the borders of the country. Drones can be used in the form of a space monitoring device as well as constantly update the borders which have been impactful. With the question of limiting the view of the drones and other perceptive objects, it is necessary to know the right way with which these devices can be used to help the individual countries to act in their self defence and improve the scope to a tactical development. Drones can be very useful and is one of the most preferred objects to substantiate their idea of Techno-Nationalism.

Utilisation of Artificial Intelligence to strengthen Techno-Nationalism and security surveillance:

Artificial Intelligence is one of the most powerful tools of strength in the modern day warfare and in the institutionalised 21st century. The usage of Artificial Intelligence can be best described when it comes down to securing the idea of day to day monitoring the regions which require extra cautiousness. China uses the Artificial Intelligence to keep a check and monitor the action of its citizen based on the data filled and entered along with the check through the 626 million motion

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[214] India Gof, "The Personal Data Protection Bill, 2019" (*Lok Sabha*2019) <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf> accessed October 31, 2021

India , G. of. (2019). *The Information Technology Act, 2000 ———— arrangement …* Retrieved November 2, 2021, from https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf.

activated cameras present through out the country.[215] Any action that intends to cause threat to the sovereignty or any how cause ruckus in the country can be easily identified. However, it must be noted that the extreme adoption of Techno-Nationalism and infringing upon the rights of the citizen in the name of national security must be justified in its own eyes. The quintessential idea of any space to come in and provide peace does not need an action which might hurt the basic purpose of the existence of the land. Thus, Artificial Intelligence must be explored on a higher scale and effectively put to use.

Building the critical infrastructure and the need of National Security Act's reformation:

The quintessential of any country's national security law should be in congruence with a structure such as the ideal position of protecting any of the information which is in relation to the idea of protecting the crucial infrastructure. The crucial infrastructure which is a wide range of industry which is on the verge of transforming a nation's economy from good to better or boon to bane, needs a bigger and better way of ensuing its safety. With the rise of the digital encryption of this infrastructure, there is a high possibility of inclusion of such actions which might infringe on the privacy and the data holding in all of the networks. and update their understanding and provide to a legislation or secured process.

With the development of the critical structure on such a high level as well as providing for the best quality of action being possible, it is high time for the countries to secure their subjects of economy through legislation. The data services can be secured through encryption but a higher provision is much in need for the purpose of punishing and impugning in case of a breach.

Germany, one of the first countries to pass a legislation to secure the critical infrastructure and their data protection from any potential threat.[216] The quintessential idea behind the law is to secure the critical infrastructure from any potential threat that might indulge and hack into the software system of the country and as a result can conversely, damage the structure and cause huge amount of losses. The importance of the act has been such, that it has been read along the National Security

[215] McGregor G, "The World's Biggest Surveillance System Is Growing-and so Is the Backlash" (*Fortune*November 3, 2020) <https://fortune.com/2020/11/03/china-surveillance-system-backlash-worlds-largest/> accessed October 20, 2021

[216] "What You Need to Know about the Cybersecurity Act of 2015" <https://www.lw.com/thoughtLeadership/lw-Cybersecurity-Act-of-2015> accessed October 10, 2021

Act of Germany, with which any person involving in the data breach shall be resulting a punishment of up to ten years as well as a fine of up to ten thousand euros.

India, a nation holding a huge amount of critical infrastructure through data encryption, needs to hold and create a substantive quality of work with which it can secure the same as well. There is a need to hold these structures as a part of the national interest and can therefore be structured in such a manner that they can take action with which they can create a better vision. Since it will be a matter of national interest, it will be better off to include to such provisions under the National Security Act and provide for actions, penalties and reforms with which the legitimacy remains intact and does not indulge in such actions that will make it impossible for the country to not abide by. This action will also make the success of establishing a bigger and better attitude for the people to stern themselves with and give their best possible efforts.

Adopting and improvising on the tactic of Neo-Techno-nationalism:

As already mentioned above, the idea of finding common grounds between Techno-Nationalism and Techno-Globalism is the quintessential for one to secure their position on global level. The recent development of Neo-Techno-nationalism is a subjectively newer concept which tries to bring in the opinion of ensuring the Techno-Nationalism and Techno-globalism to go hand in hand. Neo-Techno-Nationalism supports the idea of Government to find ways of ensuring and providing the local manufacturers and providing them the platform to compete on a global level with the competitors. However, the quintessential idea being Neo-Techno-Nationalism is to provide a breather to Techno-globalism. It is not giving a complete balance to the idea of Techno-Nationalism, rather slowing the pace down to the wire and being a support to the concept of Techno-Nationalism. The balance is a need and it is a requirement which one must fulfil, for which the idea of improvising the concept of Neo-Techno-Nationalism is the need of the hour.[217]

Conclusion:

The concepts of Techno-globalism and Techno-nationalism have found their way as an important aspect of national security. However, with the rise of technology across the border and economy, emphasis on the idea of Techno-globalism and Techno-nationalism is important for country like

[217] Yamsada A, "Neo-Techno-Nationalism: How and Why It Grows" <https://ciaotest.cc.columbia.edu/isa/yaa01/> accessed October 31, 2021

India, where the move is towards becoming the global leaders of today and tomorrow in field of technology through effective partnership.

THE CITIZENSHIP AMENDMENT ACT (2019) - AN INSIGHT INTO ITS EFFICACY IN THE STATE OF ASSAM.

- ZENNAT PARVIN

Abstract

Post-independence India has maintained its position as a responsible and humane society that commits to protect its citizens. Shockingly however the legislative development in the recent past has not been able to live up to its commitment. A classic example in this regard is the Citizenship Amendment Act, 2019 which puts religion on the forefront in granting citizenship to non-citizens belonging to six religious identities- Hindus, Sikhs, Jains, Buddhists, Parsi and Christians. The CAA, 2019 is a draconian law that casts a negative impact more specifically to the state of Assam. The CAA's implications for the state of Assam is different from the rest of India due to the NRC exercise and the Assam Accord. Under the CAA, the cutoff date for persons belonging to the six communities is 31st Dec, 2014 which clashes with NRC deadline of 24th March, 1971 in Assam rendering the entire NRC exercise futile. The CAA also violates provisions from the Assam Accord of 1985. This paper seeks to address the impact on CAA, 2019 with special emphasis of the state of Assam. The northeast has seen its fair share of unabated influx of illegal immigrants and the state of Tripura is a classic e.g. in this regard. History plays a significant role in the context of illegal migration from Bangladesh. Migration in Assam has been taking place from the dawn of history. However after the British annexed Assam, large scale population movement from the south i.e. east Bengal and now Bangladesh has been an ongoing problem over the past few centuries. Initially this movement was for economic reasons only but with the approach of independence, it started adding communal and political flares. This paper seeks to give us a picture of the newly amended Citizenship Amendment Act, 2019 and how it grossly affects the state of Assam.

KEYWORDS- Citizenship, CAA, NRC, Assam Accord.

INTRODUCTION

India a country of a billion plus boasts itself of being one of the largest democracies that flaunts itself of its multifaceted religious identities. The Indian subcontinent is home to a conglomeration of multiple interfaith communities that reside together as citizens under a common identity encircling themselves under the umbrella term "Indian." Post-independence India has maintained its global position as a responsible and humane society that commits to protect its citizens. Shockingly however the legislative development in the recent past has not been able to live up to its commitment. A classic e.g. in this regard is the Citizenship Amendment Act, 2019 which puts religion on the forefront in granting Citizenship to non-citizens belonging to six religious identities- Hindu, Sikhs, Buddhists, Jains, Parsis, Christians. The CAA, 2019[218] is a draconian law that casts a negative impact more specifically to the state of Assam. The CAA's implications for the state of Assam is different from the rest of India due to the NRC[219] exercise and the Assam Accord[220]. Under the CAA, the cutoff date for persons belonging to the six communities is 31st December, 2014 which clashes with the NRC deadline of 24th March, 1971 in Assam rendering the entire NRC exercise futile. The CAA also violates provisions from the Assam Accord.

Assam is in many ways a country of exceptional interest. Hemmed in as India is by the sea on the South-east and south-west and by the lofty chain of Himalayas on the north, the only routes between it and the rest of Asia which are practicable for migration on a large scale lie on its north west and north east confines, the so called Aryans and many later invaders such as Greeks, Huns, the Pathans and the Mughal entered India from the north west and north east through Assam have come from the great hives of Mongolian race in west China. Many of these immigrants passed into Bengal, but in that province they have as a rule become merged in their population.[221]

Migration is a dynamic process which is propelled by a number of adverse circumstances such as flood, war, religious persecution, political upheavals etc. Both positive and negative impacts are associated with migration. It can contribute towards economic prosperity in the destination country while alleviating poverty in the sending countries. However migration into an already densely populated country or area can lead to new challenges as it may lead to conflict over sharing limited

[218] CAA- Citizenship Amendment Act, 2019 hereinafter stated as CAA, 2019.
[219] NRC- National Register of Citizens.
[220] Assam Accord of 1985.
[221] http://ignca.gov.in/Asi_data/9404.pdf visited on 16th April, 2022.

population sustaining resources and civic amenities, poorer living conditions, health and sanitation.[222]

The migration from Bangladesh to Assam has significant implications for its demography, economy, socio-political framework and environment. The migration that started at the end of 19th century from areas in today's Bangladesh continues unabated making it a large scale migration problem.[223]

History of migration of Bangladeshi illegal migrant

The unabated influx of the illegal migrants from Bangladesh into Assam and the consequent perceptible change in the demographic pattern of the state, has been a matter of grave concern. It threatens to reduce the Assamese people to a minority in their own state, as happened in Tripura and Sikkim. History plays a significant role in the context of illegal migration from Bangladesh. Migration in Assam has been taking place from the dawn of history. However after the British annexed Assam, large scale population movement from the south i.e. east Bengal and now Bangladesh has been an ongoing problem over the past few centuries. Initially this movement was for economic reasons only but with the approach of independence, it started adding communal and political flares.

Transcending back to the British domination in Assam, when Lord Curzon partitioned Bengal in 1905, Assam was a Chief Commissioner's province. It was merged with the new Muslim majority province of East Bengal. This led to political unrest in the country ultimately culminating into India's independence. In 1911 the British government annulled the partition of Bengal. Assam was restored its status as province and was now placed under a lieutenant governor. The Assamese fear of losing their identity and being swamped by Bengalis go back to their merger and even earlier. This fear has been aroused by both the Bengali Hindus dominating the administrators and the professions, and the Bengali Muslims altering the demography of the province. The Bengali Muslims belonged mostly to the peasant profession who occupied vacant land and put virgin areas under cultivation.[224]

[222] https://digital.library.adelaide.edu.au/dspace/bitstream/2440/97379/4/01front.pdf visited on 16th April, 2022.
[223] Ibid.
[224] https://www.satp.org/satporgtp/countries/india/states/assam/documents/papers/illegal_migration_in_assam.htm visited on 16th April, 2022.

In January 1838, the judicial and revenue department of the British Company Raj ordered that, "in the districts comprising in the Bengal division of the Presidency of Fort William, the vernacular language of those provinces shall be substituted for the Persian in judicial proceedings, and in the proceedings relating to the revenue, and the period of twelve months from the first instance shall be allowed for affecting the substitution." Bengali thus came to be imposed on Assam- an imposition for which the Bengali clerks rather than the British Sahibs were blamed. This subsequently became the historical genesis of a conflict between the Bengalis and Assamese linguistic communities in the north east that lingers on even to this day.[225]

When the demand for partition was raised, it was visualized that Pakistan would comprise of Muslim majority provinces in the west and Bang-e-Islam comprising Bengal and Assam in the east. The partition did bring about a sea change in the situation. An international border now separated Assam and East Pakistan. Population movement from East Pakistan continued but it was initially mostly of Hindu refugees, fleeing from religious persecution. Unlike the West, where refugee movement lasted for a few months only, in the case of the East, this spread over several years and is still continuing. Along with Hindu refugees, Muslim infiltrators continued migrating into Assam for economic reasons. The movement of Hindu refugees into Assam got largely arrested due to anti-Bengali riots and as a result of violence in the wake of insurgency in the state. However, Hindu refugee movement from Bangladesh has continued to Tripura and West Bengal. Illegal migrants from Bangladesh into Assam are now exclusively Muslims.[226]

There is a tendency to view illegal migration into Assam as a regional matter, affecting only the people of Assam. Its more dangerous dimension of greatly undermining our national security is ignored. The long cherished design of East Pakistan/ Bangladesh, making inroads into the strategic land link of Assam with the rest of the country can lead to severing the entire land mass of the North-East, with all its rich resources from the rest of the country.

History of the Assam Accord

The influx of Bangladeshi illegal immigration into Assam has been an ongoing problems even prior to formation of Bangladesh. It is estimated that the issue had begun in the 1920's when a

[225] https://www.livemint.com/mint-lounge/features/focus-assam-s-complicated-tryst-with-caa-11577418654545.html visited on 16th April, 2022.
[226] Ibid.

huge influx of illegal immigrants came from East Bengal who encroached on the lands reserved for grazing in Assam. The communal policies initiated by the then leader of the Assam provincial Muslim League, S.M. Sadullah further aggravated the issue. There was a rapid increase in the inflow of Muslim population in the state while in 1940, East Pakistan was created. All these led to sense of identical crisis especially in the minds of the indigenous Assamese. The first ever migration into Assam took place during the Noakhali Riots of 1946 from East Pakistan which led to swelling up of the demography of Assam by the influx of illegal Bangladeshi immigrants. This led to a huge revolt of the student local leaders urging for the identification and deportation of illegal migrants from the state of Assam. They demanded postponing of elections until the names of such foreigners were deleted. This mass movement is popularly known as Assam agitation.[227] In this movement people from all quarters participated along with the AASU[228] and AGSP[229] which was basically a non-violent protest, where the student leaders declared the closure of all educational institutions as well as official establishments state as well as central in November 1979 and restricted all candidates from filing nominations for the upcoming elections. On December 10th 1979 which was the last date for filing up of nominations a statewide bandh was declared by AASU. In the process a scuffle between the police and student leaders who resisted Begum Abida Ahmed from filing nominations for contesting elections and in the process a student leader named Khorgeswar Talukdar was brutally beaten up by a police force led by UK PS Gill who later was declared as the first martyr of the Assam Movement. While on 7th October, 1982, another member of the student's union Anil Bora was killed who was leading a procession from Nagaon district to Hojai in support of a bandh declared by AASU, by those who supported the Bangladeshi immigrants. All these led to serious resentment among student leaders and soon turned the non-violent protest into a violent massacre known as Nellie massacre on 18th February, 1983 where the local Assamese people killed around 2191 suspected illegal migrants in 14 villages of the Nagaon district. 855 supporters of the Assam agitation also had to lay down their lives, proceeding which the then Prime Minister of India, Rajiv Gandhi came to Assam and signed the historic Assam Accord in 1985.[230]

Provisions of the Assam Accord

[227] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868334 visited on 16th April, 2022.
[228] AASU- All Assam Students Union.
[229] AGSP- Assam Gana Sangram Parishad.
[230] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868334 visited on 16th April, 2022

The first four clauses of the Assam Accord deals with provisions relating to resolving of the issue of illegal immigration from Bangladesh which entails charting out a comprehensive blue print and making provisions for giving constitutional as well as legal protection to the Assamese people.

Clause 5.1 mentions that the for the purpose of detection and deletion of foreigners 1st January, 1966 shall be the base year. Similarly clause 5.2 mentions that all those people who came to Assam prior to 1st January, 1966 including those amongst that whose name appeared on the electoral rolls used in 1967 elections shall be regularized. Clause 5.3 states foreigners who came to Assam after 1st January, 1966 and up to 24th March, 1971 shall be detected in accordance with provisions of the Foreigners Act, 1946 and the Foreigners Tribunals Order, 1964. Clause 5.4 mentions names of foreigners so detected will be deleted from electoral rolls in force. Such persons will be required to register themselves before the Registration of Foreigners Act, 1939 and Registration of Foreigners Rules, 1939. Clause 5.5 states Government of India will undertake suitable strengthening of the government machinery. Clause 5.6 states on the expiry of the period of ten years following the date of detection, the names of all such persons which have been deleted from the electoral rolls shall be restored. Clause 5.7 mentions all persons who were expelled earlier but have since re-entered illegally into Assam shall be expelled. Clause 5.8 states foreigners who came to Assam on or after 25th March, 1971 shall continue to be detected, deleted and expelled in accordance with the law. Immediate and practical steps shall be taken to expel such foreigners. Clause 5.9 mentions the Government will give due consideration to certain difficulties expressed by the AAASU/AGSP regarding implementation of Illegal Migrants Determination by Tribunals Act, 1983.

Clause 6 mentions constitutional, legislative and administrative steps shall be taken to provide, preserve and promote the cultural, social, linguistic identity and heritage of Assamese people. A very important feature of the Assam Accord is that post implementation of the provisions, additional provisions are added showcasing how much of the action has been taken.

Clause 7 states that the government takes this opportunity to renew their commitment for the speedy all round economic development of Assam, so as to improve the standard of living of the people. Special emphasis will be placed on education and science and technology through establishment of national institutions.

Clause 8.1 mentions that the government will arrange for the issue of citizenship certificates future only by the authorities of the central government.

Clause 8.2 states specific complaints shall be made by the AASU/AAGSP about irregular issuance of the Indian Citizenship Certificates will be looked into.

Another important provision of the Accord is clause 9 which mentions that international borders shall be made secure against future infiltration by erection of physical barriers like walls, barbed wire fencing and other obstacles at appropriate places.[231]

The most striking feature about the Assam Accord is that it mentions the actions that were taken at the end of each clause.

Conflicting provisions of the Assam Accord and the Citizenship Amendment Act, 2019

The Assam Accord although was a historic step towards protecting the identity and fate of the Assamese community, several doubts were raised by different scholars. The constitutional validity of the Assam Accord along with section 6A of the Citizenship Amendment Act, 1955 was challenged before the Supreme Court for the first time by Assam sammilita mahasangha sangha[232] on the ground of being against the general rules of uniformity, because as regards the determination of Citizenship both Assam Accord and section 6A of CAA, 1955[233] made separate provisions for determining citizenship in Assam. Apart from that since AASU was a non-registered organization it was not in the capacity to give effect to a memorandum of settlement with the central government and the treaty lacked the support of the Parliament of India.

The new amendment of 2019 made significant changes by inserting sub section 2 clause b where the persons belonging to six communities- Hindus, Buddhists, Sikhs, Jains, Parsis and Christians who came from the three countries- Bangladesh, Pakistan and Afghanistan before 31st December, 2014 are exempted by the central government under the Passport Act 1920 and the Foreigners Act of 1946 shall not be treated as illegal immigrants. Even under section 6B certificates of registration or naturalization were to be granted to persons as mentioned under clause b of sub section 2 of section 1. This Act also made new provisions regarding exemption of certain class of foreigners. However the sea change bought about by the Act was citizenship to be decided on the basis of religion.[234]

Citizenship Amendment Act, 2019 and the NRC

[231] https://assamaccord.assam.gov.in/portlets/assam-accord-and-its-clauses visited on 16th April, 2022.

[232] Assam Sanmilita Mahasangha v. Union of India, WP(C)) 562/2012.

[233] CAA, 1955- Citizenship Amendment Act, 1955 hereinafter stated as CAA, 1955.

[234] Ibid.

The National Register for Citizens is a registry to be meant to be maintained by the government of the India for the state of Assam. It is expected to contain the names and certain relevant information for the identification of genuine Indian citizens in the state. The register was first prepared after the 1951 census of India. Since then it was not updated until the major updation exercise conducted during 2013-2019. The government also declared that it would also prepare a register on similar lines with the NRC for the rest of India.[235]

Under the CAA, the cutoff date for persons belonging to the six communities is 31st Dec, 2014 which clashes with NRC deadline of 24th March, 1971 in Assam rendering the entire NRC exercise futile.

As regards the state of Assam, it has history a history shaped by migration so the people of Assam fear that it will primarily benefit illegal Hindu Bengali migrants from Bangladesh who have settled in large numbers across the state. The Assamese fear that if citizenship is granted to Bangla-speaking Hindu immigrants, they will outnumber Assamese speaking people in the state. Taking Tripura as a living e.g. where Bengali speaking Hindu migrants from Bangladesh now dominate political power pushing the original tribal population to the margins. Moreover the CAA will provide citizenship to illegal non-Muslims migrants from the three countries and who have entered India before 31st December, 2014, an honest NRC should exclude illegal migrants of all religions. There is nothing wrong per se with the exercise of detecting illegal migrants irrespective of religion but to discriminate on the basis of religion is against the secular ethos especially when CAA does not clarify that it will cover people who have faced religious persecution.[236]

Conclusion

A silent and invidious invasion of Assam has been taking place for several decades and successive governments have failed to stem this demographic onslaught. The problem of illegal infiltration has been viewed as a as a local problem affecting the people of Assam. Therefore concrete steps should be taken on a war footing to ensure that borders are as nearly sealed as possible and the unabated flood of infiltration should be monitored on a frequent basis.

[235] https://en.wikipedia.org/wiki/National_Register_of_Citizens visited on 16th April, 2022.
[236] https://www.indiatoday.in/india-today-insight/story/everything-you-wanted-to-know-about-the-caa-and-nrc-1630771-2019-12-23 visited on 16th April, 2022.

The newly passed CAA, 2019 and its efficacy in the state of Assam is a crucial factor that needs to be viewed through myopic lenses. Given how this ethno-nationalism is structured around linguistic, land and common homeland, there are concerns that the regularization of illegal Hindu Bangladeshi migrants will further fuel an outsider-insider narrative, which if left unchecked will have negative consequences for social stability and law and order in the state.[237]

[237] http://www.ipcs.org/comm_select.php?articleNo=5641 visited on 16th April, 2022.

CONCEPT OF REVERSE MERGER IN INDIA: ISSUES & CHALLENGES

- YOGESH THAKUR

Abstract:

Corporate reorganization is characterized as a central course adjustment and system for an association, which influence the manner by which the association is organized. Corporation rebuilding acquires the significant changes top and base level of an association. The speed of corporate rebuilding has expanded since the start of advancement time. Because of improved rivalry, FDIs, globalization, free progression of capital across the nations, and crack of exchange hindrances, Mergers and Acquisitions have become more well-known lately. Consolidation is quite possibly the most widely recognized type of non-natural corporate rebuild. Corporate organizing was the unique way taken on by organizations to expand their benefits and smooth out their working in the cutthroat situation. The idea of converse consolidation has arisen as an enchanted charm for corporate rebuilding and henceforth saving corporate duty. Reverse consolidations/merging (counting consolidations with unique reason securing organizations, or SPACs) and self-filings are the two most famous options in contrast to IPOs. Reverse consolidation/merger is the most popular way for an organization to become public as it likewise accounts various tax reductions and makes a simplicity to burden suggestion. The scope of the paper is to understand the laws and regulations in relation to concept of reverse merger. The research methodology used in this paper is Doctrinal, analytical study, sources are secondary which includes books, legal statutes, case studies, legal journals, articles, etc. The objective of this article is to find out the issues in practice of reverse merger and lacunas in the present law. This study will help us to get a basic knowledge reverse merger and need of improvements in the present law.

Keywords: Reverse Merger, Organization, Acquisition, Company, Shareholder, Directors, Management, Assets and Liability.

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1. Introduction:

With the initiation of the possibility of the world as a ―Global town and Globalization being the trendy expression, the latest procedures are being embraced and acknowledged by the monetary world to preserve a period of time; increment the current advantages and assist the cycles associated with different tasks. Reverse/Invert Merger is the result of such creative practice reception over the all-around present conventional IPO course to turn into a public recorded organization. It assists a privately owned business with disposing of the problems engaged with the IPO cycle and velocities up the interaction for public listing in the market. The fundamental contrast between an IPO and a Reverse Merger is that an IPO permits an organization to open up to the world and furthermore assists it with raising capital; though Reverse consolidation permits it just to open up to the world (Augusto Arellano-Ostoa and Sandro Brusco). In any case, a reverse merger is favored these days by an enormous number of little firms who are in a rush to get recorded absent a lot of exertion and extensive posting prerequisites engaged with the IPOs.

Mostly, the procuring organization's finance is normally rebuilt as a feature of the exchange in the converse consolidation. It has additionally alluded to as a converse Merger or inverts IPO or opposite Takeover. Converse incorporation is a streamlined and assisted process for a private firm to turn into a public corporation. Essentially, a public organization is just a hull and the investors of the privately-owned business obtain larger part offers and control of the board in the public organization. The privately-owned business' investors trade their portions in the privately owned business for shares in the public organization, in this way actually making the privately owned business a public corporation without going through the IPO interaction[238].

In India, the process of the Reverse Merger (RM) was administered by Section 394 of the Companies Act, 1956. Few of the arrangements which represented consolidations and procurement were additionally administered through RM. Notwithstanding Section 394 the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code or SAST) directed RM. Preceding the 2011 code there was the Takeover code of 2009 which managed consolidations overall.

The course of converse consolidation is finished via an inverted IPO, it is the cycle by which a private enterprise could invert converge with a public corporation and open up to the world without giving

[238] Max Chen, Reverse Merger Takeover---Shortcut of Financing in the United States, (2014) (last visited on March 25, 2022 at 5:00pm)

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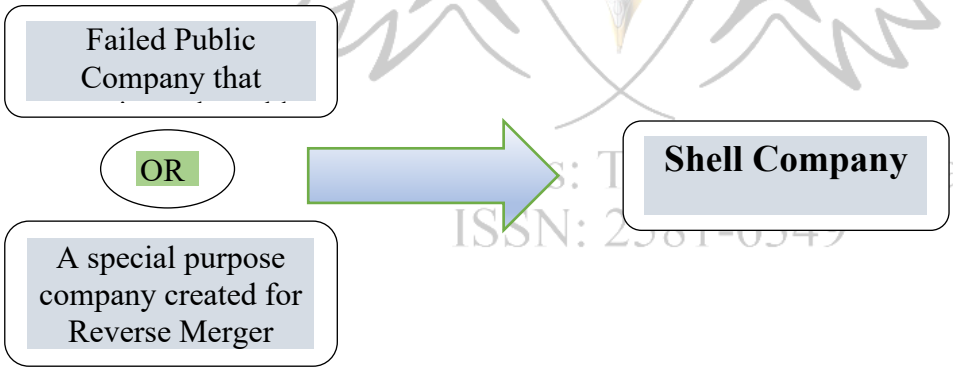
an IPO. The investors of the private company trade their portions for portions of the public organization in this manner making the privately owned business a public corporation without going through a course of IPO and making now is the right time and savvy and there is an interchange from private to public. Post-consolidation, the working organization's resources, and liabilities are moved to the hull organization, which is possessed by the previous working organization's investors. Other fundamental components of Reverse consolidation, the Reverse Stock split, and the shell organization's name being changed to the working organization's name, however, the chief officer and investor don't interchange. Henceforth, it may be very well reasoned that the working organization's business is as yet constrained by a similar gathering of investors and overseen by similar chief officers and officials, yet it is presently held inside a public organization. Essentially, the working organization has prevailed over the crux of the organization's public status and is accordingly now general.

1.1 Public Shell Company:

• A registrant with no or ostensible activities and either none or ostensible resources, these resources comprising exclusively of endlessly cash reciprocals and normally no liabilities[239].

• It fills in as a mode for deals like being utilized for Reverse Mergers and so on.



The public shell organization is utilized by a private substance to open up to the world. This plan is utilized to open up to society rapidly and at negligible expense. Whenever a privately owned business oversees a public shell organization, the shell is organized to be the parent organization and the purchaser's organization turns into its auxiliary. The proprietors of the privately-owned business trade

[239] Barry I. Grossman, Esq. Ellenoff Grossman & Schole LLP (last visited on March 26, 2022 at 5:00pm)

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their portions in the privately owned business for stocks in the public organization. They have currently dealt with a greater part of the load of the shell, and are carrying a public organization[240]. This peculiarity has additionally acquired a ton of significance in a portion of the quick arising economies like China where a lot of organizations are taking this course to get them recorded in unfamiliar business sectors. This thought of one nation's organization attempting to get recorded on the stock trade of another country by converging with a public recorded organization of that nation is known as Cross Border Reverse Merger. This is being utilized by Chinese corporations to get to the US stock trade. At this time, the Chinese privately owned business attempts to take on the US-state level corporate regulation and furthermore utilizes this system to get speedy funding (Jordan Siegel, Yanbo Wang).

