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

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THE VULNERABILITY OF INDIGENOUS PEOPLE DUE TO CLIMATE CHANGE

- ASHISH VERMA[1]

ABSTRACT

With millennium development goal and sustainable development goals setting targets for countries to tackle climate change and protect the environment, globalisation on the other hand has been promoting healthy competition. in either of the case, nature has its own way of giving back which may sound very poetic, but natural disasters like floods, draughts, extreme changes in weather conditions are some instances which put people's life at stake. The worst affected are always the indigenous people. The people already impacted by the social and most importantly economic vulnerabilities find it difficult to pass through repercussions of climate change. The increasing emissions of greenhouse gases by both developed and developing nation have been affecting the climate, which in turn affects the poor people, specifically in developing countries. The issue is not a current one but has been in light in the 20th century when international organization prepared a special report for helping in the adaptation by the poor, which highlighted the interrelationship between poverty and climate change.

A poor person while struggling for the basic necessities for life finds it extremely difficult to be the most vulnerable to the actions of development undertaken by the nation. This paper argues for the betterment of the indigenous people: the methods and recourse available alongside the legal instruments in various countries. The exploitation of natural and renewable resources by the