It is actually important that the name ―reverse‖ conclude from the way that albeit the shell organization gains the privately owned business, the privately-owned business gets by (Augusto Arellano-Ostoa and Sandro Brusco).

2. Concept of reverse merger:

A reverse Merger is characterized by two types initially where a holding organization converges with an auxiliary or investee organization and furthermore where a benefit making organization is converged with the misfortune making organization. The word Reverse consolidation has not been characterized explicitly under any of the rules be that as it may; High Court has examined three tests for converse consolidation:

i) Resources of the Transferor Company being more noteworthy than Transferee Company.

ii) Equity cash-flow is to be given by the transferee organization in accordance with the obtaining surpasses its unique offered cash-flow.

iii) The difference in charge in the transferee organization plainly showed that the current plan was a course of action, which was a regular delineation of taking over by converse bid.

[240] https://www.accountingtools.com/articles/2017/5/13/the-public-shell company#:~:text=A%20public%20shell%20company%20is,buyer's%20company%20becomes%20its%20subsidiary (last visited on March 28, 2022 at 7:00pm)

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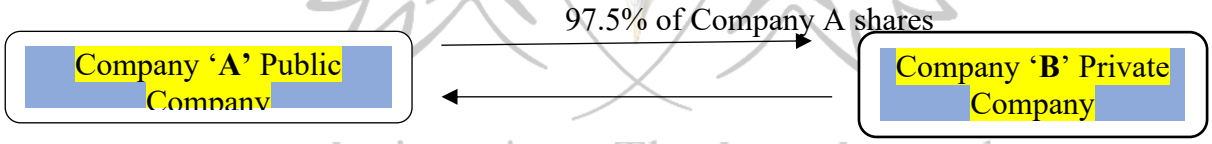
Court held that by all appearances the plan of consolidating a flourishing unit with a wiped-out unit couldn't be supposed to be insulting the arrangements of section 72A of the Income Tax Act, 1961 since the item is hidden in this arrangement was to work with the consolidation of wiped out enterprises unit with a sound one. This consolidation is for the most part taken on for two primary reasons:

i) It is an elective strategy for privately owned businesses to become open to society, without going through the long and tangled course of customary IPO. In this interaction, a privately owned business gains a public element by possessing the greater part portions of the public element. Generally, in the society "shell" is an essential part of opposite consolidation exchanges which is a freely recorded organization without any resources or liabilities. The word "shell" is used on the grounds that the main thing staying from the present organization is its corporation shell arrangement.

ii) Tax saving is one more allurement for such kind of consolidations. Section 72A of the Income Tax Act 1961 gives an appealing assessment help to a combination of debilitated organizations with solid and productive organizations to exploit convey forward of misfortunes.

Reverse Merger Transactions:



• Organization A is an outdated furniture seller. • When the consolidation is shut, organization A is going to sell its resources and its investor will accept their installment. • Organization A turns into the holding organization of B enterprise.	• Organization B is a monetary gathering and is a secretly held organization. • Organization B designated another administration and another governing body in organization A.

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• Organization A progressions its name and its ticker in NASDAQ.	• This organization turns into an auxiliary of organization A

Source: Augusto Arellano-Ostoa and Sandro Brusco, Understanding Reverse Mergers: A First Approach, Working Paper 02-17, BUSINESS ECONOMICS SERIES 11, P 9 (2002).

3. Examining Latter Reverse Merger Cases:

Currently, the Merger and procurements are prevailing universally. In the United States, converse consolidations are incredibly normal, but this idea of converse consolidation is additionally arising in India. The opposite incorporation has been an option by which the organizations open up to the world without IPOs. Some significant investigations on the converse consolidation situations in India are defined as:

ICIC bunch incorporated with ICIC bank - This consolidation occurred in the year 2002 which prompted an expansion in the balance sheet of the organization. The reasonable of converse consolidation was to make a general bank that would loan to both entities and retail debtors and after the consolidation, another substance named ICICI bank was framed.

Godrej Soaps converged with Gujarat Godrej Innovative Ltd - preceding that the Godrej cleanser was a beneficial organization with a turnover of ₹437 crores and later it converged with a misfortune making organization with 6 crores turnover and the subsequent enterprise was named Godrej Soaps. The Cross Border turnaround consolidation[241] is the point at which an unlisted public company in one country needs to get recorded in unfamiliar stock trade by converging with a public enterprise in that

[241] Jordan Siegel Yanbo Wang, Cross-Border Reverse Mergers: Causes and Consequences, Harvard Business School Strategy Unit Working Paper No. 12-089 (2013) (last visited on March 28, 2022 at 6:00pm)

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far-off country. There are sure Indian Enterprises enrolled their selves for Cross Border converse consolidation.

Videocon d2h incorporation with Silver Eagle Acquisition Corp - In 2015 Videocon d2h company sold its 33.5% of value offers to an American unlimited check organization known as Ko Silver check at procurement Corp. This cross-line converse consolidation was made to the qualification register of the US Stock Exchange.

3.1 Features of Reverse Merger:

The accompanying guide should be complied with before the consolidation is named as a converse consolidation:

1. The worth of the enormous organization's resources should be more noteworthy than the worth of the little organization's resources.
2. The quantity of value money to be given as thought for the procurement should be too much capital before the securing.
3. The net benefits inferable from the resources of the huge firm should outperform those of the little organization (subsequent to reducing all indictment with the exception of tax assessment and barring strange things).
4. Converse consolidation needs are deeply grounded prior to joining the arrangement.
5. It is important to decide the honest evaluation of the procurement thought.
6. Consolidations should be to the greatest advantage of general society.
7. Determine that the exchange has brought about the receipt of tax reductions under the Income Tax Act of 1961.
8. At the point when the consolidation has been turned around, the little enterprise is to proceed with its exercises, and the huge business stops existing.

3.2 DIFFICULTY IN SELECTING IPOs OVER REVERSE MERGER:

In a converse consolidation, a working privately owned business assumes command over and converges with a torpid public organization. These torpid public organizations are alluded to as "shell enterprises" since they seldom have resources or total assets other than the way that they go with an

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IPO or elective documenting procedure already. There are sure reasons for picking reverse consolidation over IPO[242]s:

Complicated and costly cycle: The recording of IPO is a costly issue it incorporates many costs like lawful expenses, book-keeping expenses, and different charges for documenting offers so commonly the organizations change to the course of converse consolidation which is more affordable and simple to document the process for opening up to the world. Smaller organizations need fast financing and consequently, it will be useful for themselves.

Time inclusion: The documenting of IPO to open up to the world usually takes more time to 9 months or considerably longer to send off an IPO through the converse consolidation is a seriously less complex cycle, and it includes a short time duration.

Involved Risk: In many cases, the converse consolidation technique is likewise less dependent on economic situations. In the event that an organization has gone through months arranging an IPO through conventional options and market conditions fall apart, the cycle might be postponed and subsequently, a great deal of time and exertion is squandered. A converse consolidation, then again, lessens the risk on the grounds that the organization isn't as dependent on advancing finance.

4. Challenges:

4.1 Market Risk: An IPO doesn't ensure that the organization will at last complete the interaction. Administrators can endure many hours getting ready for an IPO, although, assuming economic situations become negative to the suggested offering, those hours will have turned into a squandered exertion. Anyway chasing after a Reverse Incorporation limits this gamble. As referenced before, the IPO joins both the go public and capital elevating capacities and converse incorporation is exclusively an instrument to change over a privately owned business into a public substance, the cycle is less reliant upon economic situations in light of the fact that the organization isn't proposing to raise

[242]David N. Feldman and Steven Dresner, Reverse Mergers: And Other Alternatives to Traditional IPOs, (2009) (last visited on March 29, 2022 at 5:00pm)

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capital. Hence Reverse incorporation works exclusively as a transformation system, economic situations have minimal bearing on the contribution. While the cycle is embraced to endeavor to understand the advantages of being a public substance[243]. Consequently, dissimilar in an IPO, economic situations modest effect deciding the planning of converse incorporation.

4.2 Raising Finance:

Finance for a converse incorporation arrangement is organized as a trade of offers though, in an IPO, it is with the implantation of assets into the enterprise that opens up to the world. Reverse Merger companies will more often than not have lower monetary record liquidity and higher influence[244]. They likewise have a lower propensity for insider investors to pay off and depend intensely on PIPE (private interests in public value) financial backers for support. There is contention, that's what which states, Reverse Mergers and IPOs (in the U.S.) are not straightforwardly similar as the two essential advantages of opening up to the world, viz., raising finance and liquidity, are to a great extent missing for the Reverse Merger entities. In any case, there are enterprises, which are exceptional via considering outline and simultaneous raising finance. In this way, converse incorporation companies are nearer fill in for IPOs.

4.3 Costs:

Converse Mergers are interesting as a direct result of their minimal expense and the short handling span. As per the Stag Financial Group, a converse incorporation counseling enterprise, ―a Converse Merger exchange can be finished for as low as $50,000, making the converse incorporation procedure an exceptionally appealing method for opening up to the world, particularly for little enterprises. This is just an essential expense, wherein the whole expense of the arrangement construction will likewise include the expenses of examined explanations, a critical reasonable level of investment costs, lawful charges, and an assortment of different expenses just to get down to business. Conforming incorporated each class of cost still the expense of opening up to the world utilizing Reverse Mergers

[243]Marv Dumon, Reverse Mergers: the Pros and Cons, available at http://www.investopedia.com/articles/stocks/09/introduction-reverse-mergers.asp (last visited on March 29, 2022 at 5:00pm)

[244] Gleason, K.C., Jain, R., and L., Rosenthal (2006) _Alternatives for going public: Evidence from Reverse Takeovers, self-underwritten IPOs, and traditional IPOs‘ Working Paper, Florida Atlantic University(last visited on March 28, 2022 at 6:00pm)

is extremely low contrasted with the expense of an IPO[245]. Subsequently, Reverse Merger is appealing to little enterprises, and likewise, it empowers enterprises that are generally not prepared for the market to open up to the world. Companies not prepared for an IPO probably won't have the foundation to endure the tensions of public posting like customary reviews and expanded revelation necessities and are bound to bomb not long after they open up to the world. RMS gives a stage where the few companies can tolerate becoming public.

4.4 Assurance of stocks:

Global experience presents that public organization investors frequently auction their stocks with malafide goals. These may incorporate deliberate non-revelation of gigantic liabilities like forthcoming claims, and fake corporate administration. An extra reasonable level of investment is expected to shield.

4.5 Proprietorship:

Frequently in an IPO, a submerged recommends or even demands that the organization collect more cash in the contribution than it sensibly needs bringing about more weakening of possession. In a Converse Incorporation, minor accounts will quite often be raised, permitting prior financial backers, business administrators, and the board to hold a higher elixir of their organization's holding. Because public organizations regularly have a lot higher valuation than their private partners, public organizations need to sell minimum stock (possession) to collect a similar measure of cash as their private partner, and along these lines acknowledge less proprietorship weakening[246]. Hence, Companies deciding on Reverse Mergers[247] don't fundamentally interchange their proprietorship arrangement at the opening up to the populace day.

4.6 Effect of reverse merger on investors:

[245] Arellano-Ostoa and Brusco, Reverse Mergers completed between 1990 and 2000 in the US stock markets,(2002) (last visited on March 23, 2022 at 5:00pm)
[246] Reverse Mergers, A truly efficient concept to raise capital for your company right from scratch, P4. ,http://swissfinpartners.com/yahoo_site_admin/assets/docs/Concept_of_Reverse_Mergers_SFP.10865025.pdf (last visited on March 25, 2022 at 8:00pm)
[247] RM firms release on average only 3% of their shares to free float at the time of going public. Ioannis V. Floros and Kuldeep Shastri, A Comparison of Penny Stock Initial Public Offerings and Reverse Mergers(last visited on March 29, 2022 at 10:00pm)

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As talked about in the last area, Converse Incorporation represents a few dangers to investors since the Shell organizations associated with the exchange are by and large unfortunate entertainers with next to zero business activities yet keep on posting on perceived stock trades. Investors of public organizations are occupied with converse incorporation achieved from such exchanges. As we have seen previously, for the most part, Converse Incorporation exchanges are organized as an obtaining by a public firm of the multitude of offers in or resources and business activities of a private organization. As though, the previous pay for the securing by giving an enormous amount of new offers with casting ballot rights in the organization to the proprietors of the last option. The thought offers might be enhanced by different types of thought, which incorporate money, investment opportunities, switchable notes, and acquire-outs (e.g., execution stocks). The choice to settle on Converse Merger instead of conventional techniques for opening up to the world about the first sale of stock proposition various advantages and expenses for various classes of partners, for example, the executives of the private element, the private investors and the investors of the joined, post-exchange company. These investors incorporate both the "advertisers" who hold by far most of the offers as well as the "sponsor" who control just a little cut of the substance in Reverse Merger exchanges. Advertisers and spectators wouldn't be ensnared in an IPO, therefore the privately owned business would give shares straightforwardly to general society in such an exchange, delivering a shell pointless. Perceiving that the advantages and dangers of Reverse Mergers sway different gatherings in an unexpected way, the review tends to each useful party separately underneath.

4.7 The executives of Private Corporation:

In a large portion of the events, the chiefs of private substances go about as a significant power behind the choice of the private company to open up to the society. At last, they end up being a possible objective for the enticing endeavors of gatherings that have attended in such an exchange. As we probably are aware taking an organization public is an intricate interaction. For the most part, the board faces extra time pressure, expanding guidelines, and a developing gamble of investor suits from a more extensive scope of investors both during and after the exchange. At the point when organizations are private, they face generally barely any revelation and administration rules. Nonetheless, when they open up to the world, organizations face significant guideline affecting both the public organization as well as the actual exchange. At long last, it is the administration that

experiences the developing gamble of investor claims as the offers are exchanged into a more extensive arrangement of grip[248].

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4.9 Investors of Public Shell:

Investors of the public shell substance might be ordered as advertisers and onlookers, advertisers. They have great motivators to take part in Reverse Mergers. They likewise control a stable of shell organizations held for that reason. Spectators, then again, in all probability have never finished off a situation in a working public organization that is wrapping up its issues sending the organization's normal stock to a virtual zero costs. In this step, Sponsors get cash expenses for their monetary warning administrations connected with the exchange as well as a little cut of the value in the post-exchange joined element. Also, Bystanders hold a similar limited quantity of normal stock in the public shell both when the exchange, gets a monetary advantage just through their value position. Although, they have no cash-based costs connected with the arrangement (without a doubt they are probably not going to try and know about the arrangement ahead of time). Curiously, they just

[248] General Accounting Office, Report to the Chairman, Committee on Small Business, U.S. Senate, Small Business Efforts to facilitate Equity Capital Formation 21-22 (sept. 2000) (last visited on March 27, 2022 at 5:00pm)
[249] General Accounting Office, Report to the Chairman, Committee on Small Business, U.S. Senate, Small Business Efforts to facilitate Equity Capital Formation 21-22 (sept. 2000) (last visited on March 28, 2022 at 4:00pm)

experience the potential gain of the expansion in the worth of their value after the shell gets resources and activities by the Reverse Merger.

4.10 Investors of Interlinked Companies:

A significant likely gamble to investors of the consolidated organization is the negative estimating tension on the security because of any shame financial backers might connect with a Reverse Merger exchange. Whether this chance damages financial backers is an experimental inquiry. The response to this question would reveal significant insight into the whole approach banter with respect to the arrangements. Assuming such a shame exists, the protections of organizations that have gone through a Reverse Merger will exchange at a markdown to their friends. Also, chief officers of such organizations can almost certainly order higher remuneration than their companions to conquer the negative sign of being related to corrupted organizations[250].

5. Conclusion:

Progressively perceiving the significance of converse consolidations as of late, it is obvious that it will before long become one of the most famous methods of public posting all over the planet. This has been conceivable as it elevates a number of advantages to the consolidating organizations that go through the course of converse consolidation. Organizations in both created and agricultural nations are finding that bringing downtime and cost is the best way to deal with acquiring an upper hand over their rivals, underscoring the need for arrangements that satisfy the two targets comprehensively. Generally speaking, a country with a decent corporate regulation, more grounded control and more reliable inspecting organizations is the best situation to receive the full rewards of converse consolidations. Indeed, even the tax breaks under converse consolidation have advanced the restoration of wiped-out units and have likewise supported the rise of the country's economy.

Bibliography:

[250] Iman Anabtawi, Secret Compensation, 82 N.C. L. REV. 835, 836-37 (2004); Marcel Kahan & Edward B. Rock, How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law, 69 U. CHI. L. REV. 871(last visited on March 28, 2022 at 9:00pm)

- Full Speed Reverse! The Reverse Merger: Backing into Wall Street‘s Worst Idea By JAMES MOLLOY (Associate) and MICHAEL FUNG (CFA) Mirus‘ Technology Group (last visited on March 28, 2022 at 7:00pm)

- UNDERSTANDING REVERSE MERGERS: A FIRST APPROACH , By: Augusto Arellano-Ostoa and Sandro Brusco (last visited on March 26, 2022 at 9:00pm)

- Paper on ―The Truth About Reverse Mergers‖ By: WILLIAM K. SJOSTROM, JR (last visited on March 25, 2022 at 9:00pm)

- Europlus Capital Limited: A study on Reverse Merger, by Sandeep Poddar (last visited on March 26, 2022 at 4:00pm)

- Iman Anabtawi, Secret Compensation, 82 N.C. L. REV. 835, 836-37 (2004); Marcel Kahan & Edward B. Rock, How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law, 69 U. CHI. L. REV. 871 (last visited on March 27, 2022 at 10:00pm)

- Reverse Mergers, A truly efficient concept to raise capital for your company right from scratch,P4. (last visited on March 25, 2022 at 9:00pm),http://swissfinpartners.com/yahoo_site_admin/assets/docs/Concept_of_Reverse_Mergers_SFP.10865025.pdf

- RM firms release on average only 3% of their shares to free float at the time of going public. Ioannis V. Floros and Kuldeep Shastri, A Comparison of Penny Stock Initial Public Offerings and Reverse Mergers (last visited on March 28, 2022 at 9:00pm)

- Marv Dumon, Reverse Mergers: the Pros and Cons, available at http://www.investopedia.com/articles/stocks/09/introduction-reverse-mergers.asp (last visited on March 24, 2022 at 4:00pm)

- Gleason, K.C., Jain, R., and L., Rosenthal (2006) _Alternatives for going public: Evidence from Reverse Takeovers, self-underwritten IPOs, and traditional IPOs' Working Paper, Florida Atlantic University. (last visited on March 28, 2022 at 4:00pm)

- Khan M. Adil, Hassan Asim, A study on Reverse Merger in India: Tax Implications, p.no. 24-26, IOSR Journal of Economics and Finance (IOSR-JEF)https://www.iosrjournals.org/iosr-jef/papers/vol2-issue5/C0252426.pdf (last visited on March 23, 2022 at 5:00pm)

- Ojha Dr. Samiksha, Maheshwari Richa, Jain Star, Reverse Mergers: The Way Forward, p.no. 21-29 IOSR Journal of Business and Management (IOSR-JBM https://www.iosrjournals.org/iosr-jbm/papers/Vol10-issue3/C01032129.pdf (last visited on March 28, 2022 at 5:00pm)

- Bhattacharyya Priyanka, Analyzing Reverse Merger in India: Ease in Tax Implication, Vol. 2, Issue 1, May 2021
file:///C:/Users/user/Downloads/analyzing-reverse-merger-in-india-ease-in-tax-implication.pdf%20(1).pdf (last visited on March 27, 2022 at 9:00pm)

- Bhavna Gupta, Videocon d2h inks $375M deal with US blank cheque co; on track for NASDAQ listing, VCC, Jan. 6, 2015 http://www.vccircle.com/news/media-entertainment/2015/01/06/videocon-d2h-inks-375m-deal-usblankcheque-co-track-nasdaq

- Asquith, P., & Rock, K. A test of IPO theories using Reverse Mergers, SSRN - Working Paper Series, (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737742 (last visited on March 29, 2022 at 4:00pm)

- According to Hariharan Gopalakrishnan, Founder , MeritusJuris Corporate Counsel for Business Strategies, Start up Consulting, Corporate Laws, M&A, Contracts, Compliances, Will and Testamentary advisory, etc Corporate firm working with: Past : Arshiya International, Holcim (Ambuja Cements Ltd), Amforge Group (last visited on March 30, 2022 at 5:00p

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AVIATION LAW: AN ELUCIDATION

- MEHAK, SAURAV KATARIA & NIPUN GARG

ABSTRACT

Aviation law is the area of law that deals with flight, air travel, and the legal and business issues that arise as a result. Due to the nature of air travel, some of its jurisdiction overlaps with admiralty law, and in many circumstances, aviation law is considered a topic of international law. However, aviation law also encompasses the commercial side of airlines and their regulation. Aviation Law is a subfield of legal studies. Air Law is a broad perspective that encompasses the unique characteristics and requirements of the aviation industry. There is no regulatory body with the authority to enact air regulations that apply to all states legally, and there is no international law. However, the term "Air Law" refers to a system of tacit and explicit agreements that hold nations together. In this paper the authors have made a humble attempt to decipher and establish an elucidated vignette of this discipline of law.

KEYWORDS: Aviation; Air Law; International Law; Flying; Aviation Industry; Aerospace.

INTRODUCTION

There is no regulatory body with the authority to enact air regulations that apply to all states legally, and there is no international law. However, the term "Air Law" refers to a system of tacit and formal agreements between governments. Conventions are the terms used to describe these agreements. There are various conventions, including those in Chicago, Rome, Tokyo, and Geneva. It is a subset of law that deals with air transport operations and the legal and commercial issues that arise from them. This is a set of laws that control the use of airspace for aviation, as well as the advantages it provides to the general public and the world's governments. Around 1910, when German air balloons regularly trespassed over French territory, the first attempt to establish an air law was launched. The French government desired that both countries reach an agreement to address the issue. The 1910 Paris Conference favoured governments' sovereignty over the space above their boundaries.

It continued to expand when, following World War I, the first regular flight from Paris to London took off in 1909. In principle, Roman law and other ancient lund systems accorded the owner of the

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underlying land complete rights in airspace. The first rule particularly addressing aviation was a local ordinance adopted in Paris in 1784, one year after the Montgolfier brothers' first hot air balloon flight. Throughout the nineteenth century, several court cases involving balloonists were tried in common law jurisdictions.

INDIA'S AVIATION TIES

With 108 nations, India presently has bilateral Air Service Agreements (ASAs). While 72 foreign airlines serve India, four private domestic airlines — Jet Air, IndiGo, SpiceJet17, and Kingfisher – serve 35 destinations in 25 countries. The national airline, Air India, runs a number of international routes, including seven in North America, nine in Europe, 12 in the Gulf, two in the Middle East, two in Africa, and 13 in West and East Asia. India is a major player in the civil aviation business, with a sizable aircraft fleet. Sixty-six airlines provide scheduled air services to and via India, including 22 international carriers that fly through Indian territory.

The country is home to over 450 airports and 1091 registered aircraft. Apart from the three public sector airlines – Air India, Indian Airlines, and Alliance Air – India is also served by two commercial carriers – Jet Airways and Sahara India Airlines. Additionally, 41 non-scheduled air transport firms exist. Additionally, the Ministry of Civil Aviation has approved the creation of 34 applications for non-scheduled air transport operations.

India is not immune from global trends. Liberalization of the aviation industry began in 1986 and continues to this day. Private airlines now have access to domestic and international routes. India is liberalising its policies through bilateral air services agreements by granting enhanced traffic rights to multinational carriers.

India has suggested to ASEAN an open skies policy. Additionally, India provided additional frequencies and landing locations to SAARC nations. International freight is still subject to the open skies policy. Foreign tourist charter flight regulations have been loosened.

THE INTERNATIONAL AIRSPACE: A BRIEF EXORDIUM

International law typically recognises that a country's sovereign airspace encompasses both the airspace above and below its territorial seas. Territorial waters are defined as waters that extend 12 nautical miles from a nation's coastline. International airspace is defined as that which is not inside a country's territorial limits. By international agreement, a country may accept responsibility for

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managing portions of international airspace, such as those over seas or polar regions. For example, despite the fact that the airspace is international in nature, the US provides air traffic control services over a big portion of the Pacific and lesser portions of the Atlantic Ocean. The remainder of the northern Atlantic airspace is shared by Canada, Iceland, and the United Kingdom. Canada and Russia share responsibility for the airspace above the northern polar regions. There is no international agreement defining a country's airspace's vertical borders. While it is widely accepted that no government controls space, there is no international agreement defining the boundary between airspace and space. This is an issue that will demand attention as governments move toward increasing space flight and the potential of civilian space flight becomes more probable.

THE DELIBERATIONS OF CHICAGO CONVENTION

Prior to World War II, international flying was governed by a patchwork of hundreds of bilateral agreements. This arrangement was inefficient and inconvenient, but aviation technology had not yet advanced to the point where air travel could compete fully with established routes of international transport such as rail and ship. Prior to the war, little emphasis was placed on international aviation accords because to the focus on de-rising the escalating conflict. The conflict had the unforeseen consequence of eradicating previously insurmountable geographic and political obstacles to worldwide travel. With only three major world powers remaining, the opportunity to create a new framework for international aviation accords became rare. Additionally, the war accelerated advancements in aircraft technology that may be used for civilian use. Throughout the war, aircraft improved in speed, strength, and fuel efficiency – all of which aided civilian air trade significantly.

Due to wartime production requirements, the required factories and trained labour were already in place to support a successful civil aircraft manufacturing industry. Not only did the Second World War provide the means, but also the will for international aviation travel. The scale of the conflict instilled a strong desire in international nations to usher in a new age of collaboration and peace. To that purpose, soon before the conclusion of hostilities in Europe, representatives from 52 nations signed the Convention on International Civil Aviation. The agreement is commonly referred to as the Chicago Convention, after the city of Chicago, Illinois, where it was signed.

The Convention laid the groundwork for the future establishment of a unified set of international aviation laws. It featured provisions for safety and environmental rules, as well as a definition of each nation's rights and duties with respect to international aviation operations.

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The Convention's purpose was to replace hundreds of patchwork individual agreements with a unified structure that would allow international commercial aviation to thrive. It is applicable solely to international commercial air travel; military activities, domestic commercial air travel, and private aircraft operations are excluded. The Convention's articles establish the Member States' rights and duties. The articles serve as a guide rather than a comprehensive set of regulations.

The Convention recognises each country's sovereign interest in its own airspace, prohibits military aircraft and drones from flying over member countries without permission, prohibits monopolies, prohibits member countries from discriminating against each other's aircraft, requires that public airports and aviation facilities be made available to all member countries on an equal footing with domestic aircraft, and recognises each country's right to regulate air travel within its borders.

THE INTERNATIONAL CIVIL AVIATION ORGANISATION

The International Civil Aviation Organization is a United Nations organisation founded in 1944 with the mission of administering and governing the Chicago Convention, also known as the International Civil Aviation Convention. Currently, the organisation has roughly 193 member-States. Additionally, the ICAO has released recommendations on how to handle unruly passengers.

THE DENOUEMENT

Air Law is a broad outlook that encompasses the unique characteristics and requirements of the aviation industry. In such cases, the Council should notify all other states immediately of the discrepancy between one or more characteristics of an international standard and that State's equivalent national practise. Any kind of public transport is dependent on finite planetary resources. Aviation cannot be considered sustainable in the long run due to its reliance on finite resources such as fuel. Today's aircrafts benefit from advanced technology that enables them to fly effectively across vast distances. The global demand for air travel is rising as people's lifestyles improve. In exchange, society and environment must pay a price, accepting some downsides such as noise, pollution, and resource use. Aviation's primary environmental problem is noise. Though it has little long-term effect on the environment, residents living near airports experience communication disruption, sleeplessness, and deafness. Students have difficulties with learning acquisition, while patients in surrounding hospitals experience physiological effects as a result of the noise. It is noted that aeroplanes flying at least 10,000ft above the earth make no audible sound. To a large part, aircraft engines run via combustible fuel. The emissions produced by fuel combustion have a substantial

impact on the air quality within a few kilometres of the airport. When the aircraft is around 3 kilometres above sea level at the time of departure and 6 kilometres below sea level at the time of landing, the air quality is compromised. Additionally, if baggage and food carts are not properly kept, they generate smoke. Climate change is the gradual altering of a region's average weather conditions. It takes into account a variety of variables, including temperature, storm frequency, winds, and rainfall. Aircraft release greenhouse gases such as carbon dioxide into the atmosphere (CO2). Additionally, they release water vapour, which traps chemically active gases responsible for the transformation of the natural greenhouse gases ozone (O3) and methane (CH4).

REFERENCES

- Hudson, Manley O. "Aviation and International Law." The American Journal of International Law, vol. 24, no. 2, 1930, pp. 228–40, https://doi.org/10.2307/2189401. Accessed 23 Apr. 2022.

- Griffin, Kirk Y. "Aviation Law." GPSolo, vol. 30, no. 2, 2013, pp. 46–50, http://www.jstor.org/stable/23630804. Accessed 23 Apr. 2022.

- McKenry, Carl E. B. "Aviation Law Report." Lawyer of the Americas, vol. 14, no. 1, 1982, pp. 113–19, http://www.jstor.org/stable/40175973. Accessed 23 Apr. 2022.

- Newman, Arthur L. "Aviation Law and the Constitution." The Yale Law Journal, vol. 39, no. 8, 1930, pp. 1113–29, https://doi.org/10.2307/790370. Accessed 23 Apr. 2022.

- Schmidt, William G. "Aviation and Aerospace Law." The International Lawyer, vol. 31, no. 2, 1997, pp. 571–78, http://www.jstor.org/stable/40707337. Accessed 23 Apr. 2022.

- Pounian, Steven R., and Blanca Rodriquez. "RECENT DEVELOPMENTS IN AVIATION LAW." Tort & Insurance Law Journal, vol. 31, no. 2, 1996, pp. 149–68, http://www.jstor.org/stable/25763093. Accessed 23 Apr. 2022.

- Easton, John F., and Jonathan D. Butler. "RECENT DEVELOPMENTS IN AVIATION LAW." Tort Trial & Insurance Practice Law Journal, vol. 42, no. 2, 2007, pp. 301–26, http://www.jstor.org/stable/25763838. Accessed 23 Apr. 2022.

- Jacobini, Horace Bowman. "Observations on International Aviation Law." Social Science, vol. 23, no. 1, 1948, pp. 51–53, http://www.jstor.org/stable/41885747. Accessed 23 Apr. 2022.

- Savitt, Lisa J., et al. "Aviation and Aerospace: Law and Policy Developments." The International Lawyer, vol. 36, no. 2, 2002, pp. 507–26, http://www.jstor.org/stable/40707670. Accessed 23 Apr. 2022.

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FREEDOM OF RELIGION AND ITS CHANGING PARADIGM IN CONTEMPORARY TIMES IN INDIA WITH SPECIAL REFERENCE TO PROPAGATION

- SNEHAL KAPOOR

Introduction

In Western political history the concept of secular State and granting of religious freedom developed out of many different historical situations and philosophical impulses. In particular, they have been shaped by the process of secularizations of the State and sundering of the medieval fusion between the Church and the State. In practice, this separation hasn't been always been complete. The question, however, may be raised whether the separation between religion and the State in the absolute sense can ever be maintained in this age of ours, when political decisions affect every aspect of human life, especially moral and religious issues, which people hold important in their lives.

The right to freedom of religion as understood in Indian constitution

- All religions are equal before the State and no religion shall be given preference over the other.
- Citizens are free to preach, practice and propagate any religion of their choice.
- The objective of this right is to sustain the principle of secularism in India.

The Constitution of India guarantees the protection of certain fundamental rights. They are given in articles 12 to 35, which form Part III of the Constitution. Among them articles 25 and 26 are the two central articles guaranteeing religious freedom. Article 25 reads: (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law - (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I. - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

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Explanation II. - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26 reads: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –

(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property in accordance with law.

The religious freedom of the individual person guaranteed by the Constitution of India is given in clause (1) of article 25 that reads:

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

In precise terms, the Constitution makes it clear that the rights provided in clause (1) of article 25 are subject to public order, morality and health and to the other provisions of Part III of the Constitution that lays down the fundamental rights. Clause (2) of article 25 is a saving clause for the State so that the religious rights guaranteed under clause (1) are further subject to any existing law or a law which the State deems it fit to pass that

(a) regulates or lays restriction on any economic, financial, political or other secular activity which may be associated with religious practices, or,
(b) provides for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus[2].

Similarly Article 26 is the main article that provides the corporate freedom of religion governing the relation between the State and Subject to public order, morality and health every religious denomination or any section thereof shall have the right,

(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law.

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Clause (b) of article 26 guarantees to every religious denomination or any section thereof the right to manage its own affairs in matters of religion and clause (d) gives them the right to administer their property (institutions) in accordance with laws passed by the State. It is obvious from the language of the clauses (b) and (d) of article 26 that there is an essential difference between the right of a denomination to manage its religious affairs and its right to manage its property. This means that a religious denomination's right to manage its religious affairs is a fundamental right protected by the Constitution. No legislation can violate it except for health, morality and public order. But the right to administer property associated with religion can be exercised only "in accordance with law". In other words, the State can regulate the administration of religious property by way of validly enacted laws. Hence, in the exercise of individual and corporate freedom of religion as guaranteed in articles 25 and 26 of the Constitution of India, it is necessary to understand the judicial definition of 'religion' as given in article 25(1) and 'matters of religion' as provided in article 26(b). To define religion for judicial purposes has been an onerous job for the judiciary both in the Western countries and in India.

Judicial Perception of the Right to Freedom of Religion

The term 'religion' has not been defined in the Constitution and it is hardly susceptible of any rigid definition. The Supreme Court has defined it in number of cases[3]. A religion is certainly a matter of faith and is not necessarily theistic. Religion has its basis in "a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being", but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion and these forms and observances might extent even to matters of food and dress[4]. Subject to certain limitations, Article 25 confers a fundamental right on every person not merely to entertain such religious beliefs as may be approved by his judgment or conscience but also exhibit his beliefs and ideas by such overt acts and practices which are sanctioned by his religion. Now what practices are protected under the Article is to be decided by the courts with reference to the doctrine of a particular religion and include practices regarded by the community as part of its religion[5]. The courts have gone into religious scriptures to ascertain the status of a practice in question[6]. In numerous cases the courts have commented upon, explained an interpreted the provisions of the Constitution on equality, non discrimination and religious freedom. The decisions in most of these cases have been given is the

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contexts of the rights of particular religious communities or under sped; laws relating to such communities. A brief on major decisions follows.

In India the need to define religion was raised for the first time by Dr.B.R. Ambedkar when the matter pertaining to personal law and its relation to religion came for discussion in the Constituent Assembly. He pointed out:

The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved I am sure about it that in social matters we will come to a standstill…There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion…I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field[7].

In the opinion of Dr. B.R. Ambedkar, what constitutes a 'religion' or 'matters of religion' is to be ascertained by limiting to religious beliefs and ceremonials, which are held as essentially religious in a particular religion, which is under judicial review. The Indian Constitution has no explicit definition of 'religion' or 'matters of religion'.

Under the directive of article 32 of the Constitution, which provides the right to constitutional remedies, it is left to the Supreme Court to decide on the judicial meaning of such terms. In the early 1950s in a number of cases the Courts in India had been faced with the problem of defining 'religion' as given in article 25 (1) and 'matters of religion' as provided in article 26 (b). An attempt has been made to examine some of those specific cases, which were appealed before the Supreme Court of India for judicial classification. In Rajasthan v. Sajjanlal, A.I.R. 1975 S.C. 706, the Supreme Court surveyed the Jain religious tenants as regard to the management of Jain religion endowments.

Some of the case briefs are given below for comprehensive elaboration of the issue.

1. Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt.

The Shri Shirur matt case arose out of the Madras Hindu Religious and Charitable Endowments Act 1951[8] passed by the Madras legislature in 1951. The object of the Act, as stated in its preamble, was to amend and consolidate the law relating to the administration and governance of Hindu

religious and charitable institutions and endowments in the State of Madras. The Act contained sections dealing with the powers of the State with regard to the general administration of the Hindu religious institutions, their finances and certain other miscellaneous subjects. Section 20 of the Act dealt with matters pertaining to the administration of Hindu religious endowments that were to be placed under the general superintendence and control of the Commissioner. The Commissioner was authorized to pass orders, which he deemed necessary, for the proper administration of these religious endowments. He was to ensure that the income from these endowments was spent for the purposes for which they were founded. Section 21 of the Act gave the Commissioner, the Deputy and Assistant Commissioners, and such other officials as might be authorized, the power to enter the premises of any religious institution or any other place of worship for the purpose of exercising any power conferred, or discharging any duty imposed by or under the Act, provided that the concerned officer exercising such power was a Hindu. Section 23 of the Madras Hindu Religious and Charitable Endowments Act of 1951 provided that the trustee of a religious institution was to obey all lawful order issued under the Act by the Government, the Commissioner and other such officials. Section 56 stated that the Commissioner was empowered to ask the trustee to appoint a manager for the administration of the secular affairs of the institution and in default of such an appointment he could make the appointment himself. The rest of the sections dealt with the financial aspects of the religious bodies. On constitutional grounds, the validity of the Act was challenged by Shri Lakshmindra Tirtha Swamiar, the mathadhipati of Sirur math[9] who assumed also the office of mathadhipati of Udipi math at a time when it was under financial crisis. The Hindu Religious Endowment Board stepped in at this point to assist the Udipi math in getting out of its financial problems. Apparently the Mathadhipati, Shri Lakshmindra Tirtha Swamiar, consented to the intervention as he signed over power of attorney to the manager appointed by the Board. But it seemed that the manager wanted his own way in all affairs of the math. This caused the mathadhipati to retract his power of attorney and to ignore the efforts of the Board, which filed a case against the mathadhipati. The mathadhipati appealed to the Supreme Court on the ground that the Board, whose powers were alleged to be unconstitutional, had violated his constitutional guarantees under articles 25 and 26 of the Constitution. The Supreme Court found the case in favour of the math. While giving the judgment, it seems that the Court has taken a thoughtful approach to the meaning of "religion." Besides the Supreme Court seemed to have given an indigenous meaning to what includes into the category of "secular activities" associated with religion. This ruling of the Supreme Court has been considered as

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one of the most important decisions in Indian jurisprudence with regard to the definition of religion[10]. Mr. Justice Mukerjea who spoke for the unanimous decision of the Court pointed out that the resolution of the dispute hinged on the clarification of what 'matters of religion' are. He said: The word "religion" has not been defined in the Constitution and it is a term which in hardly susceptible of any rigid definition. In an American case (vide Davis v. Benson, 133 U.S. 333 at 342), it has been said "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cult us of form or worship of a particular sect, but is distinguishable from the latter." We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism, which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines that are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress[11]. This passage, which has been frequently quoted by judges and jurists, broadened the protection guaranteed in the Constitution 'to practice religion' as given in article 25 (1). Commenting on clauses (b) and (d) of article 26, the Supreme Court held in the instant case: Under Article. 26 (b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent Legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Art.26 (d), it is the fundamental right of a religious denomination or its

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representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself, subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art.26.

2. Ratilal Panachand Gandhi v. State of Bombay.

In Ratilal case, the Supreme Court was once again appealed to decide on the judicial application of 'religion' and 'matters of religion' as implied in the right to exercise of religion protected under articles 25 and 26 of the Constitution. The case arose out of the Bombay Public Trust Act, 1950,15 passed by the Bombay State Legislature. Similar to the Madras Act of 1951,16 the object of the Bombay Act as stated in its preamble was to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay. Section 18 of the Bombay Public Trust Act, 1950, declared that it was obligatory upon the trustee of every public trust to which the Act applied, to make an application for the registration of the trust. Like section 21 of the Madras Act of 1951, section 37 of the Bombay Act also authorized the Charity Commissioner and his subordinate officers to enter and inspect any property belonging to a public trust. Section 44 of the Act provided that the Charity Commissioner might be appointed by a Court of competent jurisdiction or by the author of the trust to act as a sole trustee of a public trust. Section 74 gave powers to the Court to appoint a new trustee or trustees and the Court, after making inquiries, could appoint the Charity Commissioner or any other person as a trustee to fill up vacancies. The Manager of a Jain public temple and Trustees of Parsi Panchayat Funds and Properties in Bombay challenged before the Bombay High Court17 the constitutional validity of the Bombay Public Trust Act of 1950. It was done on the ground that the provisions of the Bombay Act of 1950 contravened freedom to practice religion as guaranteed in article 25 (1) and freedom to manage matters of religion as protected by article 26 (b) of the Constitution. The Bombay High Court denied the petition in the light of sub-clause (c) and (d) of article 26 of the Constitution, which provides the State with authority to enact the legislation as given in the Bombay Act18Therefore, the Bombay High Court resolved the case in favour of the State on the basis of the definition that the Court gave to religion in the instant case. This definition reduced religion to spiritual and moral aspects only and eliminated secular activities, like the property ownership and expenditure associated with religious practices, from the protection guaranteed in the Constitution. The Chief Justice, Mr. M.C. Chagla who delivered the judgment of

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the Bombay High Court said: "Religion" as used in arts. 25 and 26 must be construed in its strict and etymological sense. Religion is that which binds a man with his Creator, but Mr. Sommaya on behalf of his client (Panachand) says that as far as Janise are concerned they do not believe in a Creator and that distinction would not apply to the Jains. But even where you have a religion which does not believe in a Creator, every religion must believe in a conscience and it must believe in ethical and moral precepts. Therefore whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men that alone can constitute religion as understood by the Constitution. A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do, whether in the way of clothes or food or drink, which is not considered a religious activity. But it would be absurd to suggest that a Constitution for a secular State ever intended that every human and mundane activity was to be protected under the guise of religion, and it is therefore in interpreting religion in that strict sense that we must approach arts. 25 and 26.

3. Mohammad Hanif Quareshi V. State of Bihar

The Quareshi case is about prohibiting the slaughter of cows. It has got long constitutional history. The Constitution of India has certain Directives to the States that they expect to keep in view in the conduct of their policies. These Directives are different from the rest of the articles of the Constitution in the sense that they are non-justifiable because they don't have a legal force to bind them. That is, if the State acts in a way contrary to the Directives laid down in Part IV of the Constitution; its action cannot be challenged in the Court.

It is held that the Directive principles are, nevertheless, important. Their importance consists, as commented by M.C. Setalvad, a former Attorney-General of India, that "they appear to be like an instrument of instructions, or general

recommendations addressed to all the authorities in the Union reminding them of the basic principles of the new social and economic order, which the Constitution aims at building." Hence, article 48 of the Constitution of India is one of the Directive Principles. The objectives of this article are for the development of agriculture and animal husbandry on modern and scientific lines as well as for the preservation and improvement of the breeds of cattle, and prohibition of the slaughter of cows and calves and other milch and draught cattle. Article 48 reads: The state shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps

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for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milk and draught cattle.

It may be appropriate here to point out that the directive for the prohibition of cow-slaughter as referred to in article 48, was made mainly out of respect for the religious sentiments of the majority community, the Hindus. As it is well known in India, cow has great religious significance for them. This article did not find a place in the Draft Constitution but was incorporated during the debates in the Constituent Assembly. Most of the members of the minority communities, the non-Hindus, who were in the Constituent Assembly, seemed to have consented to the Hindu religious sentiments associated with the provision against cow-slaughter. However; some held that the Hindu sentiments predominated in the Constitution. As follow-up to these Directives, some State Governments have enacted legislation banning the slaughter of cows. Shortly after these enactments, three cases were petitioned before the Supreme Court challenging their constitutional validity.

The petitioners were Muslims, mostly of the Quareshi community, who were traditionally engaged in the butcher's trade. The first among the three was the Quareshi case that challenged the legislations of the all three States, namely Bihar, Uttar Pradesh and Madhya Pradesh on the ground that they violated the constitutional right of the petitioners to carry out their trade.

The petitioners also contended that these legislations infringed on their right to practice religion because Islam enjoined on every Muslim to sacrifice one goat on the Bakr-Id day (the festival of sacrifice) or seven persons together may even sacrifice one cow. They claimed that cow sacrifice was customary among Indian Muslims on Bakr-Id day and the practice was "certainly sanctioned by their religion." Therefore, cow sacrifice was part of their practice and profession of religion protected by article 25 of the Constitution. The Bihar Act placed a total ban on slaughter of all types of animals of the species of bovine cattle while the Uttar Pradesh Act did not protect the slaughter of buffaloes and the Madhya Pradesh Act allowed such slaughter under a certificate issued by certain authorities as mentioned in the Act. In dealing with this case, the Supreme Court traced the history of cow slaughter in India and indicated that in the past many Muslim kings prohibited cow slaughter even on the Bakr-Id day. Chief Justice Mr. Das who delivered the judgment of the Court stressed that the Islamic law gives option to sacrifice a camel instead of a cow or even permits to give gifts of charity as a substitute for animal sacrifice on the Bakr-Id day. Chief Justice Mr. Das argued further, as claimed by the State, that many Muslims do not sacrifice a cow on the Bakr-Id day. He, moreover, pointed out that three members of the Gosamvardhan (cow protection) Enquiry Committee appointed

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by the Government of Uttar Pradesh were Muslims. All the three concurred with the unanimous recommendation of the Committee for total ban on cow slaughter Mr. Das, C.J., who issued the judgment of the Court in the Quareshi case, stated that the Islamic law sanctioned cow sacrifice on the Bakr-Id day but did not enjoin it as an obligatory overt act in the practice and profession of Islamic faith and therefore, cow sacrifice was not essential. He said: We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In examining this case, the Court acknowledged that Islam sanctioned cow sacrifice. Nevertheless, Mr. Chief Justice Das ascertained that it was not "an obligatory overt act for a Mussalman to exhibit his religious belief" because Islamic law provides alternatives. The Supreme Court noted that instead of a cow, Muslims could sacrifice a camel or do acts of charity on the day of Bakr-Id. The petitioners of the instant case pleaded that the impugned laws, if enforced, would affect adversely their trade and, therefore, violated the constitutional protection guaranteed under article 19(1) (g). The Court ruled that the laws only regulated and restricted these occupations, but did not deprive the petitioners of their right to practice them because butchers could still slaughter certain classes of bulls, bullocks, buffaloes, as well as sheep and goats.

It seems that the Supreme Court's ruling on this case (Quareshi case) had taken into consideration the Hindu religious sentiments attached to the legislation of banning cow slaughter as one of the reasonable elements. Certainly, the Court was equally concerned with communal riots often arising on account of cow slaughter.

The honorable judges of the Quareshi case acknowledged, "While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial decision as to the reasonableness of the restrictions"

Bramchari Sidheshwar Bhai v. State of West Bengal

In this case, The Ram Krishna Mission wanted to declare itself as a non- Hindu minority where its members were to be treated as Hindus in the matter of marriage and inheritance but in the religious sense to be recognized as non-Hindus. This would certainly mean that they are given the status of legal Hindus but religious non- Hindus, similar to Sikhs and Buddhists. To this, the Supreme Court ruled that it cannot be claimed by the followers of Ram Krishna that they belong to the minority of the Ram Krishna Religion. Ram Krishna Religion is not distinct and separate from the Hindu religion.

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It is not a minority based upon religion. Hence, it cannot claim the fundamental right under Article 30 (1) to establish and administer institutions of education by Ram Krishna Mission.

Right to establish and maintain-institutions for religious and charitable purposes: Azeez Basha v. Union of India

In this case, certain amendments were made in the year 1951 and 1965 to the Aligarh Muslim University Act, 1920. These amendments were challenged by the petitioner on the ground that:

1. They infringe on the fundamental right under Article 30 to establish and administer educational institutions.
2. Rights of the Muslim minority under Article 25, 26, 29 were violated.

It was held by the Supreme Court that prior to 1920 there was nothing that could prevent Muslim minorities from establishing universities. The Aligarh Muslim University was established under the legislation (Aligarh Muslim University Act,1920) and therefore cannot claim that the university was established by the Muslim Community as it was brought into existence by the central legislation and not by the Muslim minority.

Breaking of coconuts and performing Pooja, chanting Mantras and Sutras in State functions: Atheist Society of India v. Government of A.P., AIR 1992 AP 310

The petitioner (Atheist Society of India), in this case, prayed for the issuance of writ of Mandamus to direct the Government of Andhra Pradesh to give instruction to all the concerned departments to forbid the performance of religious practices such as breaking of coconuts, chanting mantras, etc at the State function on the ground that the performing of these practices is against secular policy of the constitution. The petitioner's prayers were rejected by the court on the grounds that it infringes upon the right to religion and if permitted it will be against the principle of secularism, which is the basic structure of our Constitution. It would lead to depriving of the right to freedom of thought, faith, worship.

Freedom from taxes for promotion of any particular religion (Art. 27)

Article 27 of the Constitution prevents a person from being compelled to pay any taxes which are meant for the payment of the costs incurred for the promotion or maintenance of any religion or religious denomination.

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Prohibition of religious instruction in the State-aided Institutions (Art. 28)

Article 28 prohibits:

- Providing religious instructions in any educational institutions that are maintained wholly out of the state funds.
- The above shall not apply to those educational institutions administered by the states but established under endowment or trust requiring religious instruction to be imparted in such institution.
- Any person attending state recognized or state-funded educational institution is not required to take part in religious instruction or attend any workshop conducted in such an institution or premises of such educational institution.

Teaching of Guru-Nanak: D.A.V. College v. State of Punjab, (1971) 2 SCC 368

In this case, Section 4 of the Guru Nanak University (Amritsar) Act, 1969 which provided that the state shall make provisions for the study of life and teachings of Guru Nanak Devji was questioned as being violative of Article 28 of the Constitution. The question that arose was that the Guru Nanak University is wholly maintained out of state funds and Section 4 infringes Article 28. The court rejecting this held that Section 4 provides for the academic study of the life and teachings of Guru Nanak and this cannot be considered as religious instruction.

Education for value development based on all religions: Aruna Roy v. Union of India, (2002) 7 SCC 368.

In this case, a PIL was filed under Article 32 wherein it was contended by the petitioner that the National Curriculum Framework for School Education (NCFSE) which was published by the National Council of Educational Research and Training is violative of the provisions of the constitution. It was also contended that it was anti-secular and was also without the consultation of the Central Advisory Board of Education and hence it should be set aside. NCFSE provided education for value development relating to basic human values, social justice, non-violence, self-discipline, compassion, etc. The court ruled that there is no violation of Article 28 and there is also no prohibition to study religious philosophy for having value-based life in a society.

Propagation of religion in India in contemporary times

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The Fundamental Right to "propagate" one's religious faith has always trodden on slippery ground. Legislative history and judicial precedents have remained wary of the tipping point when the "basic human right" to spread religion translates into conversion through force, fraud or allurement.

Article 25(1) of the Constitution says "all persons," not just Indian citizens, are equally entitled to the freedom of conscience and the right to profess, practise and propagate religion freely. The original intention of the Constituent Assembly and the interpretation of Article 25 by the Supreme Court later on clearly differentiate the right to propagate from the right to convert other persons to one's own religion. The former is a Fundamental Right, the latter, if forcibly done and not by choice of the person converting, is illegal. To go back in history, one has to start with the morning of December 6, 1948, at the Constitution Hall where the Constituent Assembly debated the inclusion of "right to propagate" as a Fundamental Right.

Here, Lokanath Misra cautions the Assembly that "the cry of religion is a dangerous cry." "It denominates, it divides, and encamps people to warring ways."

"Today, religion in India serves no higher purpose than collecting ignorance, poverty and ambition under a banner that flies for fanaticism. The aim is political, for in the modern world all is power-politics and the inner man is lost in the dust," he said. Misra advised the Assembly that everybody should have the right to profess and practise their religion as they saw best, but not to "let him try swell his number to demand the spoils of political warfare."

But Pandit Lakshmi Kanta Maitra disagreed that "propagation does not necessarily mean seeking converts by force of arms, by the sword, or by coercion." He argued the Fundamental Right to propagate may probably work to remove the "misconceptions" in the minds of the people about other co-existing religions in this land of different faiths.

H.V. Kamath then rose to talk of the "real meaning" of the word "religion." He pointed to how Dharma, in the most comprehensive sense, should be interpreted to mean the true values of religion and spirit. He pointed to how this young nation was moulding its Constitution in the background of a "war-torn, war-weary world."

Kamath argued that even as no particular religion should receive State patronage, "we must be very careful to see that in this land of ours, we do not deny anybody the right not only to profess or practise but also to propagate any particular religion."

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"This glorious land of ours is nothing if it does not stand for the lofty religious and spiritual concepts and ideals. India would not be occupying any place of honour on this globe if she had not reached that spiritual height which she did in her glorious past," he argued.

But over the years, these lofty ideals have been replaced by immediate concerns about propagation. The Supreme Court has unequivocally declared that the right to propagate does not mean the right to convert.

In his January 2011 judgment on the murders of Graham Staines, an Australian missionary who worked with the tribal people in Orissa, and his two sons, Justice P. Sathasivam wrote, "It is undisputed that there is no justification for interfering in someone's belief by way of use of force, provocation, conversion, incitement or upon a flawed premise that one religion is better than the other."

Chief Justice of India A.N. Ray, heading a five-judge Bench, in Rev. Stainislaus vs. State of Madhya Pradesh , upheld the validity of two regional anti-conversion laws of the 1960s — the Madhya Pradesh Dharma Swatantraya Adhiniyam and the Orissa Freedom of Religion Act. The court dissected Article 25 to hold that "the Article does not grant the right to convert other persons to one's own religion but to transmit or spread one's religion by an exposition of its tenets."

"What is freedom for one is freedom for the other in equal measure and there can, therefore, be no such thing as a fundamental right to convert any person to one's own religion," the court interpreted. In reference to the 1954 judgment of Ratilal Panachand Gandhi vs. State of Bombay , the court held that the "freedom of conscience [the right to believe in one's faith] is not meant merely for followers of one particular religion but extends to all."

The Supreme Court, in reference to the Arun Ghosh vs. State of West Bengal verdict of 1950, holds that an attempt to raise communal passions through forcible conversions would be a breach of public order and affect the community at large. Thus, it held that the States were empowered under Entry 1 of List II of the Seventh Schedule of the Constitution to enact local Freedom of Religion laws to exercise its civil powers and restore public order.

These local laws make forcible religious conversions a cognisable offence under Sections 295A and 298 of the Indian Penal Code. These provisions stipulate "malice and deliberate intention to hurt the sentiments of others" as a penal offence. But many human rights organisations and scholars argue that anti-conversion laws have less to do with fraud and more to do with violence against Christians.

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Even pre-Independence anti-conversion statutes by Princely States such as the Raigarh State Conversion Act of 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act of 1946 were specifically against conversion to Christianity.

Over the years, more Freedom of Religion Bills have found their place in legislative history, including in Arunachal Pradesh in 1978 and Gujarat in 2003.

Under the Madhya Pradesh Freedom of Religion (Amendment) Act of 2006, if a person chooses to convert, he has to declare it before the District Magistrate concerned. Even the religious priest who "directly or indirectly participates" should give details of the purification ceremony and details of person whose religion is going to be changed to the District Magistrate with one month's notice. The same year saw Chhattisgarh pass a similar law seeking 30 days' notice from a person desiring to convert and permission from the District Magistrate. With the Himachal Pradesh Freedom of Religion Act, 2006, the State became the first Congress-ruled one to adopt a law prohibiting forcible conversions.

Conclusion

Criminalising glorification of religion is an assault on the fundamental right to propagate religion. This right may be restricted only to protect public order, health, morality, and other fundamental rights. None of these grounds justifies imprisoning a person for glorifying a religion. Similarly, the fundamental right to freedom of speech and expression enshrines a person's right to freedom of religion.

References

1. https://www.bbau.ac.in/dept/HR/TM/Freedom%20of%20religion%20under%20Indian%20Constitution.pdf
2. V.D.Mahajan, Constitutional law of India p.232-241
3. Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954 S.C. 282; Ratilal v. State of Bombay, A.I.R. 1954 S.C. 388; Taher Saifuddin Saheb v. State of Bombay, A.I.R. 1968 S.C. 662
4. Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954. S.C. 282 at 290.
5. Seshammal v. State of Tamil Nadu (1972) 2 S.C.C. 11
6. www.hindustantimes.com/freedomofreligion

7. Constitutional Assembly Vol,7,p.
8. Madras Hindu Religious and Charitable Endowment Act, 1951 (Madras Act 19 of 1951)
9. V.P. Luthera, op.cit. p. 129
10. Richard W. Lariviere, "The Indian Supreme Court and The Freedom of Religion", in Journal of Constitutional and Parliamentary Studies, vol. IX, no.2 (1975), p. 176
11. Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Matt, AIR 1954 SC 282, at 290.

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RIGHT TO COPARCENARY PROPERTY FOR WOMEN WITH SPECIAL ANALYSIS ON THE CASE OF VINEETA SHARMA V. RAKESH SHARMA

- NANDITA KRISHNAN & NIKKITHA KRISHNAN

VINEETA SHARMA V. RAKESH SHARMA	
CITATION	(2020) 9 SCC 1: 2020 SCC OnLine SC 641
CASE NUMBER	Civil Appeal No. 32601 of 2018
BENCH	Arun Mishra, S. Abdul Nazeer, M.R. Shah J.J.
DECIDED ON	11th August 2020

INTRODUCTION

Protests, debates and negotiations for women empowerment seems to be raising on a high scale in this era without a murmur on it all this while. Doesn't it feel anomalous to outcry suddenly? Does it mean only this era has taken away their rights which necessitated them to outcry? The answer is No! The efforts put in by women has been constant ever since the old times but the failure to recognise the same has resulted in this sudden outcry and rage.

Unfortunately, recognition is one which is not owned by itself but rather owed by the society to whomsoever it is. So, we can more or less state that time has come where women are necessitated to be considered by the society as the next prime factor for its efficient and effective functioning.

Being an integral part of something is special. On the same time, it is to note that reaching to that point of being an integral part demands its own due efforts and time. As mentioned in the previous

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sentence, being an integral part doesn't give an inherited right to exploit anything. They are without no doubt subjected to the rules and regulations conferred to them by the statutes, which provides for both rights and liabilities commonly. However, bias and discrimination on the basis of gender has been a very common practice since the olden times. Women rights and development has been a deep hollow sphere in various fields like education, technology, science etc. and it is obvious that the limited rights in terms of property and succession have also been a major loophole restraining women empowerment. Though the Constitution of India guarantees equality under Article 14 and opposes the segregation based on creed, caste and sex, it has never been that simple for women to be considered as equals. Even after so many years of Independence, claiming and wanting to be considered of what is rightfully theirs has been a dreary process.

Before enforcement of the Hindu Succession Act 1956, the rule of succession was predominantly governed by the old Shastric Law. Property rights have always been denied to the women sector as they were not considered to be a coparcener of the family but just considered as a member of the joint family. This concept was envisaged in ***Debidas Udhao Gaukar v. Smt. Vithabai***[251]. It was held that the share of the deceased would devolve by survivorship and not by succession, and, accordingly, would pass to his brother as surviving coparcener and not even the sons. Hence, the possibility of daughters getting entitled to any share in the property is evidently ruled out.

EVOLUTION OF THE CONCEPT OF SUCCESSION

The law of inheritance of property has envisaged several changes till date. The changes can be classified into five periods. It is as follows:

- I PERIOD: 1850 - 1936
- II Period: 1937–1956
- III Period: 1956– September 8th 2005
- IV Period: September 9th 2005 – August 10th 2020
- V Period: August 11th 2020 – Till Date

[251] AIR 2008 Bom 183

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HISTORY

A brief timeline as to how the overall concept of succession has evolved, taking a major place in the legal practice and paving way for the development of property rights of women is as follows.

- ✓ The Hindu Law of Succession underwent its first modification by the Caste Disabilities Removal Act, 1850, a general statute, that is, which applied to all communities according to which conversion ceased to be a disqualification.
- ✓ The above Act applied only to the person who had either renounced his religion or was deprived of caste, but it did not enable his descendants to claim the benefit of the provision.
- ✓ Next feature which was not focussed or provided for by the traditional Hindu Law of Succession was the "testamentary" succession. Finally, this concept was featured by which the Hindus were permitted to dispose of their property by will for the first time by the Hindu's Will Act, 1870.
- ✓ In this regard, Hindu Transfer of Bequests Act was passed in 1914 and finally the Central Legislature passed the Hindu Disposition of Property Act in 1916.
- ✓ The provisions of the Hindu's Will Act, 1870 were, with some modifications, re-enacted in the Indian Succession Act, 1925.
- ✓ The Hindu Inheritance (Removal of Disabilities) Act, 1928, removed the disqualification of congenial lunacy and idiocy. The trace of this statute has been placed in the Hindu Succession Act, 1956.
- ✓ Hindu Law of Inheritance (Amendment) Act, 1929 changed the traditional law of inheritance relating to son's daughter, daughter's daughter, sister and sister's son.
- ✓ Hindu Gains of Learning Act, 1930 reshaped the traditional joint family law. It is a known fact that the rules relating to joint family and partition of property form part of the same branch of law.
- ✓ The Hindu Women's Right to Property Act, 1937, was passed to amend all the schools of Hindu law so as to confer greater rights on certain women than what they initially had. In other words, this Act gave certain tangible rights to women in respect of certain property.
- ✓ As a result of the enactment of the Hindu Succession Act 1956, the three classes of heirs recognised by Mitakshara school of law, namely, the Gotraja Sapindas, Samanodakas and Bandhus and the three classes of heirs recognised by Dayabaga school of law, namely,

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Sapindas, Sakulyas and Bandhus ceased to exist in cases of evolution taking place after the Act came into force. The class of heirs included in the 1956 Act are divided into four classes, namely,

1. Heirs in Class I of the Schedule,
2. Heirs in Class II of the Schedule,
3. Agnates and
4. Cognates

- ✓ The Tamil Nadu Hindu Succession (Amendment) Act, 1989 which got into effect from March 25, 1989 inserted Section 29-A to the Act. This provision states that the daughters are entitled to claim a share in the Joint Hindu Family Property. However, Clause (iv) makes clear exception to the married daughters expounding the fact that daughters who were married before the commencement of the Amendment Act, 1989 would not be entitled to equal rights in the Joint Family Property.
- ✓ The Hindu Succession Act,1956 in Section 6 provided for the intestate succession rights of a coparcener (sons, only male heirs) over the coparcenary property.
- ✓ However, the (Amendment) Act, 2005 was enacted to remove the discrimination as contained in Section 6 of the Hindu Succession Act, 1956 by conferring equal rights and liabilities to the daughters in the Hindu Mitakshara coparcenary property as the sons have.

Let us now understand the principles and rules laid down under the Hindu Succession Act,1956 in brief:

HINDU SUCCESSION ACT, 1956

Hindu succession act, 1956 discusses and explains about the succession and inheritance of property. This act specifically provides the ratio as to how much each person can claim from the concerned individual which consequently clears the calculation as to what amount of property will be inherited by others in the family.

Section 2 of this Act states that the statute is applicable on Hindu, Muslims, Jains and Sikhs. The Act has foreseen difficult situations well before and had analysed and formulated the provisions related to the division of the property of a Hindu undivided family.

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According to this Act there are two types of property. They are as follows:

1. Ancestral Property
2. Self-Acquired Property.

Ancestral property refers to the property which had originated from the ancestors and consequently inherited by the legal heirs of the family. In other words, ancestral property is the property that has been inherited from our ancestors i.e. our fathers and forefathers. Ancestral property paves its way to the coparceners according to the provisions of the Act either by way of devolvement to the legal heirs of the deceased after the death of the father/mother or by devolvement by settlement from the person be it father or mother to the legal heirs voluntarily. Section 3 (f) of the Hindu Succession Act,1956 defines the term "heir": *(f) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act".*

Self-acquired property refers to the property which is solely procured and acquired by one's self earnings and investment. The concept of devolvement does not exist in self-acquired property. The owner i.e father or mother can pass it on to the legal heirs out of his/her own will and wish by way of settlement deed or by way of writing out a Will establishing the independence and willingness to bequeath the self-acquired property to whomsoever they like be it their legal heirs or anyone. In other words, self-acquired property can be transferred by the means of testamentary succession or intestate succession. Section 3 (g) define the term "intestate": *(g) "intestate"—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect".*

COPARCENARY RIGHTS FOR WOMEN WITH REFERENCE TO THE CASE OF VINEETA SHARMA V. RAKESH SHARMA

The concept of co-parceners comes into place only in Ancestral property. There is no concrete definition given under the Act. Coparcener refers to the lineage of an individual who is of the same ancestor and of the same blood line. This Act stated that only male members were ought to be the coparcener and have the right to inheritance of the coparcenary property. The drawback or hitch of the Hindu succession Act, 1956 was only this. It clearly stated those coparceners were only the male lineage group and female or the daughters were totally put off the radar from being a coparcener and

to inherit the property. This being established there were a lot of confusions raised effecting to several controversies and disputes.

Some of the unsettled issues were:

1. Whether the amended provision has prospective (or) retrospective effect?
2. Whether such coparcenary right will be given only to those daughters who are born after September 9,2005 (or) also will be given to all daughters irrespective of her birth date (or) even marital status?
3. Whether the provisions would apply even if disposition (or) alienation including partition (or) testamentary disposition of property, which had taken place before the 20th day of December, 2004?
4. Whether oral partition and unregistered partition deeds are to be included in the definition of 'partition' as per the amended Section 6(5) of the Hindu Succession Act, 1956?

There were various judgements on these aspects but none of it was identical and unanimous. It would end up erroneous if we skip out to study, analyse and understand the two major contradictory verdicts of the Supreme Court which were highly significant such that these judgements pushed the Apex Court itself to review its own decisions and set right all the unsettled issues and confusions.

The two contrasting judgments of the Supreme Court are:

1. ***Prakash v. Phulavati,*** [252]
2. ***Danamma @ Suman Surpur v. Amar*** [253]

In ***Prakash v. Phulavati,*** the Division Bench of the Supreme Court has stated that the Amendment Act, 2005 of Hindu Succession Act, 1956 is applicable to living daughters of living coparceners irrespective of their date of birth. The application of this amendment cannot be construed retrospective and is absolutely prospective from the date of commencement of this Amendment Act.

In ***Danamma v. Amar,*** the Supreme Court took the view that the Amendment Act,2005 of Hindu Succession Act,1956 is applicable to daughters even if the father had died before the 2005 Amendment came into force stating clearly the Amendment Act to be retrospective in nature.

The above conflicting decisions created a chaos in the minds of the legal fraternity and the public at large which necessitated the Legislative Body to clear the air on the unsettled issues mentioned above.

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[252] (2016) 2 SCC 36

[253] (2018) 3 SCC 343.

A brief study on the case of ***Vineeta Sharma v. Rakesh Sharma***[254] has settled a lot of unsettled issues and thus clearing the air on the distinctive views on the right to property to women would follow below:

The Bench consisting of Arun Mishra J, S.Abdul Nazeer J and M.R.Shah J., on August 11th 2020, gave its answers to all the above issues on a clear note. Discussions on various aspects of the Hindu law of property have been discussed in this judgement.

The extract of the conclusion reached is as follows:

"(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv)The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly."

[254] (2020) 9 SCC 1: 2020 SCC OnLine SC 641

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The decision in ***Mangammal v. T.B.Raju*** [255]was based on The Tamil Nadu Hindu Succession (Amendment) Act, 1989 which got into effect from March 25, 1989 inserted Section 29-A to the Act. It was held that because of Section 29 – A (iv) of the above Act the appellant could not institute a suit for partition and separate possession as they were not coparceners.

CONCLUSION

The Bench on August 11th 2020 overruled the views expressed in Prakash v. Phulvati and Mangammal v. T.B.Raju and partly overruled the opinion expressed in Danamma v. Amar to the extent it is contrary to this decision.

Hence, it gave absolute coparcenary right to a daughter irrespective of her date of birth, marital status, or even her father's death date.

This case was declared a landmark case as it finally settled the confusions and settled the unsettled issues regarding property rights. The current scenario on the law of property after this holding is that both the son and daughter have an equal liability and right over the property irrespective of whether the father was alive in 2005 or not and there will be equal division of the property. This amendment was instrumental in bringing a significant change in society and women's right.

[255] (2018) 15 SCC 662

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AN ANALYSIS OF THE SEDITION LAWS IN INDIA: A SURVEY ON PEOPLE IN TAMIL NADU

R. ISHA BHAVANTI & R. VIMALA

ABSTRACT

Natural rights are the ones which cannot be taken away from anyone and one such right is the right to freedom of speech and expression. During the British rule in India, sedition laws were brought in to suppress the voices of the people of India and the freedom fighters. But even after independence, they are still in existence. The very existence of such a law undermines democracy and appears as a stain left by the colonial laws. The study was conducted using primary data collected through an online survey on their views on sedition in independent India from 201 respondents. The result was that the majority of the people find sedition laws redundant and irrelevant in independent India. There is a need for repealing or reforming these sedition laws to protect the freedom of speech and expression as a part of decolonisation in modern democratic India.

Keywords: Sedition, 124A, freedom of speech and expression, misuse, British rule, colonial law, democracy

INTRODUCTION

A nation creates or enforces laws to maintain law and order in the society while people exercise their rights. But such laws should not infringe the rights of the people. Natural rights are the rights that are there for a person by birth and cannot be taken away by anyone including the State. One such right is the right to freedom of speech and expression. Freedom of speech and expression includes freedom of press, freedom to remain silent along with freedom to speak one's mind and conscience and express opinion, interests and criticism. Crime is an act that is said to be harmful or dangerous to the society socially. It is defined, prohibited and punished under the criminal law specifically which differs at times. The Indian Penal Code is the official criminal code of India. Sedition is any speech or writing which the government thinks that it is directed to overthrow the government. Section 124A of the

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Indian Penal Code (IPC) deals with sedition. Sedition was brought to India to suppress the freedom movement in India. Law relating to sedition in India is viewed as a relic of British rule, a reminder of one of the tough times in our past. During British rule, in order to quell the freedom struggle, the British had introduced the sedition laws. In the process, many freedom fighters like Mahatma Gandhi, Bal Gangadhar Tilak, V. O. Chidambaram and others were tried under the sedition law. After Independence, these sedition laws continued to be in the statute books. The crime of sedition is considered cognizable, non-bailable and non-compoundable. The punishment for sedition is life imprisonment and fine or imprisonment up to three years and fine or with fine.

A few countries which criminalise sedition are Saudi Arabia, Malaysia, Iran, Uzbekistan, Sudan, Senegal and Turkey. Defaming the King/Regent of Norway is a crime in Norway. In the United States of America, in respect for freedom of speech, sedition laws are rarely enforced. The same happens in the case of Canada where the Canadian citizens enjoy liberal freedoms. In Germany, incitement of the people is referred to as Volksverhetzung and is a legal concept which bans the kindling of hatred against any specific race or religion. This word translates vaguely to 'sedition'. New Zealand ceased sedition to be a crime after the initiation of The Crimes (Repeal of Seditious Offences) Amendment Bill in 2007. The United Kingdom abolished sedition and seditious libel in 2009 by Section 73 of the Coroners and Justice Act 2009 but this doesn't apply to aliens, as sedition by them is considered as an offence.

Of late in India, there is a trend that social activists, environmental activists and others were arrested and put behind bars under the sedition laws. This raises the question whether the sedition law should be continued in the statute books. Recently, the Honorable Chief Justice of India has also expressed apprehension regarding the misuse of sedition law in independent India. The **aim** of the study is to look into the sedition laws and their relevance in independent India and whether they can continue in the Indian statute books of independent India.

OBJECTIVE

- To study the different perceptions on sedition laws in the criminal justice system.
- To examine the relevance of sedition laws in independent India.
- To analyze whether sedition laws should continue in the statute books of independent India.

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LITERATURE REVIEW

Cohan (2003)[256] has discussed the seditious conspiracy because basically sedition is intertwined with conspiracy. The author anaysed the Smith Act and Prosecution for religious speech advocating the violent overthrow of the Government. The author has examined the history of sedition, conspiracy, and seditious conspiracy that are targeting religions.

Ghosal (2014)[257] has analysed the law of sedition and its impact on freedom of expression. The author has discussed the history and development of sedition laws in India and Section 124A of Indian Penal Code regarding sedition and its way into the Constitution. The author concluded that as law changes with the changing needs of the society, there needs to be directions and guidelines to prevent the misuse of sedition laws.

Saksena and Srivastava (2014) have analyzed the modern offence of sedition in India. They have done an analysis on the cases of sedition before the High Courts and Supreme Court and found that sedition has been becoming increasingly obsolete as problems of public order, that may instead be addressed through other laws that have been enacted for that specific purpose.

Narayanan (2015)[258] has analyzed the law on sedition in India theoretically. The author proposed an amendment to Section 124A, by devising Austin's Speech Acts Theory, Sorial's exposition based on Austin's theory and by accommodating the prevalent judicial interpretation into the existing provision. The author has concluded with a new version of Section 124A based on the above said theories.

Anand (2017) has analysed the sedition laws and the need to prevent its misuse. The author has done exploratory and descriptive research using primary data in the form of questionnaires, the author has found that the majority want repeal of sedition laws, and concluded that there is a need to introduce

[256] Cohan, John Alan. "Seditious Conspiracy, The Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government." *Journal of Civil Rights and Economic Development*, vol. 17, no. 2, 2012, p. 2.

[257] Ghosal, Joydip. *An Analysis of Law of Sedition and Its Impact on Freedom of Expression*. Mar. 2014, https://papers.ssrn.com/abstract=3457494.

[258] Aishwarya, Narayanan. "A Theoretical Analysis of the Law on Sedition in India." *Christ University Law Journal*, vol. 4, no. 1, 1970, pp. 87–101, doi:10.12728/culj.6.5.

course corrections to protect democracy and strengthen it, in the light of international experience and recommendations.

Shah and Pachauri (2017)[259] have analysed the application of sedition laws in India in various courts and found that they are quite outdated, and are not in tune with the present societal norms of democracy. They brought in various recommendations on repealing and amending S.124A of IPC. They found that in independent India, criminalization contemplated under sedition laws is unjustified in democratic society and hence, concluded that Section 124A IPC should be in consonance with modern definitions as the recent applications of sedition laws justify the need for the sedition laws to be amended.

Raghuvansh (2017) has analysed sedition by looking into its definition, history, its constitutionality and brought in the difference between treason and sedition and found that there is a controversy over freedom of speech and sedition. The author raised the question as to why sedition is needed in India at present and concluded based on the case laws that S.124A of Indian Penal Code needs to be declared unconstitutional.

Makhijaand and Sundaram (2018) have discussed the sedition laws in India with special reference to the case, Shreya Singhal v. Union of India. They critically analyzed the case in relation to sedition law in India and also compared the sedition laws in India with several other countries in the current scenario.

Venkatesh (2018) has analyzed the applicability and enforcement of sedition laws in India in relation to the serious infringement on freedom of speech and expression by S. 124A of IPC and S.95 of CrPC. The author has discussed the history, concept and applicability of the sedition law cases and found that for the balance to be achieved, there is a problem of legal culture and public culture in the application of the sedition laws.

Basu (2018) has discussed how the Indian constitution safeguards democracy and minority rights. The author found that there is an increase in anti-minority violence, ever since BJP has come into power in the centre and there is an increasing tendency to curb dissent by using sedition laws. Religious Freedom by the resurgence of Hindu Nationalism, have brought in beef ban, which resulted in violence against minorities. The author has found the increasing incidence of hate speech by the

[259] Shah, Jhalak, and Shantanu Pachauri. "An Analysis of Sedition Law in India." *Vidhi Aagaz Scholar's Paradise Journal*, Apr. 2020, https://www.academia.edu/42810469/An_analysis_of_sedition_law_in_India.

leaders, resulting in friction between various communities but sedition laws have been used against the minorities. The author concluded that in independent democratic India, the use of colonial laws of sedition is unwarranted.

Sharma (2019) has analysed the balance between sedition law and right to freedom of speech and expression in India by discussing the history and evolution of sedition laws from during British rule, and questioned the validity of sedition laws in a democracy. The author concluded with suggestions for amendments as there is a need for reconsideration of the sedition laws.

Tiwary (2020) has reviewed and revisited constituent assembly debates and intense debate on sedition laws and its relation to freedom of speech and expression. The author concluded that on perusal of the judicial trends regarding balance between the freedom and its restrictions, and the various incidents and statistics in relation to sedition crime in India and also the fate of sedition in UK, there is a need for amendments on the sedition laws to check its misuse.

Odyuo (2020) has discussed the aim to amend the S. 124A of IPC and protect freedom of speech and expression. The author found that though freedom of speech and expression is fundamentally guaranteed in the constitution, the governments in the name of hate speech and contempt against the government resort to suppressing criticism in the name of necessity for public interest. The author concluded that this amounts to threat to freedom, and there is abuse of sedition law, and that it has become obsolete in modern day democracy, and hence, there is a need for amendment.

Sahoo and Kapoor (2020) have critically analysed sedition in India by a comparative study of Indian and English laws on sedition proposing abolition of the colonial law. They discussed the question whether sedition is a law in the interest of the public order to stay or the time has come to do away with this archaic colonial law which is preventing free speech. They concluded with a suggestion of repealing the archaic colonial law of sedition as it reminds one of colonial oppression and undermines the rights of the citizens to oppose and criticize the government in a democracy.

Kumar and Verma (2020) have critically analysed sedition laws in India. They have used secondary data and various case laws and discussed the history of Sec.124 A of IPC and the Consultation Paper submitted before Law Commission of India on the debate on amendment of S. 124A of IPC. They concluded that disaffection/dis-approbation towards elected government should not be construed as sedition unless there is violence or disorder and suggested for amendment in S. 124 A of Indian Penal Code by regarding mens rea, and concluded that there is a need for a proper legislation that is fair and reasonable.

Kanna (2020)[260] has done a judicial review of colonial criminal laws, like sodomy and sedition laws in Malaysia, Kenya and India and the role of courts. The author found that these colonial criminal laws are pervasive, antiquated and problematic for development of democracy and hence need to be scrapped as a way of furthering decolonisation.

Mishra (2020)[261] has studied the crime of sedition in India. The author discussed the purpose of abolishing sedition laws in relation to the experience of Indians with sedition in its colonial past and quasi-authoritarian present. The author concluded with a discussion on the law's use as a political weapon and on the question as to whether the sedition laws should be repealed or reformed to save Indian democracy from the crisis of rule of law, the author feels that redrafting would be a better option.

Helm and Naru (2021)[262] have discussed the regulatory responses to fake news and freedom of expression in the light of 3 different regulatory approaches, viz., information correction, content removal/blocking and criminal sanctions. They concluded that there must be normative standards for regulation of fake news that should not be equated to defamation/sedition.

Sarkar (2021) has explored the various verdicts of sedition cases and its rise in use in the last 5 years. The author found that Section 124A criminalizes sedition and takes a toll on free speech. The author analysed how much freedom is guaranteed under Art.19(1)(a) , its history and discussed various case laws on its use and concluded that sedition laws should not be used as a tool for suppressing dissent in a democratic nation in the name of public order and stability in administrative system.

Patel (2021) has analysed the sedition law in India revealing that the main reason to bring it to India by the British was to suppress voices of freedom, suppress dissenters and dissipate criticism of the British. The author has done doctrinal research on sedition laws that showed the history of sedition laws and the various case laws and how it is misused and also did a comparison with other countries

[260] Kanna, Maryam. "Furthering Decolonization: Judicial Review of Colonial Criminal Law." *Duke Law Journal*, vol. 70, no. 2, Duke University School of Law, 2020, pp. 411–49.

[261] Mishra, Mythili. "Criminalising Dissent: Sedition Laws in India." *Rule of Law Journal*, vol. 1, no. 1, Houghton St Press, Dec. 2020, pp. 14–24.

[262] Helm, Rebecca K., and Hitoshi Nasu. "Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation." *Human Rights Law Review*, vol. 21, no. 2, Oxford Academic, Feb. 2021, pp. 302–28.

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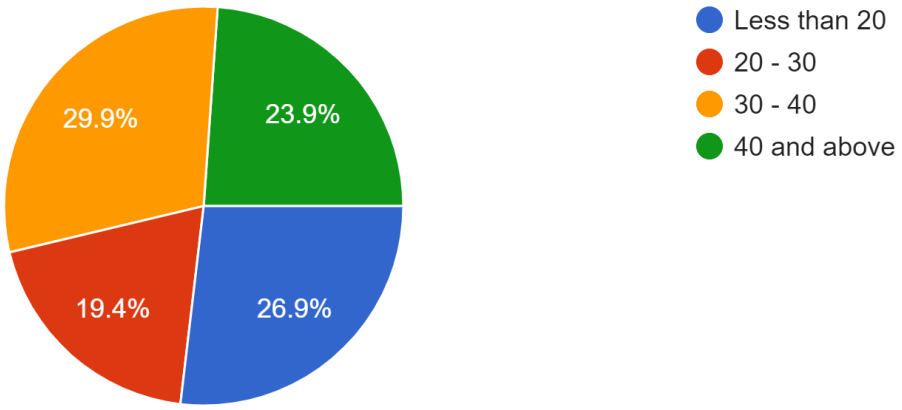
like UK, Australia, Malaysia and concluded that the application of sedition laws should not infringe on others' basic rights and that there is a need for due checks on its usage.

RESEARCH METHODOLOGY

The current study is based on non-doctrinal (empirical) research. It consists of the scientific frame of research. It begins with the finding of research problems based on the review of literature. The major contribution of the study is to collect the legal facts of a particular area and to test the hypothesis of a cause-and-effect relationship between variables. The research design is exploratory and experimental. It explored the problem tested with hypotheses and provided the solution from the analysis. Convenient sampling method is used (non-probability sampling). The sample size is 201. Data is collected through online sources. Questionnaire is used as the primary data collection and secondary data includes the articles, journals, reports and newsletters. The analysis is carried out for demographic statistics (Age, Occupation) and hypothesis testing graphs are used.

DATA ANALYSIS AND INTERPRETATION

Variable 1:



Legend: Pie chart showing the age groups of the sample respondents.

Variable 2:

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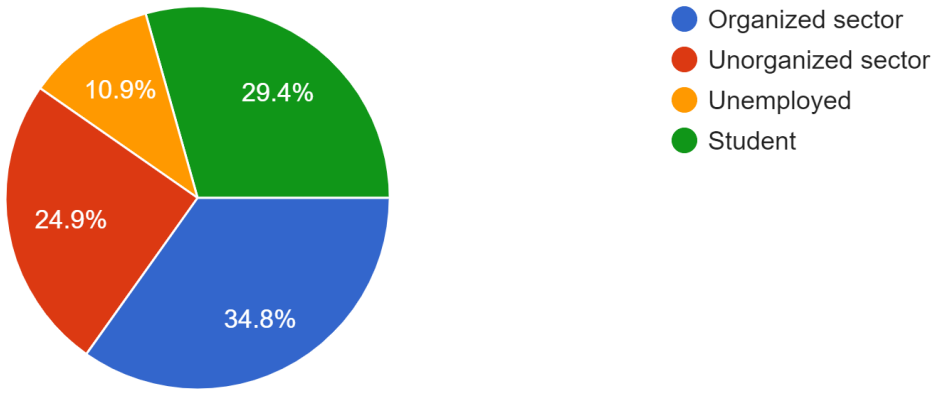

Legend: Pie chart showing the occupation of the respondents.

Figure 1:

			Occupation				
			Organized sector	Student	Unemployed	Unorganized sector	Total
Age	20 - 30	Count	13	8	5	13	39
		Expected Count	13.6	11.4	4.3	9.7	39.0
	30 - 40	Count	29	1	5	25	60
		Expected Count	20.9	17.6	6.6	14.9	60.0
		Count	25	0	12	11	48

	40 and above	Expected Count	16.7	14.1	5.3	11.9	48.0
	Less than 20	Count	3	50	0	1	54
		Expected Count	18.8	15.9	5.9	13.4	54.0
Total		Count	70	59	22	50	201
		Expected Count	70.0	59.0	22.0	50.0	201.0

Chi-square test

	Value	df	Asymptotic Significance (2-sided)
Pearson Chi-Square	159.502[a]	9	.000
Likelihood Ratio	175.470	9	.000
Linear-by-Linear Association	5.206	1	.023
N of Valid Cases	201		

a. 1 cells (6.3%) have expected count less than 5. The minimum expected count is 4.27.

Legend: Chi square test showing the relationship between the occupation and the age of the respondents.

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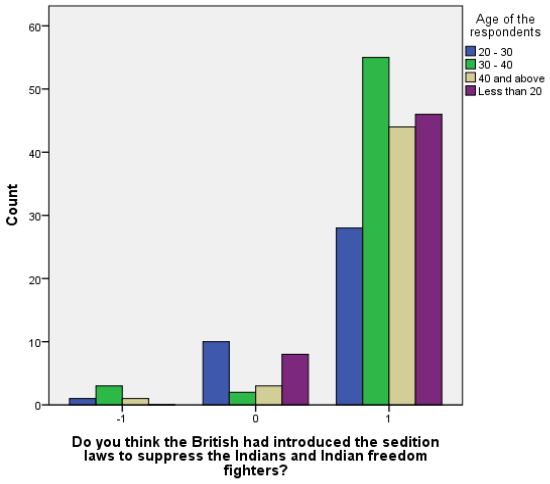
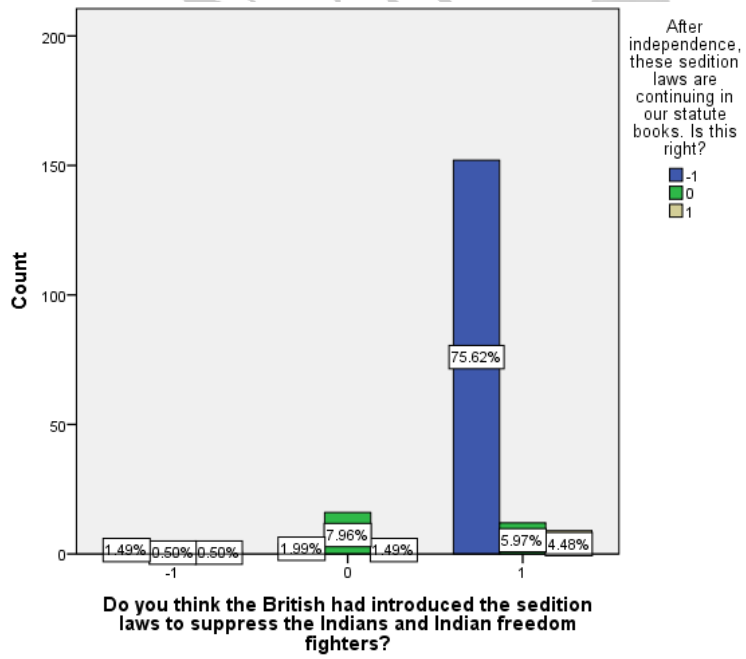
Figure 2:



Legend: Clustered bar graph showing the views of the respondents on whether the British had introduced the sedition laws to suppress the Indians and Indian freedom fighters based on their age groups. Here, -1 = No, 0 = Maybe, 1 = Yes.

Figure 3:



Legend: Clustered bar graph showing the comparison between the answers to the two questions where -1 = No, 0 = Maybe, 1 = Yes.

Figure 4:

Legend: The line graph of the answer to the question - After independence, these sedition laws are continuing in our statute books. Is this right? Here, -1 = No, 0 = Maybe, 1 = Yes.

Figure 5:

Variables Entered/Removed[a]

Model	Variables Entered	Variables Removed	Method
1	Age of the respondents[b]	.	Enter

a. Dependent Variable: Do you think the Indian government is misusing the sedition laws to suppress opposition parties and activists?

b. All requested variables entered.

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.064[a]	.004	-.001	.517

a. Predictors: (Constant), Age of the respondents

ANOVA[a]

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Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	.222	1	.222	.830	.363[b]
	Residual	53.250	199	.268		
	Total	53.473	200			

a. Dependent Variable: Do you think the Indian government is misusing the sedition laws to suppress opposition parties and activists?

b. Predictors: (Constant), Age of the respondents

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	.851	.094		9.002	.000
	Age of the respondents	-.031	.034	-.064	-.911	.363

a. Dependent Variable: Do you think the Indian government is misusing the sedition laws to suppress opposition parties and activists?

Legend: Figure 5 shows the linear regression between the age of the respondents and the question regarding the Indian government's misuse of sedition laws.

Figure 6

Variables Entered/Removed[a]

Model	Variables Entered	Variables Removed	Method
1	Occupation[b]	.	Enter

a. Dependent Variable: Do you think that the sedition laws have outlived its purpose and that it should be scrapped?

b. All requested variables entered.

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.125[a]	.016	.011	.423

a. Predictors: (Constant), Occupation

ANOVA[a]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	.567	1	.567	3.170	.077[b]
	Residual	35.622	199	.179		
	Total	36.189	200			

a. Dependent Variable: Do you think that the sedition laws have outlived its purpose and that it should be scrapped?

b. Predictors: (Constant), Occupation

Coefficients[a]

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Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	.714	.065		11.058	.000
	Occupation	.045	.025	.125	1.780	.077

a. Dependent Variable: Do you think that the sedition laws have outlived its purpose and that it should be scrapped?

Legend: Linear regression showing the relationship between the occupation and the question regarding the scrapping of the sedition laws.

Figure 7:

	Do you think the Indian government is misusing the sedition laws to suppress opposition parties and activists?	Do you think that the sedition laws have outlived its purpose and that it should be scrapped?
N Valid	201	201
Mean	.77	.82
Mode	1	1
Std. Deviation	.517	.425
Minimum	-1	-1

Maximum	1	1

Legend: Descriptive statistics showing about the answers to the two questions where -1 = No, 0 = Maybe, 1 = Yes.

RESULTS

Variable 1 shows the pie chart showing the age groups of the respondents where 29.9 percent of them are aged between 30 and 40 years, while those who are less than 20, constitute about 26.9 percent of the respondents.

Variable 2 shows a pie chart showing the occupation of respondents where 34.8% of them work in the organised sector while 29.4% of the respondents are students.

Figure 1 shows with the help of a chi-square test that there is a significant relationship between the age of the respondents and the occupation of the respondents as the p-value is 0.000 which is less than 0.5 and hence, they are related.

Figure 2 shows the views of the respondents on whether the British had introduced the sedition laws to suppress the Indians and Indian freedom fighters based on their age groups. Majority of the people from all the age groups have agreed that sedition laws had been introduced by the British to suppress the Indians and Indian freedom fighters.

Figure 3 shows the bar graph showing the views of the respondents on whether the British have brought the sedition laws to suppress the Indians and Indian freedom fighters and if these sedition laws are right to be continued after independence. Those who feel it was brought in to suppress Indians and Indian freedom fighters also feel that the continuance of these laws after independence is wrong (75.62% of those who agreed for the first question).

Figure 4 shows a line graph showing if these sedition laws are right to be continued in independent India. 79.1% of the respondents have replied No.

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Figure 5 shows the linear regression between the independent variable, the age of the respondents and the dependent variable, their views on whether they think that the government is misusing sedition laws. There is a significant relationship between the two as the t-value is more than 2 and significance value is 0.000.

Figure 6 shows the linear regression between the occupation of the respondents and the question whether the sedition laws need to be scrapped off the statute books. There is a significant relationship between the independent variable and dependent variable as the t-value is more than 2 and significance value is 0.000.

Figure 7 shows descriptive statistics on the views of the respondents as to whether they think the Indian government is misusing its power and that the sedition laws need to be scrapped. Many feel that they are misused by the government and that they need to be scrapped.

DISCUSSION

Variable 1 shows the pie chart showing the age groups of the respondents. All the given age groups are almost the same showing that the views of different age groups have been looked into. 29.9 percent of them are aged between 30 and 40 years, while those who are less than 20, constitute about 26.9 percent of the respondents. There is equal distribution of the respondents with respect to age helping us to cover the views of all age groups. Variable 2 showing the occupation of respondents shows that 34.8% of them work in the organised sector while 29.4% of the respondents are students. Only 10.9% of the respondents are unemployed. Figure 1 shows the count of the respondents based on their age and occupation and a chi-square test shows that there is a relationship between age and occupation because the p-value is 0.000. People who are less than 20 are not working. This analysis also helps us to understand how many of the respondents are in the organized and unorganized sector which indirectly shows how many are educated and how many are not, to an extent. Figure 2 shows the views of the respondents on whether the British had introduced the sedition laws to suppress the Indians and Indian freedom fighters based on their age groups. Almost everyone has accepted that the British had indeed brought sedition laws to suppress the voices of the people of India, from all age groups. Figure 3 shows that people who feel that the British had introduced the sedition laws also feel that it is not right to have these laws in independent India (75.62%). Those who are not sure about

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it also feel the same way for whether the existence of these laws in independent India is right. Figure 4 shows that many feel that these sedition laws are irrelevant in modern India where freedom of speech and expression is a fundamental right. Figure 5 shows that there is a statistically significant relation between the age of the respondents and the question as to whether they think that the government is misusing sedition laws. So we can confer that the awareness of current affairs and general knowledge and thinking of the respondents play a role here. Figure 6 shows that there is a statistically significant relationship between the occupation of the respondents and their view on whether the sedition laws need to be scrapped off the statute books. We can see that the occupation of the respondents affects people's views on the sedition laws. By figure 7, we can see that many find the sedition laws to be misused by the government and that they need to be thrown out of the statute books while only a very few people feel the other way.

LIMITATIONS

The sample frame is the major limitation. The samples were collected through online platforms like sending mail, sending links via WhatsApp. This is the limitation of the study. The restrictive area of sample size is yet another drawback of the research. Collection of data via online platforms is limiting the researcher to collect data from the field. Since the data is collected on an online platform wherein the respondent is not known, the original opinion of the respondent is not found and this research could only come to an approximate conclusion on what the respondents are trying to convey.

SUGGESTIONS

Before independence, the British had used sedition laws to suppress the Indian freedom movement. But after independence there is no relevance for sedition laws in India. Hence it is better the sedition laws are scraped from the statute books. Further for any transgression, the provisions of Indian Penal Code may be used for trying those offences and for giving punishments for the same. It is relevant to mention here that the provisions like Offences against Public Tranquillity, which includes unlawful assembly, rioting, promoting enmity between groups on the basis of caste, religion etc., may be used. Further there are other provisions in Indian Penal Code like defamation, blasphemy, insult etc., which may also be used for any transgressions. In the modern context, the State can make use of the provisions of the Information Technology Act and Rules for any transgression against the State using modern technological social media. Basically, sedition laws are used against political offenders and

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those who have contrary views other than the ruling government, and hence if they are tried under sedition laws in modern India, it is because of political vendetta and political suppression. If such offences are tried under normal criminal laws of India, such offences would be characterised only as criminal offences and not political offences.

CONCLUSION

Historically, the British had introduced the sedition laws to sustain the power and rule over India. In the process, the British had treated the genuine freedom struggle as directed against the government to overthrow them. Theoretically, after independence, with the establishment of democratic constitution, continuing the sedition laws in the statute books becomes redundant. Moreover, there are occasions where sedition laws are being misused and various social activists were tried under sedition laws and put behind bars. The following survey conducted on sedition laws in India shows that the majority of the respondents want these sedition laws to be scrapped out of the law books, by striking down Section 124A of the Indian Penal Code and embrace the freedom of speech and expression in independent democratic India.

REFERENCES

1. Aishwarya, Narayanan. "A Theoretical Analysis of the Law on Sedition in India." *Christ University Law Journal*, vol. 4, no. 1, 1970, pp. 87–101, doi:10.12728/culj.6.5.
2. *Analyzing the Law of Sedition in India - International Journal of Law Management & Humanities*. 11 May 2021, https://www.ijlmh.com/paper/analyzing-the-law-of-sedition-in-india/.
3. Cohan, John Alan. "Seditious Conspiracy, The Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government." *Journal of Civil Rights and Economic Development*, vol. 17, no. 2, 2012, p. 2.
4. Ghosal, Joydip. *An Analysis of Law of Sedition and Its Impact on Freedom of Expression*. Mar. 2014, https://papers.ssrn.com/abstract=3457494.
5. Helm, Rebecca K., and Hitoshi Nasu. "Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation." *Human Rights Law Review*, vol. 21, no. 2, Oxford Academic, Feb. 2021, pp. 302–28.

6. Kanna, Maryam. "Furthering Decolonization: Judicial Review of Colonial Criminal Law." *Duke Law Journal*, vol. 70, no. 2, Duke University School of Law, 2020, pp. 411–49.
7. Mishra, Mythili. "Criminalising Dissent: Sedition Laws in India." *Rule of Law Journal*, vol. 1, no. 1, Houghton St Press, Dec. 2020, pp. 14–24.
8. *[No Title]*. http://docs.manupatra.in/newsline/articles/Upload/37E592F0-BE2A-475F-AF99-2F6909F3CF11.pdf. Accessed 26 Dec. 2021.
9. ---. https://www.mediawatchjournal.in/wp-content/uploads/2020/07/Freedom_of_Speech_and_Expression_A_Study.pdf. Accessed 26 Dec. 2021.
10. ---. http://ijlljs.in/wp-content/uploads/2017/12/Essay.pdf. Accessed 26 Dec. 2021.
11. ---. https://acadpubl.eu/hub/2018-119-17/1/11.pdf. Accessed 26 Dec. 2021.
12. ---. https://thelawbrigade.com/wp-content/uploads/2019/05/Kruthika-Venkatesh.pdf. Accessed 26 Dec. 2021.
13. ---. https://www.tandfonline.com/doi/full/10.1080/15570274.2018.1535035. Accessed 26 Dec. 2021.
14. ---. https://www.ijlmh.com/wp-content/uploads/2020/03/Striking-a-balance-between-Sedition-Law-and-Right-to-Freedom-of-Speech-Expression.pdf. Accessed 26 Dec. 2021.
15. ---. http://www.penacclaims.com/wp-content/uploads/2020/06/Benchilo-Odyuo.pdf. Accessed 26 Dec. 2021.
16. ---. http://www.penacclaims.com/wp-content/uploads/2020/07/Rakesh-Kumar-Sahoo.pdf. Accessed 26 Dec. 2021.
17. ---. https://www.ijrar.org/papers/IJRAR19D2080.pdf. Accessed 26 Dec. 2021.
18. Shah, Jhalak, and Shantanu Pachauri. "An Analysis of Sedition Law in India." *Vidhi Aagaz Scholar's Paradise Journal*, Apr. 2020, https://www.academia.edu/42810469/An_analysis_of_sedition_law_in_India.
19. *The Judicial Standpoints of Sedition Cases in the Last Five Years - International Journal of Law Management & Humanities*. 30 Apr. 2021, https://www.ijlmh.com/paper/the-judicial-standpoints-of-sedition-cases-in-the-last-five-years/.
20. *Website*. https://ili.ac.in/pdf/art.pdf.

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CUSTODIAL DEATH AND POLICE BRUTALITY IN INDIA: A CRITICAL ANALYSIS

- NANDITA PHAL

ABSTRACT

The framework of the maintenance of law and order, detection of crime, and enforcement process of social legislation rests on the foundation of an efficient and functional police system. However, as paradoxical as it may sound, it is a universal fact that police officers have been chastised and condemned for behaving in ways that contradict revered values. The high incidence and regularity of custodial deaths in the world's greatest democracy raises citizen concerns and casts doubt on democracy's fundamental tenets. Under Articles 20, 21, and 22 of the Indian Constitution, a prisoner or person in custody is guaranteed a variety of rights. Certain rights, like as the right against handcuffing, the right to a fair trial, and the right to free legal aid, have been regarded by the Supreme Court of India as intrinsic parts of Article 21 of the Constitution. Custodial deaths are raising concern in society as the police officers are entrusted with protecting humankind and when they violate those laws instead of protecting it. The key objective of the article is to raise awareness of custodial death and the importance of upholding equality and safeguarding a person's right to life. Only with the collaboration of both the police and the general people can we develop a strong and healthy democracy free of human rights violations. Therefore, the article critically analyses physical violence against detainees in police custody and provides suggestions to curb custodial violence.

KEYWORDS: CONSTITUTION, CUSTODIAL DEATH, VIOLENCE, POLICE OFFICERS, HUMAN RIGHTS.

INTRODUCTION

Custodial death occurs when an individual who is arrested and incarcerated by the authorities, either as a convicted criminal or as a suspect in a criminal case dies in police custody. The existence of this heinous and vile crime in a civilised society is frightening and astonishing. In this case, law enforcement authorities act as offenders and violate human rights. This is the result of a abuse of power this is vested in the police authorites. It eventually leads to prejudice based on caste and

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religion. This type of cruelty has long been accepted and done in order to elicit confessions from suspected criminals. The majority of the time, these deaths are misrepresented as natural deaths or suicides, allowing the perpetrator to avoid prosecution. There's a lot of room for manipulating the specifics of the events that transpired while the suspect was in custody. When a court hears a case involving a custodial death, a recurrent question that arises is whether a criminal or suspect loses his right to life, which is guaranteed by the Indian constitution, after he is arrested. And why should he be deprived of that right? He has a good probability of proving his innocence based on the evidence. These harsh treatment methods are illogical. And the police officers' misconceptions about limitless power and control must be removed.

AIM OF STUDY

To critically examine the notion of custodial death as a societal evil, as well as the human rights breaches that occur in cases of custodial death.

RESEARCH QUESTION

Is death in custody considered a violation of human rights?

METHODOLOGY

The researcher has used a doctrinal methodology to conduct research for this paper. This paper's research was conducted using primary and secondary sources of information such as statutes, case law, journals, and reports, among others.

CUSTODIAL DEATH

Custodial death can be defined as any manner of torture or brutal treatment by police officers that occurs at any point during the investigation or interrogation process. The Indian Constitution guarantees fundamental rights to detainees or those in custody. The police officers they are not allowed to engage in any form of violence because they are in jail as an accused person. People in custody cannot be denied basic human rights, with the exception of those whose rights have been curtailed by the court. The term ‘Custody’ can be classified into two categories the first of which is police custody while the second is judicial custody. In the instance of Police custody, the information about the crime is first is lodged by the police officer. The suspect is then escorted to the police station

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after the police officer takes him into custody to prevent him from commenting on the disrespectful acts. Police custody refers to this type of incarceration in a police station. The second type is judicial custody, in which the accused is placed in jail on the orders of the Magistrate. He can be sent to jail or taken into police custody on the Magistrate's orders. A person can be held in custody until the matter in which he or she is involved is heard in court. If a person in custody dies as a result of cruel and brutal treatment metted to him or her before the court issues its judgement, it is considered a violation of human rights.

Police officers play a crucial role in guaranteeing and preserving public safety. However, the powers granted to them to ensure safety are limited because they, like citizens, are subject to the law. If the crimes committed by the police officers on people in custody are similar in nature to the crimes of convicted criminals, the offenders should be held accountable. However, the situation is rather different. Under the guise of self-defense, the police officers simply avoid charges and conviction.

CASES OF CUSTODIAL DEATH IN INDIA

- ***D. K. Basu v. State of West Bengal.***[263]

In this case, the petitioner, DK Basu, contended that physical harm to people in custody by police officers should be avoided because it is against the law, and that there is a need to reduce the arbitrariness of arrest by police officers that results in custodial death because such behaviour is unacceptable in a civilised country, and that steps should be taken to eliminate such violence. The Hon'ble Supreme Court ruled in favour of the petitioners, elucidating that the state is violating the fundamental rights of suspects in custody, and that specific remedies must be provided for the same. The right to life and liberty includes protection from torture and violence by state officials. It was said that a person could not be detained without having the basis for the arrest explained to him. The Court believed that custodial death was one of the most heinous crimes committed in a civilised country and that it needed to be stopped. The convicts' right to life is not revoked on his arrest, rather certain restrictions have been placed on them. In this landmark judgement, the issued guidelines that prescribed the procedures and requirements for the police or other agencies to follow during arrest or interrogation

[263] Shri.D.K.Basu, Ashok K. Johri v. State of West Bengal, State of UP (1997) 1 SCC 416, (India).

- ***Harbans Kaur v. Union of India.***[264]

In this case, the Supreme Court held that in order to begin an investigation into whether a suspect in custody was beaten to death in police custody, resulting in a custodial death, it is necessary to identify the degree of police officers' involvement in the suspect's death. Furthermore, the Court ordered that the police station's records must be thoroughly scrutinised in order to obtain justice for the person and officer who were found guilty of misconduct or negligence that resulted in the deceased's death while in police custody.

- ***Joginder Kumar v. State of Uttar Pradesh***[265]

It specifies that the police officer must tell the individual of his arrest. and a note in the journal about who was informed of the arrest should be made. This provision is supported by Articles 21 and 22(1), and it should be vigorously enforced. It was also ruled that the magistrate in front of whom the person was arrested be in charge of making sure that all of the foregoing requirements were met.

- ***Yashwanth and Ors. v. State of Maharashtra.***[266]

The Supreme Court confirmed the convictions of nine Maharashtra cops in a 1993 custodial death case and doubled their terms from three to seven years each on September 4. A bench of Justices NV Ramana and MM Shantanagoudar supported the High Court's ruling, stating that incidents involving the police tend to erode people's trust in the criminal justice system. As the cops' prison sentences were enhanced, the supreme court remarked, "With huge power comes greater accountability." The officers were found guilty under Section 330 of the Indian Penal Code, which forbids inflicting bodily damage on others in exchange for confessions or property return.

- ***Nilabati Behera vs State of Orissa***[267]

In the case, the Supreme Court stated that every prisoner and arrestee possess fundamental rights guaranteed under Article 21 of the Indian Constitution. They have equal rights to all basic fundamental rights, and police officers are obligated to follow the law and safeguard their fundamental rights by guaranteeing that the person in custody does not lose his right to life. The Court also cited Article 9(5) of the International Covenant on Civil and Political Rights[268], which states that the right to compensation should be recognized, and that anyone who has been wrongfully arrested

[264] Smt. Harbans Kaur v. Union of India & Ors. (1995) SCC (1) 623, (1994) (India).
[265] Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 26, (India)
[266] Yashwanth and Others v. State of Maharashtra, (2018) 4MLJ (Crl) 10 (SC),(India).

[267] Smt. Nilabati vs. state of Orissa A.I.R 1993 S.C. 1960
[268] United Nations, Treaty Series, vol. 999, p. 171

and abused in custody should be compensated. In support of this, the supreme court ordered Rs. 1.5 lakhs in compensation to the deceased's mother, who was a victim of custodial violence and died in police custody.

- ***Tamil Nadu Custodial death case of father and son***[269]

In this case, the father-son victims of police brutality were subjected to harsh torture by police for narrowly violating lockdown restrictions. This type of extreme punishment is a violation of human rights. No one should be beaten by the police as a result of indiscriminate abuse of power granted to them. As a result of this incident, Section 176 of the Criminal Procedure Code was amended, and a special provision for Custodial Death Investigation was created.

The aforementioned case laws illustrate how custodial deaths have been occurring for a long time and how they violate a person's right to life. A human who is primarily a suspect has been severely tortured as a result of the occurence of this which tdemonstrates the misuse of power that has occurred in society. Most of the time, such social evil is overlooked owing to a lack of understanding of the rights given by our Constitution.

TECHNIQUES OF TORTURE

The term "torture" comes from the Latin word "tortus," meaning "to twist or torment." It is the intentional infliction of extreme bodily or mental torment on another person as a form of punishment. Torture is used in the legal system to obtain leads in cases during the interrogation stage. In the process of torture, there are certain distinctions. The third degree technique is the final level. Torture can refer to any inhumane treatment that cannot be examined.[270]

· Hammering nails into the body

Gufran Alam and Taslim Ansari were detained in connection with a motorcycle theft case in Bihar, and their soles, wrists, and thighs were pounded with nails. As a result of their injuries, they were gravely injured and died.[271]

· Burning of leg

[269] Arun Janardhan, *Explained : How Tamil Nadu Police's brutal act claimed lives of father and son,* THE INDIAN EXPRESS, sep 24, 2020.
[270] Vignesh Radhakrishnan, et al. *Five custodial deaths in India daily says the report,* The Hindu,27 June 2020.
[271] Santosh Singh, *Bihar custodial deaths: Kin of youths to approve rights panel, court,* THE INDIAN EXPRESS, Mar 13, 2019.

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In Kashmir, a school principal who was arrested in a militancy-related matter died in custody. He was released on bond, but the cops kept him in jail for 20 days. There was no indication that he had committed such crimes. He died as a result of torture while in police custody.[272]

· Trauma to the soles

The police caught Rajkumar, the victim in the Kerala Custodial Death case, in connection with a financial fraud case. He was subjected to third-degree torture. Although the medical report revealed a number of injuries, including a fracture, contusion, and haemorrhage, the cause of death was ruled to be natural. Chilli powder was said to have been used to torture him. He died as a result of such inhumane treatment.[273]

· Hitting the private parts

In the Haryana Custodial Death case, the victim Brijpal Maurya was struck in the private regions, resulting in his death.[274]

· Stabbing with Screwdriver

The victim, Pradeep Tomar, was detained by the officials in charge for murder in the Uttar Pradesh Custodial Death Case. Without telling his superior officer, the police put him into jail. He had been battered to the point that his body had become blue and he had bruises on his arms.[275]

RIGHTS OF PERSON IN CUSTODY

1.Right to remain silent

The concept is that if a suspect refuses to answer questions posed to him by authorities, courts or tribunals should not find him guilty of a crime. Article 20(3) of the Indian Constitution provides everyone the right to be free of self-incrimination. The right to silence was established in the case of Nandini Sathpathy v. P. L. Dani[276], which concluded that no coerced confessions were allowed and that an accused had the right to remain silent during the inquiry process. In the year 2010, scientific

[272] Bashaarat Massod, *J & K school principal dies in police custody, family alleges murder,* THE INDIAN EXPRESS, Mar 20, 2019
[273] Shaju Philip, Kerala: Idukki custodial death snowballing into big trouble for CPM, THE INDIAN EXPRESS, Jul 2, 2019
[274] Kanwardeep Singh, Man who died in revenue custody in UP's Baudan was a case of mistaken identity, TOI, Oct 6, 2019.
[275] Amil Bhatnagar, UP: 7 cops exonerated in Happened custodial death, TOI, June 28,2020.
[276] Nandini Sathpathy v. P.L.Dani,1978, AIR 1978 SC 1025, (India).

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procedures such as brain mapping, lie detector tests, and narco analysis were found to be in breach of Article 20(3).

2. Right to be informed about the grounds of arrest.

A police officer is required by Section 50(1) of the Cr.P.C. to inform the person arrested in detail about the offence committed. Article 22(2) of the Indian constitution protects the arrested person, stating that a person cannot be detained or held in prison without first being informed of the basis for the arrest and having the right to consult an attorney of his choice.

3. Information on the right to be released on bail.

When a police officer makes an arrest without a warrant of a person who has been suspected of committing a bailable offence, he has the right to inform him under section 50(2) Cr.P.C. He can be released on bail if he arranges his own sureties.

4. The right to be expeditiously brought before a Magistrate.

When a police officer arrests someone without a warrant, he or she must appear before a magistrate within 24 hours, and they should be kept exclusively in a police station until they appear before the magistrate. Sections 56 and 76 of the Cr. P C. mention these contents.

5. The right to not be held without court review for more than 24 hours.

A person who has been arrested must appear before a magistrate within 24 hours, according to Article 22(2).

The Supreme Court ruled in Khatri(II) v. State of Bihar[277] that police officers must ensure that a person detained is brought before a magistrate within 24 hours of their arrest. If the police personnel fail to comply with this duty, they will be held accountable for wrongful detention.

In the case of Poovan v. Sub-Inspector of Police[278], it was held that if a magistrate receives a complaint that a person is being arrested and has not been produced before a magistrate within 24 hours, he is summoned to determine whether the allegations are true and under whose custody he is being held. If the officer denies the closest, the magistrate can conduct an investigation and give necessary orders.

6. Right to a fast and fair trial

[277] Khatri v. State of Bihar, 1981 SCC (1) 627, (India).
[278] Puvan v. Sub inspector of Police, 1993 CriLJ 2183, (India).

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The accused has the right to a fair and speedy trial under the Constitution. It is not specifically written in the constitution, but it has been construed by the Hon'ble Supreme Court of India in the Hussainara Khatoon case.[279] This ruling demands that a trial investigation be conducted "as quickly as possible."

7. Right to consult an attorney and be provided with free legal aid.

According to Article 22(1) of the Constitution, a person who has been arrested has the right to speak with an attorney of his choice.[280] Furthermore, the Supreme Court has decided that the state has a constitutional obligation (implicit in article 21) to offer free legal assistance to a indignent accused individual.[281] In Suk Das v. Union Territory of Arunachal Pradesh, the Supreme Court went even farther, stating explicitly that this constitutional right cannot be denied simply because the accused failed to request for it.[282]

PAYMENT OF COMPENSATION TO THE VICTIM

Compensation to the victim is the payment of monetary aid to compensate for the victim's loss or injury caused by another person or any other means. The payment of compensation to the victims is mandated by Section 357 of the CrPC.[283] Victim compensation is an important feature in which the victim is compensated for the loss and injury he has suffered. In the case of a custodial death, the death of the victim is a result of abuse of power granted to state officials and so h e or she needs to be compensated adequately.

SUGGESTIONS AND RECOMMENDATION

The following are the recommendations made by the researcher in safeguarding the rights of individuals in custody

• Installing surveillance cameras at police stations, particularly in areas where investigations are conducted

• Installing surveillance cameras at police stations, particularly in areas where investigations are conducted

• If necessary, proper treatment in the form of first aid should be administered to the inmate.

[279] Hussainara Khatoon & Ors. v. Home secretary, state of Bihar, 1979 SCR (3) 532 (India).
[280] INDIA CONST. art 22, cl 1.
[281] Khatri v. State of Bihar, 1981 SCC (1) 627 (India).
[282] Suk Das v. Union Territory of Arunachal Pradesh, 1986 SCR (1) 590 (India).
[283] The Criminal Procedure Code, 1860, No. 2, 1974 (India).

• Providing medical facilities in the event of an emergency

• Officers should be prohibited from using any lethal and deadly weapons.

• In case of an emergency, use the scientific technique rather than barbaric methods to obtain leads.

• If a person dies while being held in custody, the policemen must be charged with the crime.

CONCLUSION

The right to life is a crucial fundamental right protected by our constitution. If a person is in custody, this right cannot be taken away. Every year, we witness custodial fatalities for a variety of reasons, some of which are natural and most of which are natural. Some cases are highlighted, while others are overlooked. This type of human therapy must be prohibited, and a scientific method must be taken. Police officers must be properly educated on the human rights of those being held in custody. Officers who are misusing their authority must face consequences. The researcher has addressed about the Custodial Deaths that have occurred in India, outlining the torture techniques used and how they have been violating human rights for a long time which are protected and safeguarded by the Indian constitution. Anti-torture laws must be enacted in India

References:

1. Arora, N., 1999. CUSTODIAL TORTURE IN POLICE STATIONS IN INDIA: A RADICAL ASSESSMENT. *Journal of the Indian Law Institute*, [online] Vol.41 No, (3/4), pp.513-529. Available at: https://www.jstor.org/stable/43953348 [Accessed 13 August 2021].

2. LOKANEETA, J., 2014. Defining an Absence: Torture 'Debate' in India. *Economic and Political Weekly*, [online] Vol.49 No,(26/27), pp.69-76. Available at: https://www.jstor.org/stable/24480533 [Accessed 13 August 2021].

3. Mishra, J., 2005. CUSTODIAL ATROCITIES, HUMAN RIGHTS AND THE JUDICIARY. *Journal of the Indian Law Institute*, [online] Vol.47 No(4), pp.508–521. Available at: https://www.jstor.org/stable/43951999 [Accessed 13 August 2021].

4. Saini, R., 1994. CUSTODIAL TORTURE IN LAW AND PRACTICE WITH REFERENCE TO INDIA. *Journal of the Indian Law Institute*, [online] Vol.36 No(2), pp.166-192. Available at: https://www.jstor.org/stable/43951530 [Accessed 13 August 2021].

5. Noorani, A., 2005. Access to Prisons and Custodial Torture. *Economic and Political Weekly*, [online] Vol.40 No(42), pp.4497-4498. Available at: https://www.jstor.org/stable/4417285 [Accessed 13 August 2021].

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ROLE OF FORENSIC SCIENCE AND ARTIFICIAL INTELLIGENCE: FUTURE OF CRIMINAL JUSTICE SYSTEM IN INDIA

- SHIVANI BHAT

"The greatest danger of artificial intelligence is that people conclude too early that they understand it" ~Eliezer Yudkowsky.

ABSTRACT

Forensic science is an essential component of the criminal justice system. Its primary focus is on the investigation of scientific and physical clues gathered from the crime. It is a discipline that operates within the legal framework and can make a meaningful impact on investigation of crimes and other serious offenses. The uniqueness of the criminal perpetrator is discussed in forensic science. Artificial Intelligence, alongside digital forensics, will facilitate investigators in conducting criminal investigations by identifying and gathering evidence at crime scenes and presenting accurate information on which they might even rely on resolving criminal cases. A.I. can be employed in Blood Pattern Recognition & Analysis, Crime Scene Reconstruction, Digital Forensics, Image-processing, and Satellite Monitoring. A.I. has a wide variety of applications, preliminary investigation of the crime scene until the Court delivers the ultimate judgment. The work aims to find improved and extensive ways to Boost, Broaden, and Vest Forensic Science techniques in all its branches by using current science & technologies and employing the latest and upcoming technologies, such as Artificial Intelligence (A.I.). The paper converses the present-day and probable forthcoming applications of A.I. in forensic science and techniques used in forensic science to investigate a crime scene. It also covers the relevant legal provisions given by the legal system. Furthermore, the paper will focus on the various scientific techniques used to investigate a crime, highlighting the legislation's relevant legal provisions.

Keywords: Digital Forensics, Artificial Intelligence, Criminal Investigation, Justice, Judiciary,

INTRODUCTION:

Forensic science is a crucial component of the criminal justice system. It is primarily focused on the investigation of scientific and physical clues gathered at the crime site. The importance of forensic science in the justice and legal systems is well understood in criminal prosecutions for evidence. This is because there is limited opportunity for injustice and bias when scientific procedures and methodologies are used. It requires using many fields for evidence analysis, such as chemistry, physics, computer science, biology, and engineering. The term "forensics" is derived from the Latin word "forenses," which means "forum."[284]

Forensic science is concerned with the preservation, acquisition, and analysis of evidence used in a criminal court to convict an offender. [285] As a result, forensic science's use in the Indian criminal justice system presents a clear picture. The importance of forensic science in the justice and legal systems is well understood in criminal prosecutions for evidence. This is because there is limited opportunity for injustice and bias when scientific procedures and methodologies are used. Forensic evidence is also used to link crimes that are suspected of being linked. DNA evidence, for example, can connect a single perpetrator to multiple murders or crime locations, or it can pardon the guilty. It also aids in the sequencing of crimes, assisting law enforcement officials in narrowing the spectrum of possible suspects and establishing crime patterns that can be used to identify and convict offenders. Forensic science is considered an integral part of the puzzle of a criminal case. Criminals cannot be sentenced unless an eyewitness is present, which is unattainable without forensic science. While detectives and law enforcement organizations are involved in acquiring physical or digital evidence, forensic science is concerned with examining that evidence to establish facts admissible in Court.

[284] 2021. [online] Available at: <https://www.merriam-webster.com/dictionary/forensic> [Accessed 17 September 2021].
[285] 'Role Of Forensic Science In Crime/Criminal Detection - Law Circa' (Law Circa, 2021) <https://lawcirca.com/role-of-forensic-science-in-crime-criminal-detection> accessed September 17, 2021

Murderers, robbers, drug traffickers, and rapists would be free to wander in a world without forensic science.[286]

Forensic science is a broad and diversified area that has become a vital working horse in the criminal justice delivery system. In India, the current state of crime investigation and prosecution is pretty bleak. A substantial majority of trials in India end in acquittals. The official ratio is around 90%, while the unofficial figure is significantly higher.[287]

Forensic Scientists strive to discover methods and solutions for the recovery and collection of evidence from crime scenes so that criminal evidence is recovered and retained without being contaminated and are sent scientifically and safely to the lab, where the latest techniques are deployed and applied to extract prosecutable evidence that will link the evidence to the perpetrator. As society progresses toward a more scientific approach to solving crime in line with today's human rights environment, forensic scientists will become an increasingly vital element of the justice-dispensing process.[288]

Forensic Scientists are frequently confronted with a more technologically savvy criminal and a more well-informed and prepared defense. Over the years, the expertise and opinions of forensic scientists have been used by courts around the country to produce new laws and jurisprudence.[289]

It has made vital contributions to the criminal investigation. It is beneficial to interrogate the suspect, victim, and even the witness to obtain the truth. Mind control, psychological detection of deception (Lie detection), Narco-analysis, and Brain mapping are examples of neurological tests that have transformed criminal prosecutions, speeding up the process, money, and effort while producing considerably better results. These scientific interrogation techniques have made interrogations more humane and legal, eliminating notorious third-degree methods of interrogation, which frequently turn

[286] 'The Importance Of Forensic Science In Criminal Investigations And Justice' (IFF Lab) <https://ifflab.org/the-importance-of-forensic-science-in-criminal-investigations-and-justice/> accessed September 18, 2021
[287] Khan G, and Ahad S, 'role of forensic science in criminal investigation: admissibility in Indian legal system and future perspective' (2018) 7 International Journal of Advance Research of Science and Engineering
[288] (Nicfs.gov.in) <https://nicfs.gov.in/nicfs/public/pdf/Final-29.08.2019.pdf> accessed September 25, 2021
[289] ibid

disastrous. A criminal investigation is a pragmatic science that entails the study of facts to categorize, expose, and prove the guilt of an accused. A detailed criminal investigation includes probing, consultations, cross-examinations, evidence collection, preservation, and numerous investigation procedures.

Materials and evidence known as associative evidence are collected from the crime scene during the investigation. Using a combination of scientific applications in various areas of knowledge, forensic scientists aim to develop methods and solutions for recovering and collecting evidence from crime scenes, ensuring that criminal evidence is recovered and retained without being contaminated or altered, packed, and sent scientifically and safely to a lab where the most cutting-edge techniques are used.[290]

Identification and analysis of bodily fluids in a forensic lab are frequently required in order to gather information. One of the difficulties with forensic examinations is that they must be performed in a non-destructive manner not to harm the evidence. For instance, Microscopy (the technique of using, designing, or production of microscopes for studying the structure of cells)[291] has been proven to be of vital importance in the real world of forensic scientists. It is a non-destructive method for evaluating body fluids and other forensic materials such as drugs or fingerprints. This allows for the evidence to be evaluated while still being preserved.[292]

ROLE OF COMPUTER FORENSICS IN CRIMINAL INVESTIGATIONS

Crime has existed since human evolution. Crime, as a concept, is not new to human society and dates back to the time when Adam was born. The Quran and Bible provide proof that the first crime committed on the earth was committed by Adam's offspring, implying that crime in some form or another has occurred in the world since time immemorial, as have methods to prevent it. Every area of human existence has evolved due to the advancement of science and technology, and the Court

[290] Schiro G, "Collection and Preservation of Blood Evidence from Crime Scenes" <https://www.crime-scene-investigator.net/blood.html> accessed September 25, 2021
[291] "Microscopy" (Cambridge Dictionary) <https://dictionary.cambridge.org/dictionary/english/microscopy> accessed September 25, 2021
[292] Lee HC, "Applying Microscopy in Forensic Science" (1998) 4 Microscopy and Microanalysis 490

and its judicial system are no exception to this general trend. Nations worldwide have taken a more liberal approach to accept scientific procedures. The usefulness of these approaches in criminal inquiry may be deduced that it does not require further justification. This scientific study aids in the development of a link between the past and present of the crime referred to as Corpus Delecti. Facts and circumstances constituting a crime or the body of the offense. Crime has existed since human evolution.[293]

Cyber Forensics, which is the discipline of collecting, analyzing, and examining digital evidence, is critical for preventing cybercrime from recurring. The collecting and investigation of numerous pieces of the evidence disclose information about the attacker and the availability of hidden digital evidence stored in the computer or mobile device. The use of suitable and established methods in cyber forensics, while adhering to the principles, will assist investigators and forensic scientists in properly examining and analyzing evidence and preserving it.[294]

Computers are used to perpetrate crime, and law enforcement now employs computers to fight crime due to the expanding science of digital evidence forensics. Digital evidence is information that has been stored or transmitted in binary form and can be used in Court. It can be found on a hard disc, as well as a cell phone.[295]

Electronic crime, or e-crime, such as child pornography or credit card fraud, is frequently associated with digital proof. Digital evidence, on the other hand, is being used to prosecute all types of crimes, not just e-crime. In order to combat e-crimes and acquire relevant digital evidence for all offenses, law enforcement organizations are implementing digital evidence collecting and processing, commonly known as computer forensics, into their infrastructure. Training police to acquire digital evidence and keep up with quickly emerging technologies such as computer operating systems presents a problem for law enforcement agencies.

[293] Khan G, and Ahad S, 'Role Of Forensic Science In Criminal Investigation: Admissibility In Indian Legal System And Future Perspective' (2018) 7 International Journal of Advance Research in Science and Engineering
[294] Supra note 6
[295] 'Digital Evidence And Forensics' (National Institute of Justice, 2021) <https://nij.ojp.gov/digital-evidence-and-forensics> accessed September 24, 2021.

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Computer forensics assists the civil and criminal justice systems in assuring digital evidence is presented in Court. As computers and other data-collection devices become more widespread in all aspects of society, digital evidence – and the forensic methods used to collect, store, and analyze evidence – has grown relevant to solving crimes and other legal problems. The average individual never sees much of the data acquired by modern devices. Autopilot cars, for example, record data on whether a driver brakes, shifts, or changes the speed of the vehicle without the driver's knowledge and consent.[296]

The cars are installed with sensors, cruise control, advanced braking systems, and other technologies working on A.I. Similarly, this information, on the other hand, can be critical in resolving a crime. Computer forensics is commonly utilized to identify and preserve it. Forensic science with the emerging use of A.I. plays a crucial role in criminal investigations by providing scientifically based relevant data through the analysis of physical evidence, determining the perpetrator's identity through personal clues such as fingerprints, footprints, blood drops or hair, mobile phones, or other gadgets, vehicles, and weapons. Crime scene investigations in India, many times, are not up to the mark. It is often observed that crime scenes are manipulated to tamper with evidence. It so happens that the criminals often try to bribe the authorities to get away with the crime. Digital forensics in computers can play a crucial role in capturing the crime site from various angles. Thereby giving the leverage to the Court to have actual (fresh) footage of the site to draw a preliminary conclusion of the scene with the help of all the evidence produced and points argued. In this era of the internet, where the world is going virtual, social gatherings significantly see a downward slope in society. The role of the computer in this virtual reality all of a sudden has become the talk of the time.

In Tomaso Bruno and Anr. v. State of Uttar Pradesh, (2015) 7 SCC 178, the Supreme Court stated that advancements in cyber forensics and scientific temper must pervade the method of investigation because scientific and electronic evidence can be of great assistance to an investigating agency, as is electronic evidence relevant to establish facts. Electronic evidence was found to be acceptable, subject to the Court's assurances concerning its legitimacy.

[296] Nimbulkar S, 'Role Of Forensic Science In Criminal Justice System' https://www.ijalr.in/2021/08/role-of-forensic-science-in-criminal.html accessed September 19, 2021

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The role of forensics and computers in investigating crimes started long back in the 1970s. The courts in the case of R.M. Malkani vs. the State Of Maharashtra[297] held that "A tape-recorded discussion is admissible if, first, the conversation is relevant to the issues at hand, second, the voice is identified, and third, the accuracy of the tape-recorded conversation is demonstrated by removing the potential of deletion, alteration, or manipulation." The Court further stated that tape-recorded conversation is relevant and admissible under Section 8 Indian Evidence Act, 1872 of and Section 7[298] respectively of the Evidence Act. The prosecution case in this instance was exclusively based on the tape-recorded discussion, which demonstrated the appellant's intent to obtain a bribe.

Similarly, in the case of the State of Maharashtra vs. Dr. Praful B Desai[299] "The Supreme Court stated that video conferencing is a scientific and technological innovation that allows people to see, hear, and talk with those who are not physically present with the same ease and comfort as if they were physically present. The legal necessity for the witness's presence does not imply real physical presence. The Court approved video conferencing for witness examination and stated that there is no reason why video conferencing for witness examination should not be an essential aspect of electronic evidence".

PRINCIPLES IN DIGITAL EVIDENCE

Locard's Principle:

Dr. Edmond Locard was a forensic science pioneer in France who stated that "Wherever a criminal steps, whatever he touches, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints but his hair, the fibers from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects. All of these and more bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. Physical evidence cannot be wrong; it cannot

[297] R.M. Malkani vs State Of Maharastra, AIR 1973 SC 157

[298] ibid

[299] State of Maharashtra vs. Dr. Praful B Desai, AIR 2003 SC 2053

perjure itself; it cannot be wholly absent. Only human failure to find it, study and understand it, can diminish its value."[300]

Best Evidence Rule:

The best evidence rule, which was established to discourage any purposeful or unintentional manipulation of evidence, stipulates that the Court prefers the actual evidence at the trial above a copy but will accept a duplicate under the following conditions:

• The original was lost or destroyed due to a fire, flood, or another natural disaster. This has included things like careless employees or cleaning staff. The original was destroyed in the course of business.

• This has included things like careless employees or cleaning staff.

• The original was destroyed in the course of business. [301]

Characteristics of Digital Evidence:

Any probative information recorded or transferred in digital form that a party to a court case may utilize at trial is referred to as digital evidence or electronic evidence. A court will decide whether digital evidence is relevant, authentic, hearsay and whether a copy is admissible or the original is necessary before accepting it HDD, CD/DVD media, backup tapes, USB drive, biometric scanner, digital camera, smartphone, smart card, PDA, and other popular electronic devices that could be used as digital evidence include HDD, CD/DVD media, backup tapes, USB drive, biometric scanner, digital camera, smartphone, smart card, PDA, and so on.[302]

Following are essential characteristics of digital evidence:

Admissibility: It must be following common law and legal standards. There must be a relationship between the evidence and the fact being established.

Reliability: The evidence must be of absolute validity.

Completeness: The evidence should indicate the culprit's actions and aid in concluding.

[300]"Trace Evidence" (Trace Evidence: Principles) <http://www.forensicsciencesimplified.org/trace/principles.html> accessed September 26, 2021a

[301] Monday, G., Anderson, A., Collie, B., Devel, O., and Mckemmish, R., 2021. Computer and intrusion forensics. Artech House, pp.145-160.

[302] Electronic Evidence - Free Legal Information: Legal Line" (FREE Legal Information | Legal Line) <https://www.legalline.ca/legal-answers/electronic-evidence/> accessed September 26, 2021

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Convincing to judges: The judges must be satisfied by the evidence and understand it.

Authentication: The evidence must be genuine and relevant to the event. The investigator must be able to demonstrate the veracity of the digital evidence by explaining:

• Steps are taken to guarantee that the data entered is correct.

• the manner of keeping the data and the measures put in place to prevent its loss

• the dependability of the computer programs used to process the data, as well as the steps, are taken to ensure the program's accuracy.

The role of computers in judicial proceedings has been very crucial. The same was understood by the courts long back. Therefore, we see many case laws that were decided solely based on electronic and computer evidence. The pandemic has given us one more chance to upgrade ourselves and administer justice in a quick time.

TECHNIQUES USED IN FORENSIC SCIENCE

Forensic Science is the application of scientific techniques and principles to provide evidence to legal or related investigations. Some things are apparent, like DNA typing or identification of drugs.[303]

Hence, forensic investigators have different roles, such as analyzing crime scenes & performing tests in the lab. They might even specialize beyond that, for example, focusing on studying DNA or a bullet. These tests are done by using special scientific equipment and hence are handled by personal holding specific degrees. For instance, some medical examiners might have a degree in the medical field. Whether the investigators do or do not have any specialized degrees, they have one thing in common: they apply science to discover, gather and analyze information that can be used as evidence in courts. Forensic experts use various techniques to examine any evidence found at the scene of a crime. Some methods are being used for a long time, whereas some are relatively new in forensic science. For instance, forensic toxicology came into being in the 19th century, when Mathieu Orfila first detected arsenic in a human body. In a murder trial in Paris, Orfila discovered that arsenic was found inside the deceased's body and not from the soil around it, and hence the wife of the deceased

[303] Tilstone WJ, Savage KA, and Clark LA, Forensic Science: An Encyclopedia of History, Methods, and Techniques (ABC-CLIO 2006)

was found guilty for his murder. Mathieu Orfila was, later on, considered the 'Father of Toxicology.'[304]

With the evolution of time, many new techniques were discovered to uncover various substantial pieces of evidence that could not be traced with the assistance of existing methods. Modern techniques ensure that no evidence is damaged during the examination process. The following are some of the many techniques used in forensic science to gather & analyze evidence:

Gas Chromatography: Chromatography is a technique for isolating the components of a mixture based on the relative amounts of each dissolved substance distributed between a moving fluid stream (the mobile phase) and a contiguous stationary phase. The mobile phase can be either a liquid or a gas, whereas the stationary phase can be solid or liquid. As a separation method, chromatography has several advantages over older techniques such as crystallization, solvent extraction, and distillation. It can separate all components of a multi-component chemical mixture without extensive knowledge of the identity, number, or relative amounts of the substances present. [305]

Gas chromatography is a chromatographic technique in which the mobile phase is gas.[306] The stationary phase, in this case, can be either solid or liquid. If the stationary phase is solid, the technique is known as gas-solid chromatography; if the stationary phase is liquid, the technique is referred to as gas-liquid chromatography. It is used to separate volatile materials. The separation of these particles is performed on either a packed column or a capillary column containing the stationary phase that can be either solid or liquid, which is maintained at defined temperature and flow of carrier gas (mobile phase). When a mixture is introduced at the inlet, each component is swept towards the detector and divided between the stationary and gas phases. Molecules with more significant attraction for the stationary phase spend more time in that phase and take longer to reach the detector. [307]

[304] "Visible Proofs: Forensic Views of the Body: Galleries: Biographies: Mathieu Joseph Bonaventure Orfila (1787–1853)" (U.S. National Library of Medicine June 5, 2014) < https://www.nlm.nih.gov/exhibition/visibleproofs/galleries/biographies/orfila.html> accessed September 21, 2021
[305] Keller R and Giddings CJ, "Elution Chromatography" (Encyclopædia Britannica November 10, 2020) < https://www.britannica.com/science/chromatography/Elution-chromatography> accessed September 21, 2021
[306] Shamsuzzaman M and Hassan MR, "An Overview of Gas Chromatography in Food Analysis." (https://www.researchgate.net/publication/334877357_An_overview_of_Gas_chromatography_in_Food_Analysis August 2019)
[307] Cirimele V, "ANALYTICAL Techniques | Gas Chromatography" [2000] Encyclopedia of Forensic Sciences 146

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Ballistics: Ballistics is a specialized branch of forensic science that deals with the motion, behavior, dynamics, angular movement, and effects of projectiles, such as bullets, rockets, missiles, bombs, etc. These projectiles are often be fired from firearms and frequently involved in committing heinous crimes such as murders, attempted murders, accidental shootings, suicides, dacoities, robberies, rioting, police firings, and police encounters.[308]

There are many applications of ballistics within a criminal investigation. For instance, bullets that are fired at the scene of a crime will be examined using basic principles of forensic science in the hopes of discovering several pieces of information. Investigators can determine the perpetrator's firearm by studying the marks on the bullet and fired cartridge cases. Every gun produces a unique pattern on the cartridge cases and ammunition specific to that handgun only. The actual bullets can be utilized to determine the type of firearm used by the perpetrator and whether the firearm is linked to any other crime. The amount of damage a bullet sustains when it strikes a hard surface can be used to estimate the range and angle of fire. Gunshot residue on the suspect's hands or any other body part can be investigated to determine whether or not the suspect fired the pistol.[309]

This information assists researchers in determining the identity of the gunman. Once these indications have been recognized, experts can readily match them to the particular gun. Many experts are extensively involved in this study, and they are routinely called upon to assist in the resolution of crimes. Ballistics information is also frequently put into an extensive database that law enforcement authorities across the country can access. When someone adds new data, the computer searches prior investigations for any pertinent material. This information can lead to identifying the owner of a particular weapon and pursuing the person responsible for firing the gun. Furthermore, firearm investigators are in charge of linking bullets to the weapons they were fired from using microscopic

[308] "The Importance of Forensic Science in Criminal Investigations and Justice" (IFF LabJuly 3, 2018) <https://ifflab.org/the-importance-of-forensic-science-in-criminal-investigations-and-justice/> accessed September 23, 2021

[309] "Ballistics" (Crime MuseumJune 8, 2021) <https://www.crimemuseum.org/crime-library/forensic-investigation/ballistics/> accessed September 23, 2021

examination, and then the guns to the people who fired the rounds. The last link is established by inspecting obliterated serial numbers to identify the weapon's registered owner.[310]

In Mohan Singh vs. the State of Punjab[311] the Court sorted the ballistic expert's opinion whether the shots fired by the appellant killed the deceased and grievously hurt the lady in self-defense. The expert opined that Shots received in parcel one were fired from an L.G. cartridge, and the shot received in parcel 2 was either an L.G. shot or S.G. shot. It was possibly an L.G. shot (as indicated from the undamaged portion of the shot), but the expert was not definite about it. The expert was sure that the shot received in parcel was factory-made. From the photographs of the injuries inflicted on both the deceased and the lady, he concluded that the deceased and the injured lady were probably caused by one gunfire only. However, he was not definite about it. It was observed that most of the expert's answers were not categorical. He did not have an opportunity of seeing the injuries and exit wounds of the shots himself. He mainly was giving his answers based on observations made by others and measurements noted by them. A slight difference in the sizes one way or the other might make all the difference to the result. The Court thinks it would be unsafe to place implicit reliance on the expert's evidence for the reasons we have already given.

Forensic Toxicology:

Toxicology is the study of chemicals' harmful effects on living things. The word toxicology is derived from the Greek word "Toxicon," which means poison, and "logos," which means study.[312]

Forensic toxicology goes even further, involving several related disciplines such as analytical chemistry, pharmacology, and clinical chemistry to aid in detecting and interpreting drugs and poisons in medico-legal death investigations, human performance issues such as driving under the influence, compliance, and other related issues. [313]

[310] Iskandar V, "What Is Forensic Ballistics?" (News-Medical.net July 28, 2021) <https://www.azolifesciences.com/article/What-is-Forensic-Ballistics.aspx> accessed September 23, 2021
[311] Mohan Singh vs. State of Punjab, AIR 1975 SC 2161 ,
[312] Gupta PK, "Introduction," Fundamentals of toxicology: Essential concepts and applications (Elsevier 2016)
[313] "Toxicology" (Toxicology: Introduction) <http://www.forensicsciencesimplified.org/tox/> accessed September 23, 2021

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The three primary objectives investigations are:

• Determining whether or not toxicants are present and capable of causing death.

• Determining whether toxicants are present and capable of contributing to death; or cause behavioral changes.

• Determining the presence of substances and whether they represent legitimate use or exposure, such as prescribed medications or workplace exposures.

Toxicology is the learning of the antagonistic effects of elements/compounds on living organisms. Forensic toxicology consists of an inclusive list of various disciplines that help detect and interpret various drugs and different kinds of poisons in the medico-legal death investigations that involve scientific technology with legal color and various human performance issues. Like any other evidence, the chain of custody must be preserved at all times, from the mortuary through the laboratory testing, reporting, and storage, for court purposes.[314]

In Jaipal vs. the State of Haryana[315], the appellant was convicted for murdering his wife by poisoning. The post mortem report opined that the deceased died because of (Celphos) poisoning. Still, Scientific Forensic examination of several organs of the body of the deceased and the samples collected from the body exclude the presence of aluminum phosphide (Delphos). Hence, the Court observed that there is no probability of the poisoning of aluminum phosphide (Delphos), thus failing to fasten the guilt on the accused, leaving no room for doubt. The conviction of the accused under Section 302 IPC was set aside.

DNA Profiling:

In DNA profiling, the uniqueness of an individual's DNA is used for identification purposes in the investigation. Based on the biological components left on them, DNA evidence can help link an

[314] "A Simplified to Toxicology" (Toxicology: How It's Done)
[315] Jaipal vs. the State of Haryana, 2002[(crl.) 705 of 2001]

individual to an object or a crime scene. Because every nucleated cell contains DNA, any biological fluid, skin, or viscera can provide DNA for analysis.[316]

Individuals have 0.1 percent of their unique DNA and are used for individualization; this has limitations for monozygotic twins. DNA profiling is used in criminal proceedings and to determine genetic relatedness. The pattern of genetic material inheritance among biological relatives allows DNA profiles to determine relationships among individuals throughout an investigation. DNA analysis is carried out using variable number tandem repeats (VNTRs), short tandem repeats (STRs), single nucleotide polymorphisms (SNPs), and other techniques. These markers are distinct and can be used for identification and profiling. Profiles that are unique to an individual are developed based on specific characteristics in the DNA. These profiles are created using biological evidence and compared to those maintained in databases.

In Dharam Deo Yadav v. the State of U. P[317], A 22-year-old tourist, Diana from New Zealand, was murdered in Varanasi. The DNA sample from the skeleton matched with her father's blood sample. The Supreme Court, before pronouncing judgment, has explained crime scene management and the importance of forensic science. The Court in the judgment has emphasized the need to adopt scientific methods in crime detection to save the judicial system from low conviction rates. Further highlighted a need to strengthen forensic science for crime detection.

As far as the present case was concerned, the DNA sample from the skeleton matched with the blood sample of the deceased's father. Experts whose scientific knowledge and experience were not doubted in these proceedings did all the sampling and testing. Therefore, it thought that the prosecution succeeded in showing that the skeleton recovered from the accused's house was that of Diana. The accused was convicted based on circumstantial evidence.

IMPORTANT JUDGMENTS IN FORENSIC SCIENCE INVESTIGATION

[316] DNA Profiling: How Is It Used in Criminal Justice?" (Maryville Online January 6, 2021) <https://online.maryville.edu/blog/how-is-dna-profiling-used-to-solve-crimes/> accessed September 23, 2021
[317] Dharam Deo Yadav v. the State of U.P., (2014) 5 SCC 509

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In criminal trials based on circumstantial evidence, forensic science plays a vital role in establishing the evidence of the crime, identifying the culprit, and determining the guilt or innocence of the accused. One of the most crucial tasks of the investigating officer at the crime scene is to conduct a thorough search for potential evidence that may be used to prove the crime. In some instances, the courts have relied upon forensic evidence and sentenced the accused to death by the Sessions Judges for the brutal murder of a child aged ten years after subjecting the offender to carnal intercourse and then strangulating him to death on scientific evidence, including DNA profiles and oral evidence.[318]

In the case of Nitish Katara[319], the identification of the deceased was difficult as only a tiny portion of unburnt palm finger was found. In this case, DNA profiling helped identify the body remains by comparing those to the deceased's parents. In the case of Sujeet Kumar[320] after examining the child's testimony and various other methodologies, the Court approved the findings based on various DNA reports and other forensic evidence and held the accused guilty and had to set aside the order of acquittal.

In the case of Shreya Singhal[321], the validity of Section 66 A of the Information Technology Act was thoroughly reviewed. As a result, the decision is significant in terms of cyber forensic law. Supreme Court ruled that Section 66A of the Information Technology Act of 2000, which restricts online speech, is unconstitutional because it violates Article 19(1)(a) and is not protected by Article 19. (2). Section 69A and the Information Technology (Procedure and Safeguards for Blocking Public Access to Information) Rules 2009 are constitutionally valid.

ARTIFICIAL INTELLIGENCE (A.I.) AN EMERGING FIELD IN THE CRIMINAL JUSTICE SYSTEM

Brilliant criminal investigations, accurate forensic examinations, and an impartial judicial system are the cornerstones of criminal justice success. A.I. is a part of computer science primarily concerned

[318] Anthony Arikswamy Joseph vs. the State of Maharashtra, (2014) 4 SCC 69.
[319] Vishal Yadav v. State of U.P. 2014 SCC Online Del 1373
[320] State of NCT Delhi v. Sujeet Kumar, 2014 SCC Online Del 1952
[321] SHERYL SINGHAL v/s. UNION OF INDIA, AIR 2015 SC 1523

with developing intelligent machines that operate in the same way that people do. This entails creating machines or computers that really can engage in human-like mental processes such as learning, reasoning, adapting, self-correction, and so on, as well as behaving rationally. Machine learning, neural networks, and deep learning are all related and fall under the umbrella of artificial intelligence.[322]

The advancement of A.I. technologies assist law enforcement and security personnel in crime detection and crime prevention and prediction. Some advanced A.I. algorithms are being developed to detect crime trends and suspected anomalies, forecast future crime trends, analyze criminal risk factors, and identify criminal networks. Machine Learning is a part of artificial intelligence that allows a machine or computer program to learn from historical activities or patterns to predict new output values using specific algorithms.

Implementing A.I. in the justice system depends on identifying specific legal processes where this technology can reduce pendency and boost efficiency. The machine must first perceive a particular technique and gather information about the activity under investigation. For example, the program must first comprehend the document and its contents.[323]

The computer may learn from experience over time. As we offer more data, the software learns and makes predictions about the document, making the underlying system more intelligent each time. A.I. can eliminate lag and incrementally improve procedures. According to the most recent National Judicial Data Grid (NJDG), 3,89,41,148 cases are outstanding at the District and Taluka levels, while 58,43,113 remain unresolved at the high courts.[324] Such dependency has a knock-on effect that diminishes the efficiency of the judiciary and, as a result, people's access to justice.[325]

[322] Jadhav E, Kumar R, and Sankhla M, 'Artificial Intelligence: Advancing Automation In Forensic Science & Criminal Investigation' (2020) 15 Journal of Seybold Report <https://www.researchgate.net/publication/343826071> accessed September 18, 2021

[323] Pant K, 'A.I. In The Courts' Indian Express (2021) <https://indianexpress.com/article/opinion/artificial-intelligence-in-the-courts-7399436/> accessed September 26, 2021

[324] 'National Judicial Data Grid' (Njdg.ecourts.gov.in) <https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard> accessed September 26, 2021

[325] Supra note 31

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ARTIFICIAL INTELLIGENCE AND INDIAN JUSTICE SYSTEM IN THE 2050S'

The growth of computers and digitalization has been one of humanity's greatest and most transformative inventions. The notion of "electronic evidence" was established by the Information Technology Act of 2000 ("I.T. Act") and related revisions to the Evidence Act of 1872 ("Evidence Act") and the Indian Penal Code of 1860 ("Indian Penal Code") ("IPC"). The I.T. Act and its amendments are based on the Model Law on Electronic Commerce developed by the United Nations Commission on International Trade Law ("UNCITRAL").[326]

The term "electronic record" refers to data, record or data generated, image or sound stored, received or communicated in an electronic form or micro-film or computer-generated microfiche, as defined in Section 2(1)(t) of the I.T. Act.[327]

Section 4 of the I.T. Act specifically recognizes the validity and use of electronic records as an alternative to traditional paper-based records.

In the case of State (NCT of Delhi) v Navjot Sandhu (Afzal Guru case)[328], for the first time dealing with the admissibility and evidentiary value of electronic evidence, the Supreme Court held that, regardless of compliance with the requirements of Section 65B of the Evidence Act, which deals with the admissibility of electronic records, there is no bar to adducing secondary evidence.

With the enactment of the I.T. Act in 2000 and amendments to the Evidence Act, the Supreme Court concluded clearly in the case of Anwar PV[329] that documentary evidence in the form of an electronic record can only be proven in accordance with the procedure outlined in Section 65B of the Evidence Act. The Supreme Court fully recognized and appreciated the significance of Section 65B of the Evidence Act in this instance.[330]

[326] Bhargava, A., Chaturvedi, A., Gupta, K., and Diddi, S., 2020. Use of Electronic Evidence In Judicial Proceedings - Litigation, Mediation & Arbitration - India. [online] Mondaq.com. Available at: <https://www.mondaq.com/india/trials-appeals-compensation/944810/use-of-electronic-evidence-in-judicial-proceedings> [Accessed 26 September 2021].
[327] ibid
[328] State (NCT of Delhi) v Navjot Sandhu (2005) 11 SCC 600
[329] Anwar PV v P.K. Basheer and Others [(2014) 10 SCC 473]
[330] Supra note 31

The judiciary has widely accepted and has frequently relied upon the evidence produced under section 65 B and section 45 of the Indian Evidence Act. The technology has taken a boon since the pandemic has arisen, allowing all of us to work from our preferred places. We also saw courts opting for virtual hearings, taking witnesses' statements online, talking to experts via Google meet and other platforms. The pandemic also forced us to look for more advanced techniques to enhance human capabilities to conduct more advanced research in a minimal number of people. In this scenario, A.I. has played a crucial role in the administration of justice and has parted with other official courts' work. Former Chief Justice Shri S.A Bobde launched SPACE for (Supreme Court Portal for Assistance in Courts Efficiency.[331]

He further said that the system would help collect data faster than a human being by which the judge can quickly make the crucial decision. At the same time, it would not come with its own decision. A report prepared by the Vidhi Center also says that A.I. will help the Indian judiciary in a more comprehensive way and by far help the investigation authorities in all positive ways to comprehend pieces of evidence in a more detailed manner.[332]

We are likely to see more advanced and unique methods used to administer the justice system in India. Approaching 2050, it is more likely that A.I. robots will take over the investigation authorities and investigate the crime scenes, take evidence, and record witnesses' statements through remote control technology. We can take here the example of Sophia the robot.[333] Saudi Arabia is the first country to give legal status to a robot that works on its intellect.

Imparting similar intelligence in robots can help the investigation authorities to examine the crime scene and help reduce human errors. As a piece of suggestion, a robot can be fitted with all the data that the UADAI has, i.e., the biometrics of all the citizens, to help find the perpetrator of the crime.

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[331] 'CJI S A Bobde Welcomes A.I. System To Assist Judges In Legal Research' (mint, 2021) <https://www.livemint.com/news/india/cji-s-a-bobde-welcomes-ai-system-to-assist-judges-in-legal-research-11617725127705.html> accessed September 26, 2021

[332] Times of India, 'Use Of Artificial Intelligence Will Transform Judiciary But ..)<https://timesofindia.indiatimes.com/india/use-of-artificial-intelligence-will-transform-judiciary-but-technology-will-not-be-allowed-to-decide-cases-cji/articleshow/82183403.cms> accessed September 26, 2021

[333]'Sophia, Robot Citizenship, And A.I. Legal | Cartland Law' (Cartland Law) <https://cartlandlaw.com/sophia-robot-citizenship-and-ai-legal/> accessed September 26, 2021

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The robot can be taken to the crime scene to pick up all the evidence possible, such as fingerprints and other evidence related to a man's biology. The robot can report on how many persons were present at the spot. This can help the authorities find the criminal quickly; moreover, it all reduces the human effort of analyzing and testing every evidence separately, thereby reducing the possibility of evidence tampering. Sooner or later, we are most likely to see these technologies take over the judicial processes and ease and automate the process of justice to get a quick conviction or acquittal. The quote Justice delayed is justice denied would be apt shortly. [334]

With technology taking over the judicial processes, we are more likely to have A.I. robots sitting with the judges and deciding the cases to the extent of human intervention. The decision's credibility would be questioned, but the same 80/20 rule could be applied where 80% of the decision can be taken by the human judge and 20% by the A.I. robot. This would help in keeping all the human biases aside. At the same time, the decision would be not out of any dragged emotions of the judge but would solely be on the practical basis and undisputed facts. The technology would also take away the work of many court clerks, thereby giving them a chance to finish off the pending work instead of handling travail matters.

CONCLUSION

Cybercrime has a significant impact on the world in which we live. It impacts everyone, regardless of where they are from. A multipronged approach is required for effective legal enforcement of cyber laws. No single technique is self-sufficient or mutually exclusive in producing successful enforcement results. The need of the hour is to develop a well-integrated action plan for cyber law enforcement. It is critical to raise public awareness about the issue and provide ongoing training to law enforcement officers and forensic professionals. In the Indian context, there is a greater emphasis on such technology in criminal investigations and trials. The Commission on Criminal Justice Reform has underlined that technology in crime detection can help the system run more efficiently. The appropriate laws have been modified regularly to allow for forensic technologies in crime investigation and prosecution. According to Justice Yatindra Singh, "controlling cyberspace is a

[334] "Justice Delayed Is Justice Denied": Could A.I. and Data Science Be the Answer to India's Judicial…' (Medium, 2017) <https://medium.com/@swati_jena/justice-delayed-is-justice-denied-could-ai-and-data-science-be-the-answer-to-indias-judicial-aaa09207c538> accessed September 26, 2021

daunting task for any country's corpus juries. Computers, the internet, and cyberspace—collectively known as Information Technology—have created new legal issues. I have demonstrated the inadequacies of law in dealing with information technology, changes brought about by I.T., in the way we live, perceive, and conduct business." [335]The existing legislations were created with geographical location, tangible medium, and physical surroundings in mind then. These regulations are not appropriate for a faceless, borderless, and paperless cyberspace[336]

Participation of international organizations, professional and industry associations, law enforcement agencies, cyber law experts, and other relevant bodies in the development of multilateral Treaties/Conventions and the development of a Code of Conduct for Cyberspace will aid in developing clear principles that will govern cyberspace. Going through the pandemic which has taken us in a world where virtual reality seems like actual reality, looking at the upcoming technologies, i.e., A.I., there is an urgent need to reform laws, and the existing laws should be revisited, especially in the context of privacy of an individual. Approaching the era of robots, we need legislation that would be strong on paper and equally effective on the ground. The effectiveness of the laws on the ground is a significant flaw in our justice system. Forensic science proves to be scientific evidence and gives a significant boost to criminal justice. To use this technology to its highest capabilities, we have to overcome all the weaknesses existing in our system quickly. If the measures above are taken care of for proper and successful execution, forensic science can significantly bring immediate justice to modern society.

[335] Raveena Rai, CHALLENGES TO CYBERCRIME INVESTIGATION: A NEED FOR STATUTORY AND INFRASTRUCTURAL REFORMS, CNLU LJ (5) [2015] 62
[336] ibid

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BICAMERALISM AS AN ESSENTIAL FEATURE OF INDIA'S FEDERALISM

- SHREYA V RAJU

INTRODUCTION

On March 25th, 2017, a letter was written to the Vice President of India by "*concerned citizens*" who were appalled by the Government's use of money bills to pass important legislations without seeking approval from the Rajya Sabha. This "*undemocratic strategy*" has been employed to pass the Aadhaar Act, 2016 and the Finance Act, 2017. Such legislations contain provisions regarding food distribution, unique identification and tribunals which do not feature in the definition of money bills, and hence deserve to be independently scrutinized by the Rajya Sabha. The letter thus appealed to the Vice President seeking protection of the rights and duties of the Upper House, in the interests of the people of India.[4]

By way of the 2003 Amendment to the Representation of People Act, 1951 ("RPA"), the word 'domicile' was removed from Section 3, thus allowing for Manmohan Singh to contest Rajya Sabha elections from Assam, and Hema Malini from Karnataka; but were they able to truly represent the states' interests? In the recent past, certain nominees like Sachin Tendulkar and Rekha failed to contribute to deliberations in the Upper House, thus questioning the very necessity of nominations. Amidst all these controversies surrounding the Rajya Sabha, the most important question which arises is, "*Is the Rajya Sabha even necessary*?"

In this paper, the author argues that not only is the Rajya Sabha necessary for India's democracy, but it is equally important for ensuring state representation and strengthening India's federalism. The author will do so by looking at the Constituent Assembly Debates ("CAD**s**") regarding the formation, elections and proportion of state representation, nominations, and the powers of the Rajya Sabha. She seeks to locate her findings from the CADs in the present-day functioning of the Parliament and argue that the Rajya Sabha plays a more important role today with the rise in regional parties and also acts as a "*specific structural check upon majoritarianism, as well as a guarantee of states' representation*

in the federal scheme[337]." The author will also analyse the formation and functions of the Senate of the United States of America (**"USA"/ "US"**) and understand the Senate's importance in the USA's federal scheme. By contrasting the two bicameral legislatures, the author will suggest reform in the functioning of the Indian Parliament to ensure that the federal character of the legislature is upheld.

ANALYSIS

In the analysis, the author will look at **(i)** the need for a bicameral legislature in India, **(ii)** the formation and composition of the Rajya Sabha (including aspects of state representation, nominations and domicile requirement) and **(iii)** the powers of the Rajya Sabha. Within these three broad areas, the author will not only highlight the CADs and the existing constitutional provisions, but also issues which undermine the functioning of the Rajya Sabha. The analysis will also involve a comparison with the US Senate at each of these three stages.

The need for a bicameral legislature in India

The origins of the Rajya Sabha can be traced back to the constitutional reforms brought in by the British government through the Montague-Chelmsford reforms in 1919, which created a Council of States. The Government of India Act, 1935 further strengthened this institution. In the Constituent Assembly, Lokanath Misra proposed an amendment to draft Article 66 with the effect that there will be no second chamber/Council of States. He believed that second chambers are "*out of date*" and that its creation will result in a waste of public money and time. In response to this, Ananthasayanam Ayyangar gave three reasons to have a bicameral legislature, and they are as follows, **(i)** to ensure various people take part in politics and a House where the "*genius of the people may have full play*", **(ii)** the Upper House will have a sobering effect on the Lower House and to check or prevent hasty legislation and **(iii)** to ensure stability as the Upper House will be a permanent body. For these reasons, Misra's amendment was rejected by the Constituent Assembly.

The Rajya Sabha has been criticized to be an impediment on democratic expression and there have been multiple resolutions by private members in the Lok Sabha to abolish the Rajya Sabha altogether. It is also argued that in a modern democracy, there is no place for a legislative chamber constituted through indirect elections and that since there are many regional political parties forming coalitions

[337] KS Puttaswamy v. Union of India, (2019) 1 SCC 1

in the Lok Sabha, there is enough restraint on potential majoritarian tendencies. What is the need for the Rajya Sabha?

As James Madison articulated while justifying the need for a second chamber in the USA, "*such an institution may sometimes be necessary, as a defence to the people against their own temporary errors and delusions*[338]." Apart from the reasons put forth by Ayyangar in the CADs, Chapter III of Part V of the Constitution attempts a fine balance between the elected majorities of the Lower House and the federal interests through proportional representation in the Upper House. The core rationale for having two chambers flows from the need for checks and balances in a republican government and it doubles the security to the people. Apart from creating a system of checks and balances and being a permanent body, the most important justification for the Rajya Sabha is to strengthen India's federalism and ensure that local interests are adequately represented. The Upper House will provide a certainty that the government will not neglect its obligations to its constituent units and to ensure that the states become part of the decision-making process at the central level. The decline of the Indian National Congress (**"INC"**) and the rise of several regional political parties has given a new significance to the Rajya Sabha especially since the majority in the Lok Sabha may not command a majority in the Rajya Sabha. Although the Rajya Sabha is based on the House of Lords, it reflects the interests of the states and not the nobility.

After establishing the need for a bicameral legislature in India, the author will proceed to explain how seats are allocated in the Rajya Sabha, the process of elections and nominations to the Rajya Sabha.

Formation of the Rajya Sabha

State Representation

In the Constituent Assembly, there was a lot of debate as to the apportionment of seats to each state in the Rajya Sabha. KT Shah, grounding his argument on the principle of equality among constituent states, argued that each state must be represented by the same number of delegates that any other State may have so that it will bring "*some sense of a real Federation working, rather than of discrimination between the Units*[339]." Lokanath Misra agreed with KT Shah, and cited the example

[338] James Madison, Federalist, No.62, pp.416-419, 27th February, 1788. (*See* http://press-pubs.uchicago.edu/founders/documents/v1ch12s22.html).

[339] Constituent Assembly Debates, Volume VII, 3rd January, 1949. (*See* https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1949-01-03).

of the US Constitution, where the representation given to each state is always the same. He strongly believed that if the election were to be dependent on the population of the state, the Council of States will serve no real purpose and will be a mere duplicate of the House of the People and thus suggested that each state shall be represented by no more than three members. The proposals of KT Shah and Lokanath Misra were rejected.

The current formula is outlined in the Fourth Schedule, which allocates one Rajya Sabha seat for every million of a state's population for the first five million, then one seat for every two million after that. This formula was chosen because it is said to protect the interests of smaller states while still maintaining enough representation for larger states. Members of the Rajya Sabha are chosen by the elected members of the State Legislative Assemblies. The Constituent Assembly chose this method of election to save money and time, believing that individuals chosen by the State Legislative Assemblies would sufficiently represent the states. The Apex Court justified this method of representation in light of the reorganisation of states on linguistic and cultural grounds, citing the six new states carved out of Assam as an example; if each state had equal representation, the six new states and Assam would be allotted 25% of the seats in the Rajya Sabha.

In the 250th session of the Rajya Sabha, Ram Gopal Yadav called for higher representation from smaller states and Prasanna Acharya echoed what Lokanath Misra and KT Shah had to say in the Constituent Assembly by suggesting that representation of states should not be based on population. The ground reality is that Uttar Pradesh is allotted thirty-four seats in the Rajya Sabha while states such as Mizoram, Manipur and Sikkim are allotted only one seat each. The explosion of population in the Hindi-speaking states could prove to be destabilizing for the Indian Union and the South Indian and North-Eastern states are not adequately represented. The issue is that the number of state seats allocated to each state in the Parliament is based on the 1971 Census.

The allocation of seats in the Upper House and the mode of election adopted in the US is very different in comparison to the Rajya Sabha. James Madison believed that the "*government ought to be founded on a mixture of the principles of proportional and equal representation and a government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states.*" The US Senate is thus composed of two Senators from each state, elected by the people thereof, for six years. The actual representation is higher for smaller states and lower for less populous states. Further, the Senators were initially to be elected by the State Legislatures, but this was amended to give the voters in each state the power to choose their Senators by the Seventeenth

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Amendment to the US Constitution in 1913, to ensure that the Senate would be free from corrupt state legislatures and increase representation of local issues.

The fear of smaller states guiding legislation over the more populous states was the reason why the Constituent Assembly of India decided that representation in the Rajya Sabha should be based on population, and this rationale was reiterated by the Supreme Court in *Kuldip Nayar v. Union of India.*[340]

Regions such as Jammu and Kashmir and the North-East will never be represented adequately and the populous North will dominate the legislature. While giving equal representation to each state is considered to be an extreme method[40], there is scope for alteration of the formula enshrined in the Fourth Schedule to ensure that states are not underrepresented and, the number of seats to be allocated should be updated with reference to the latest Census.

Domicile Requirement

By way of an amendment to the RPA which came into force on 28th August, 2003, the Parliament has removed the word "*domicile*" from Section 3 of the RPA. The effect of this is that a person offering her/his candidature for a seat in the Rajya Sabha is no longer required to be an elector for a Parliamentary constituency in the State to which seat for which s/he is a candidate. Conversely, in the US, a Senator must reside in that state, for which s/he shall be chosen, on the date of election.

A petition was filed under Article 32 contending that this amendment violates the principle of federalism, which is a part of the basic structure of the Constitution. The Petitioner argues that someone who is not ordinarily a resident cannot effectively represent the State and that the test of ordinary residence has been woven into the constitutional scheme as an essential qualification for membership of either House of Parliament. It was further argued that the words "*representatives of the States*" in Articles 80(1)(b) and 80(2) and the words "*representatives of each State in the Council of States*" in Article 80(4) need to be interpreted in such a manner to strengthen the federal character of the Constitution. The Respondent contended that there is no constitutional requirement for domicile and that India is not a strict federalist nation and the CADs were relied upon. While paragraph 6, part I of the Fourth Schedule did initially provide for residence as a qualification, the Constituent Assembly scrapped this and decided that apart from citizenship and age qualifications, it would be open to the Parliament to describe any other qualification as required.

[340] (2006) 7 SCC 1.

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A five-judge bench of the Supreme Court upheld the constitutionality of the amendment and held that the "*illusory concept*" of domicile is not a constitutional requirement to be elected to the Rajya Sabha and what is required is to be conversant with the language, current problems and needs of the people of the State. Sabharwal, J held that "*there is no requirement in law that the person elected must possess the same qualifications as the elector*." The majority relied on *State of West Bengal v. Union of India*[341], to hold that India is not a federal State in the traditional sense and that it is not a universal (after looking at the Irish and Japanese constitutions only) federal principle for the members of the Upper House to be residents of the State they purport to represent. The Supreme Court finally held that the question of basic structure cannot arise as the basic structure doctrine is inapplicable to statutes and thus, the Apex Court failed to realize federalism in letter and in spirit.

This judgement has watered down the mark of diversity that was the "*hallmark of the Rajya Sabha*" and political parties can virtually nominate any candidate to a vacant Rajya Sabha seat, and some have been given the privilege to hold important cabinet positions, including that of Prime Minister (for example, Manmohan Singh). The Rajya Sabha has thus turned out to be another chamber akin to the Lok Sabha, except for the mode of election of members. Since the elections are indirect, the voters do not even get the opportunity to reject an "*outsider*". The States must be represented by people from the State if the Rajya Sabha is to function as the "*voice of federalism* "and the domicile requirement should be brought back to ensure the Rajya Sabha truly represents the states' interests.

Nominations to the Rajya Sabha

In the CADs, the provision for nominations to the Council of States in draft Article 67(2) was suggested by BN Rau, who borrowed the principle of "*functional representation*" from the Irish Constitution. This was opposed by KT Shah as, "*the element of nomination fundamentally mars the principle of election*[342]" and thus, he proposed that the Council of States should be wholly elected. Dr. HC Mookherjee also proposed that the system of nominations should be abolished as the President would constantly receive "*bitter allegations of favouritism and nepotism*" and this situation would be undesirable. In response to this, Rohini Kumar Chaudhury argued that people who have special knowledge in certain fields do not generally stand for elections and it is necessary to nominate such people so that they can add their knowledge and experience to parliamentary deliberation. For this reason, the amendment to abolish nominations was rejected in the Constituent Assembly and the

[341] (1964) 1 SCR 371.

[342] Constituent Assembly Debates, Volume VII, 3rd January, 1949.

number of members to be nominated was reduced from twenty-five to twelve. Now, twelve members of the Rajya Sabha shall be nominated by the President, and these nominees shall be persons having special knowledge or practical experience in "*literature, science, art and social service*", where these categories are illustrative and not exhaustive. The US Constitution, however, does not have any provision for nominations to the Council of States.

There are two issues which question the necessity of nominations to the Rajya Sabha. *First*, certain nominees such as Sachin Tendulkar and Rekha have dismal attendance and have not taken part in parliamentary deliberation. *Second*, sometimes, nominations can be politically motivated, something which the Constituent Assembly was warned about. While the President does enjoy discretionary powers in nominating members, s/he traditionally does so by taking the aid and advice of the Council of Ministers. Further, a nominated member will be disqualified if s/he joins a political party after the expiry of six months from the date s/he takes a seat and currently, eight out of twelve nominated members have joined the Bhartiya Janata Party (**"BJP"**) and four have retained their nominated status. It is thus possible for nominations to be made to promote the interests of the ruling party.

While there are few nominees who have failed to contribute to the legislative process, there are many eminent personalities, such as Fali Nariman, Shyam Benegal and Dr. C Rangarajan who have added greatly to parliamentary deliberation. Further, the nominated members do not have to confine themselves to the subject matters they are expected to represent, they are always open to speak on the local needs and grievances of the regions they hail from. While nominations have proved to be a great exercise in ensuring that different spheres of life and different regions are represented, the office is a chance for prominent citizens to make a difference and should be taken seriously.

In the next part of the paper, the author will briefly describe the non-legislative powers the Rajya Sabha possesses and analyse its restricted legislative powers with respect to money bill.

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Powers of the Rajya Sabha

Non-legislative powers of the Rajya Sabha

The Rajya Sabha enjoys certain non-legislative powers which are not even available to the Lok Sabha. Proclamations of national emergency and President's rule in states require approval of both Houses of Parliament, but if the Lok Sabha is dissolved when the Proclamation comes to the Parliament, the Rajya Sabha alone can approve these proclamations. The Rajya Sabha was specially convened in 1977 to extend President's rule in Tamil Nadu and in Nagaland and in 1991, the Rajya Sabha was convened to impose President's rule in Haryana. The Rajya Sabha, along with the Lok Sabha, has the power to impeach the President, dismiss the Vice President, approve amendments to the Constitution and affirm ordinances promulgated by the President. Further, the Rajya Sabha shall not be subject to dissolution and its permanent character has been borrowed by the American model as a measure of stability.

Bills other than money bills and financial bills can originate in the Rajya Sabha and the assent of the Rajya Sabha is required to pass an ordinary bill thus giving immense importance to the deliberations which take place within the Rajya Sabha. The legislative powers of the Rajya Sabha with respect to money bills is restricted in comparison to the powers of the Lok Sabha and is analysed subsequently.

Legislative Powers with respect to Money Bills

Based on functions and powers, bicameral legislative chambers can be classified into perfect and imperfect bicameral chambers. In the former, the federal second chamber has the same powers as the first chamber and in the latter, the first chamber has superior powers compared to the second chamber. It is argued that although having perfect bicameralism would be advantageous, even in imperfect bicameral legislatures, such as the Indian Parliament, the functioning of the second chamber is neither redundant or superfluous.

In the United Kingdom, the Parliament Act of 1911 took away the House of Lords' ability to reject money bills. The Speaker of the House of Commons' determination on whether a bill was a money bill was given finality in Section 3, which stated that the Speaker's certificate "shall be conclusive for all purposes, and shall not be questioned in any court of law." This principle of limiting the Upper House's powers was borrowed from the Parliament Act, 1911, and was introduced in India through Section 37 of the Government of India Act, 1935, which stated that bills for imposing/increasing taxes, regulation of borrowing money or giving guarantees by the Federal Government, or declaring

expenditure charged on the Federation's revenue/increasing the amount of such expenditure shall only be introduced or movable in the Upper House.

In the Constituent Assembly, draft Articles 74 and 75 were proposed where the former provided for a special procedure with respect to money bills were amendments suggested by the Upper House need not be mandatorily considered; and the latter defined money bills and held the decision of the Speaker of the House of the People to be final. The reason for the insertion of this clause in draft Article 75 was to avoid any controversy between the two houses before the President. In the CADs, Ghanshyam Singh Gupta sought to move an amendment to delete the word "only" from draft Article 75, but this amendment was rejected thus establishing the intent of the framers of the Constitution to restrict the ambit of money bills.

As per Article 109(1), a money bill cannot be introduced in the Rajya Sabha. The Rajya Sabha is entitled to make recommendations on the bill and must do so within fourteen days from the date of the receipt of the bill from the Lok Sabha and the Lok Sabha can either accept or reject these recommendations. If the Rajya Sabha does not make any recommendations within the stipulated time period, the bill is said to be passed by both houses. As per Article 110(1), a bill is a money bill if it contains only provisions as exhaustively listed out in Article 110(1)(a) to (g). Hence, with respect to money bills, the powers of the Rajya Sabha are very limited and the rationale that is offered is that the directly elected chamber is seen as a proper representative of the "tax-paying public".

Recently, the Aadhaar (Targeted Delivery of Financial and Other Services) Act, 2016 and the Finance Act, 2017 were passed as money bills. GV Mavalankar, the first speaker of the Lok Sabha, stated that "*the word 'only' must not be construed so as to give an overly restrictive meaning*" and these words were relied on by Arun Jaitley as he justified the classification of the Aadhaar bill as a money bill. While the Aadhaar Bill did make references to subsidies and services funded by the Consolidated Fund of India (**"CFI"**), a cursory reading of the bill makes it glaringly apparent that its main objective is to provide for a scheme of unique identification to regulate welfare programmes. The Finance Act, 2017 amends various statutes providing for the creation of new judicial tribunals and the merger of some tribunals. It is evident that these bills not only contain provisions which are enlisted in clauses (a) to (f) of Article 110, but also contain provisions which are not necessarily incidental to these clauses, to be included within the ambit of Article 110. While the Speaker's certification of a bill as a money bill is final, are some bills being classified as money bills as a political strategy to circumvent debate in the Rajya Sabha? The questions which thus arise are **(i)** how the word "only" in Article

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110(1) is to be interpreted and **(ii)** whether the Speaker's certification of a money bill is subject to judicial review, and to answer these two questions the author will look at two recent cases.

In *Puttaswamy-II*, the petitioner had two major contentions which are relevant to this paper,

(i) that the Aadhaar bill is not a money bill and hence the Rajya Sabha cannot be bypassed as it is essential to "*constitutional federalism*" which has been held to be a part of the basic structure[94] and **(ii)** that although Article 110(3) of the Constitution accords finality to the Speaker's certification of a money bill, the Speaker's decision can be subject to judicial scrutiny. The majority upheld the constitutional validity of the Aadhaar bill. While doing so, the majority first struck down Section 57, and then held the rest of the bill to be a money bill as it had a substantial nexus with the appropriation of funds from the CFI. The majority failed to provide clear standards to interpret Article 110. Further, the majority rejected the petitioner's contention that the Speaker's certification of money bills should be subject to judicial review.

In his dissenting opinion, Chandrachud, J holds "*the Aadhaar Act to be in violation of Article 110 and therefore liable to be declared unconstitutional*" and that "*Article 110(3) does not exclude judicial review by a constitutional court.*" With respect to interpretation of Article 110, Chandrachud, J was of the opinion that the usage of the word "only" indicates that the entry is exhaustive and is inapplicable to anything which falls outside its scope and any other interpretation will "*reduce bicameralism to an illusion*." Since the Aadhaar bill contained provisions which traveled beyond clauses (a) to (g) of Article 110, it was incorrectly classified as a money bill and thus had grave implications in terms of legislative participation of the Rajya Sabha.

On the question of justiciability of the Speaker's certificate, Chandrachud, J looks at the language of Section 3 of the Parliament Act, 1911, which consciously excludes judicial review of the certificate of the Speaker of the House of Commons. He emphasizes on the fact that the framers of the Indian Constitution did not adopt such language and thus concludes that the Constituent Assembly did not intend to confer the same status to the Speaker of the Lok Sabha as conferred on the Speaker of the House of Commons. If judicial review was to be excluded, the language of the Constitution would have explicitly provided for the same. According to him, the constitutional scheme envisages a system of checks and balances and the power of the Speaker as accorded by Article 110(3) cannot be untrammeled and immune from judicial review as "*judicial review is the ultimate remedy to ensure that the Speaker does not act beyond constitutional entrustment".*Chandrachud J further held that "*bicameralism is a founding value of our democracy and is a part of the basic structure of the*

Constitution" and it is a "*fraud on the Constitution*" for the ruling government to supersede the authority of the Rajya Sabha. Chandrachud, J thus "*structurally*" interpreted Article 110 to advance and protect bicameralism.

In *Rojer Mathew v. South Indian Bank Ltd. and Ors*[343]., the petitioners contended that Part XIV of the Finance Act, 2017, which amended provisions of central legislations dealing with statutory tribunals, could not have been certified as a money bill and is thus unconstitutional. The Supreme Court held that there is no bar against the judicial review of the Speaker's certification of a money bill and that Articles 110(3) and 122(1) cannot operate as a bar when a challenge is made on the grounds of unconstitutionality and illegality, but there would be a presumption of legality in favour of the Speaker's decision and the one challenging its validity will have to prove that such certification was "*grossly unconstitutional or tainted with blatant substantial illegality.*" The Apex Court further directed this matter to be placed before the Chief Justice for consideration before a larger bench, since the Bench was of equal strength as the Bench in *Puttaswamy-II*.

There is an apparent similarity between the powers of the Senate and the Rajya Sabha where both upper chambers cannot introduce bills dealing with finance and taxation. The "Origination Clause" gives only the House of Representatives the power to originate bills for raising revenue and prohibits the Senate from proposing any amendments which could alter the "revenue nature" of the bill. However, while the Rajya Sabha's proposed amendments with respect to a money bill are not binding on the Lok Sabha, the Senate is free of amend the content of such financial bills.

Further, the US Supreme Court has developed the "*enrolled bill*" doctrine which requires Courts to accept the signatures of the Speaker of the House of Representatives and the President of the Senate as "*complete and unimpeachable*" evidence that a bill has been constitutionally enacted. This doctrine, however, does not bar the judiciary from reviewing challenges which allege violation of the Origination Clause. In the case of *Munoz-Flores*[344], a statute was challenged before the US Supreme Court on the ground that its process of enactment violated the Origination Clause. While concluding that the statute was indeed a bill for raising revenue and did not violate the Origination clause, Marshall J (speaking for the majority) held that "*a law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses than would be a law passed in violation of the First Amendment.*" Hence, under American law, an attempt

[343] 2019 (15) SC ALE 615
[344] 495 US 385 (1990).

at bypassing the Senate is a valid ground for judicial review and the House of Representatives is not the ultimate authority with respect to determining the status of a bill under the Origination Clause. Although the powers of the Rajya Sabha and the Senate are restricted with respect to bills related to raising revenue, the US Supreme Court has explicitly held that determining the status of a bill can be subject to judicial review. However, in India, since the holdings in *Rojer Mathew* and *Puttaswamy-II* are contradictory to each other, a seven-judge bench needs to be constituted by the Chief Justice to finally decide on the question of justiciability of the Speaker's certificate and to provide a clear and consistent interpretation of Article 110(1) to ensure that the role of the Rajya Sabha isn't obliviated.

CONCLUSION

"*Finally, it should also be noted that the very existence of a bicameral legislature is itself another defence of the status quo*." – Thomas Flanagan

By making population the basis of allocation of seats combined with the removal of the domicile requirement, the Rajya Sabha seems like a mere duplication of the Lok Sabha and fails to fulfill its most important function of representing states' interests. The circumvention of the Rajya Sabha by way of passing ordinary bills as money bills threatens the Rajya Sabha's very existence. But it is important to note that the solution is not to get rid of the Rajya Sabha altogether because it is a part of the institutional architecture of Indian federalism. Apart from updating seat allocation with reference to the latest Census, the formula can be tweaked to ensure that all states are adequately represented. Although the author does believe that the domicile requirement should be reinstated, if the legislature and the Courts do not believe it to be a "*constitutional requirement*", other measures should be imposed to ensure that states' interests are put forth before the House, because the people do not get the opportunity to accept/reject Rajya Sabha members. The Lok Sabha's Speaker's certificate must be subject to judicial review to ensure that legislative procedure is not bypassed. Further, analyzing the formation and functioning of the US Senate and bicameral legislatures in other federal nations could help in bringing about reform to the Rajya Sabha and thus strengthen the federal character of the Indian Parliament

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TRIAL BY MEDIA: A VIOLATION OF THE RIGHT TO FAIR TRIAL?

- **DR. RAM KISHORE MEENA**[345]

Abstract

Outreach of Indian media has been unparalleled in the last two decades with the emergence of technology. As the information has become easily accessible, reliance of a common man upon media outlets and news channels has grown significantly. However, media is no longer a symbol of truth with its act of distorting the facts and reporting false and malicious pieces of news.

In the last few years, Media has felt empowered to conduct trials and interfere with the right of the accused to be legally represented and receive a fair trial. Owing to this, many suspects have faced backlash, humiliation, loss of reputation even before they were declared as convicts. The past wrongs cannot be undone; however, the rights and privileges granted to the press must not be unconditional or unrestricted. It is high time that Courts regulate the unfettered power enjoyed by the press to the point it does not affect their right to freedom of speech and expression.

Introduction

In the form of legal constraints, India's media is among the most liberated in the world. Freedom of expression, as enshrined in Article 19(1) of the Constitution, continues to be a significant enabler of widespread participation in a democratic setting.

Pandit Jawaharlal Nehru had put it succinctly-

"*I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press.*"

The wonderful leader could not have anticipated the risk associated with the act of administering justice. It is something that is at the heart of natural justice and the rule of law, and he might not have presumed the media to participate in something that is beyond its ethical bounds. To turn his vision into reality, the press has been accorded numerous rights and privileges, ensuring that this cornerstone of democracy never loses its footing. It should be noted that freedom of expression is not absolute,

[345] Assistant Professor, Government Law College, Jhalawar - 326001, Rajasthan.

unrestricted, or unregulated, and that granting unrestrained freedom of speech and expression would lead to uncontrolled licence under different scenarios.

The media has transformed into 'public court' with the aim to deliver justice without awaiting the court's decision on the matter.[346] Not only that but it has gone to the extent of meddling in the affairs of court by disrupting the proceedings. It has entirely forsaken the existing distinction between a person who has been indicted and a convict. Presently, all that we witness is nothing but 'media trail'. In this, independent investigation is conducted by the media that allows the common man to form opinion about the person charged with the offences even before the trial commences in the court. This separate trial sways the public opinion and influences the pronouncements of the judges in a negative matter. This hampers the rights and liberties of the accused and weakens his chances of proving himself innocent.

Throwing Spotlight on Media Trial

Abuse of this fundamental freedom granted to the media has been rife, notably in the modern age where technology has taken over essentially every facet of our life. Reporting of news is no longer confined to the conventional methods of print and publication. There are news outlets and media companies that broadcast news 24 hours a day, seven days a week. Diametrically opposed to bygone days when there was a dearth of information and communication channels, today's society suffers from an abundance of and rapid dissemination of information. With boundless information accessible, it can be tough to determine what content to absorb. In a technological and data driven world, it is critical to give the press the flexibility to control their operational bases. However, with power comes accountability. The press should be answerable. Not only that but it should never shy away from accepting responsibility for the actions whether positive or harmful. Regrettably, quite often, absolutism has been practised in the mainstream press. Hence, it intends to seize control and function as per its ideas and impulses. As a result, there is a media trial. The media's desire is no longer simply to disseminate information after ensuring the veracity of the statements or news, but to boost its TRP (Television Rating Point) in order to compete effectively. The expression "media trial" refers to the media's declaration of culpability or innocence of an individual before he or she has been heard in any court of law, based on little or no evidence, if any evidence is available whatsoever. Prior to attempting to launch a charade against a specific individual, the mainstream press most presumably

[346] S. Devesh Tripathi, *Trial by Media- Prejudicing the Sub-Judice*, *available at* http://www.rmlnlu.ac.in/webj/devesh_article.pdf (last visited on February 6, 2022).

doesn't quite consider the consequences of its doings. Aside from affecting the judges and the public, a media trial meddles into the private matter if an individual and, truth be told, has a significant impact on the person's psyche as well as that of his kith and kin. The individual's reputation suffers, quite often even before the court having the competency to decide the case takes cognizance of the matter. It is saddening that the mainstream press, for the sake of its benefit, successfully strangulates individuals, making it difficult for them to integrate into society or start afresh. There have been several instances in which an individual could no longer bear what the media said and committed suicide. Once a person ceases to exist, the prospect of a fair trial is lost, as is the implicit repercussion of the despair and endless torment that follows the death. When it comes to ethics, grave transgressions have occurred, and many wrongs have been ignored and allowed to subsist.

Media Trial: A Gross Violation of Right of the Accused

Litigation is not always a quest for finding out the truth or sifting fact from fiction. Media trials have always been fraught with complications because they involve a pull between two opposing principles: the free trial and the free press, both of which the general populace appears to believe in. Press enjoys the freedom bestowed upon and this freedom is an essential component of democratic governance. This is the kind of explanation that has been provided for investigative reporting.

Simultaneously, the right to a fair trial is a fundamental right guaranteed to all offenders and victims alike, unaffected by any external agency, and is thus acknowledged as a fundamental principle of justice.

It does not take into account the plethora of truths and the complexities of incidents, challenges, or persons. When a trial conducted in a court of law is intrinsically complicated in an adversarial legal system, a trial by media brings about major challenges.

Negative campaigns, unsubstantiated allegations, and the likes have a significant effect on the legal system. They also pollute the country's social and intellectual ecosystem. From their perspective, the media trial may be completely fair and justified since it can do no wrong. Since the public sees the media as a credible news source, the media has the ability to affect the outcome of a trial and the life of the accused. Consequently, the media functions as a public court or a Janta court, determining the culprit prior to the initiation of the court hearings.

By continuously reporting about an individual who is accused in a trial, the press convinces the common man to form an opinion about that individual as a wrongdoer, resulting in the offender's guilt before the proceeding commences. As a result, the media trial is not as objective because they lack

the authority to intervene and push the public to form a forced opinion against a person. By conducting the pre-trial, the press interferes with the court's system and mechanism, which is prohibited by any legislation or statute and violates the right of the accused to receive a fair trial.

Discerning the Judicial View towards Trials Conducted by Media

There has never been a legal system in which the press has been given the authority to adjudicate a case. Each coin has two faces, and the same is true for the trial by media; in some cases, journalists depict a predetermined image of an offender, so shredding his/her reputation, which can subsequently impact the trial and the judgement, thereby media trial. In India, such trials have gained ground. Numerous instances have occurred in which the press decided the case on its own accord and announced verdict against an offender in violation of fair trials sanctioned by law. Today, media has the means to influence a common man's thought process.

People's perceptions are influenced by media, which can have both favourable and harmful consequences. The press does nothing more than corrupt people's minds. Once an actor died a few years ago, there was a lot of outrage about the inquiry and apparent mishandling of the latter's strange death. The media told the complete narrative of the actor's death in such a fashion that the general public was conditioned to believe in the suspect's culpability. The mainstream press had taken a giant step by publishing and broadcasting information upon mere conjecture regarding the course of the investigation by relevant authorities, in order to strongly comment on the topic on a continuous basis and opine on the findings without confirming the truth.

This form of coverage has placed unnecessary strain on a fair inquiry into the matter and trial of the accused. The press launched a parallel investigation and trial in this form, and prophesied its decision without waiting for the completing of trial and pronouncement of judgement by the Court. In relation to the matter, the court questioned whether the existing framework for its process of regulating itself without interference of external agencies of the digital media was suitable to maintain an equilibrium between right of free speech and expression enshrined in Article 19(1)(a) of the Indian Constitution and an offender's right to receive fair trial.

Challenges of Regulation

Regulation of the media poses a challenge more than ever before. Modern media consists of many diverse means, both traditional and new: newspapers, periodicals, books, TV, films, the Internet, and cell phones. Newspapers are over 200 years old, while the internet is less than three decades old. Each has evolved at a different time; each depends on a different technology and throws up its own peculiar

challenges. As a result, there is no single law or coordinated control by a centralized authority but a web of laws and authorities regulate the media. The police have powers to punish for offences relating to obscenity, defamation, disruption of public order or national security under various statutes such as Indian Penal Code and the Information Technology Act, 2000. For TV, the local Magistrate and the Police Commissioner are empowered to take action for contravention of the Cable Television (Networks and Regulation) Act, 1995 in whatever form- the telecast of obscene material, programmes which are likely to incite disorder or violence, defamatory material or material likely to cause class hatred, for piracy, etc. The Press Council, a body under The Press Council Act, 1978 has power to regulate content in newspapers. The courts have the power to punish for contempt of court, as does Parliament, and the State Legislatures the power to punish for contempt of the House or a breach of privilege. The Censor Board, an authority constituted under the Cinematograph Act, 1952 regulates the content of cinematograph films and has powers to censor films on more or less the same grounds found under Article 19(2) of the Constitution. Disputes within the film industry are usually resolved by self-regulatory bodies which are fairly effective. Advertisements are regulated through self-regulation as also under the Cable Television (Networks and Regulation) Act, 1995, the Indian Penal Code and the Consumer Protection Act, 2019. Lately, self-regulatory bodies in the broadcasting industry, such as the Indian Broadcasting Federation (IBF) and the News Broadcasters Association (NBA) have become fairly active. The seamless web of laws and diverse authorities makes media regulation a rather complex and unwieldly task.

In *Destruction of Public and Private Properties* v. *State of A.P.*[347] which arose out of destruction of property during strikes and demonstrations, the Supreme Court accepted the F.S Nariman Committee recommendations on regulation of the media. The gist of these recommendations is mentioned herein: So far as the role of media is concerned Mr F.S. Nariman Committee has suggested certain modalities which are essentially as follows:

a) *The Trusteeship Principle*- Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.
b) *The Self-Regulation Principles*- A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in

[347](2009) 5 SCC 212.

reporting women and children and matters relating to national security; and respect for privacy.

c) *Content regulation*- In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statutes. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self-restraint) goes to the root of censorship and is unsuited to the role of media in democracy.

d) *Complaints Principle*- There should be an effective mechanism to address complaints in a fair and just manner.

e) *Balance Principle*- A balance has to be maintained which is censorial on the basis of the principles of proportionality and lease invasiveness, but which effectively ensures democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

It is felt that the appropriate methods have to be devised for norms of self-regulation rather than external regulation in a respectable and effective way both for the broadcasters as well as the industry. It has been stated that the steps constitute a welcome move and should be explored further.

Regulation has been made more challenging by the globalisation of news and entertainment through satellite television and the Internet. Previously what could be regarded as acceptable in certain societies could be regarded as entirely unacceptable and liable to censure in others. However, with globalisation and exposure to foreign cultures, notions of social mores, of morality and acceptability are becoming increasingly homogenised. Also, paradoxically, the very technology that made this media revolution and globalisation possible also makes it virtually impossible to control the flow of information. While the advancement of technology has broken down traditional barriers and has made communications instantaneous and globalised, it has also rendered censorship redundant. The availability of information on the Internet is difficult to monitor, and what may be banned in one country is easily available through the Internet and satellite television in another.

In a country with as robust and multifaceted a freedom of expression as India, censorship by the government and moral policing is undesirable. Yet, given the sliding standards in content, some argue that an element of centralized regulation is necessary. Organised self-regulation may provide some

solutions but may not be adequately effective given the vested interests within the industry. One solution could be the establishment of an autonomous supervisory regulator, free from governmental control as from private control. Another point of view is that the media should be left as it is; free to follow its own course. Every democracy gets the government it deserves, and every society, its media.

How Media Trial has Overshadowed Fair Trial

Pre-trial publicizing undermines the integrity of a fair trial. The trials by media have indeed placed strain on legal practitioners not to undertake matters where the public perceives certain individuals to be culpable without proof, causing the defendant to waive his right to a representation. However, it also creates a lot of hurdles and challenges for the lawyers who sign up for such cases. The concept of a media trial is not new. The part played by media in impacting the course of a trial and the subsequent judgement was discussed in the matter of Priyadarsini Mattoo[348] and other prominent cases.

The power of the fourth pillar i.e., media, has been immense, however, when this power hampers the administration of justice, intervention by the Court become necessary.[349] There have been countless cases where the press has been condemned of conducting the offender's trial and rendering the judgement before the court delivers its decision. Consider the instance, when Ram Jethmalani represented the suspect Manu Sharma in the matter concerning Jessica Lal's murder[350]. Commenting on senior advocate's move to represent the accused, a senior editor of a News station claimed it to be lost battle stating that Manu Sharma was guilty for the deceased's murder, even before the trial was concluded. The media's presumption certainly infringes upon the defendant's right to receive a fair trial and his right to choose a legal practitioner to defend his case.

In the aforementioned case, the court stated that, given the importance of electronic and print media in recent times, it is not only preferable but also the minimal to be hoped from those in control of affairs in the system to ascertain that trial conducted by them does not impede the investigation to be done by the relevant authorities and, more pertinently, does not violate the perpetrator's right to defence in any form. If each of these poses barriers to the recognized judicious and fair inquiry and trial, it will be a farce of justice.

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[348] *Santosh Kumar Singh* v. *State thr. CBI*, Criminal Appeal No. 87 of 2007.

[349] Vishwajeet Deshmukh, *Media Trials in India: A Judicial View to Administration*, JURIST-Student Commentary, January 20, 2021, *available at* <https://www.jurist.org/commentary/2021/01/vishwajeet-deshmukh-media-trials-india/> (last visited on February 8, 2022).

[350] *Manu Sharma* v. *State (NCT of Delhi)*, Criminal Appeal No. 157 of 2007 and Criminal Appeal No. 224 of 2007.

What started as a gimmick to gain attention of the public and increase the viewership has lasted too long now and is endangering the very democracy that it gets its power from.[351]

Reporters are permitted to inquire into the facts of a case and comment on the same; however, they cannot convict somebody, make baseless remark on the problem without knowing both sides of a coin, or influence the outcome of the trial. A fair trial seeks to provide the offender with the best possible opportunity to establish his innocence. A fair trial proves advantageous to both the offender and society. However, an unjust trial chips away at the moral fabric of society and fails to preserve the spirit of justice.

Supreme Court's Stance Concerning Media Guidelines

In 2012, the Supreme Court of India constituted a Constitution Bench of five judges to consider whether guidelines ought to be framed by the court in respect of media reporting of ongoing cases. The immediate provocation was the unauthorized leak by a private television channel of a privileged communication in respect of a settlement proposal exchanged between the lawyers on two sides in *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*[352] (hereinafter the "*Sahara*"). On 10 February 2012, the Apex Court passed the following order:

"*We are distressed to note that even 'without prejudice' proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate Orders could be passed by this Court with regards to reporting of matters, which are sub-judice….*"

In an application filed by *Sahara*, (IA No. 35-36 of 2012) complaining of the unauthorized broadcast, the Supreme Court opened up the debate on general media reporting of court cases and arguments were addressed before the Constitution Bench on behalf of several parties including media houses and journalists over a hearing which lasted for several weeks from March to May 2012. Most parties argued against the framing of court guidelines, notably the applicant, Sahara itself. A few parties

[351] Aditee Dash, *Media Trials: Misuse of Freedom of Speech and Deterrent in the Path of Justice,* Manupatra, July 2, 2021, *available at* https://articles.manupatra.com/article-details/Media-Trials-Misuse-of-Freedom-of-Speech-and-Deterrent-in-the-path-of-Justice (last visited on February 9, 2022).

[352] (2012) 10 SCC 603.

argued in favour of guidelines, particularly to address the difficulties arising from media reporting of criminal cases.

What was sparked off by the mysterious leak to the media of a confidential exchange between lawyers in the case, snowballed into an open-ended debate on media transgressions and the need to rein it in with guidelines. It did not help that in several recent cases the court had expressed its displeasure with media sensationalism. Still fresh in the public memory were the controversies surrounding the live telecast of 26/11 and the involvement of journalists in the Radia conversations. Here was an opportunity, it seemed, for the court to show the media its place once and for all, to craft contours within which it could report the courts. There was reason for concern.

The judgement is probably more significant for what it does not say. The court refrained from carving out any general guidelines, recognising that no one shoe fits all. That itself brought much relief.

It can be gathered that while recognising the presumption of open justice and the media's right to report court proceedings, the Supreme Court held that there may arise exceptional cases where reporting may adversely impact the administration of justice. In such cases, reporting may be deferred for a limited duration by the Supreme Court or the High Courts. An order of postponement must pass the tests of necessity and proportionality and be resorted to only where no alternative measures are available.

The *Sahara* judgement should not be seen as a dilution of the open justice principle. Such an interpretation would have dangerous implications not only for the media but for the larger public interest. The idea was surely not to open the floodgates for the rich and influential to approach the courts to have publicity of their proceedings censored, albeit temporarily. That could be very damaging for the public interest. With the ills that plague the justice system in India, we need more openness, not less. In addition to the high-profile cases that get media attention, if the media followed up on the fate of ordinary cases involving ordinary people, perhaps the tens of lakhs of cases that languish in courts across the country would get more efficient justice delivery. What is known as the "sunshine effect" of open justice ensures that the State machinery is not misused to unjustly condemn the innocent, that judges and public prosecutors conduct themselves with probity, that proceedings are not needlessly protracted and that justice is delivered fairly and efficiently. The glare of contemporaneous publicity and the fear of public censure keep the entire system on its toes.

The world has never known so much transparency and openness as technology has made possible today. In several jurisdictions, there is live televised reporting of cases. Technology should make the

system cleaner and more accountable. The media must report more cases, not less. All jurisdictions recognise exceptions to open justice. But exceptions cannot displace the norm.

Conclusion

The media trials have clearly had a detrimental influence rather than a beneficial one. The courts must effectively supervise the media. While a government-controlled media is not healthy for democracy, the implications and consequences of unchecked published news pieces are much more injurious, not only to the individual's image in a society but also on the judgements pronounced in courtrooms. As a result, these trials have only managed to aid people in a few circumstances, but this is not applicable in all the cases, thus constraints must be placed on them.

Media form one of the cornerstones of our society. Hence, it should acknowledge its responsibility towards disclosing verified information to the viewers and discarding unsubstantiated pieces of information. Since a common man relies on media to learn about the current events, and forms an opinion according to the information published, media should not misuse the faith invested by him and other such individuals and discharge its duty with utmost care.

This, in fact, necessitates the presence of a responsible media. No freedom or privilege, no matter how important, can be granted in an unlimited fashion. Existence of checks and balances is important. This also applies to freedom of press which is bound by the laws of the country. Therefore, while carrying out its functions, press should be mindful of its actions and the consequences that may ensue from them.

The legislative bears a tremendous deal of responsibility when it comes to creating rules governing the media, ensuring that their independence is not restricted. The press has the freedom to debate and opine on case decisions, but they do not have the right to conduct a trial on matters that are under judicial consideration.

The Apex Court of India has authorized the use of contempt powers by judges against publications and media outlets in a handful of cases. The ambit of media's freedom of speech and expression cannot be widened to the point that it hinders the offender’s right to receive a fair trial.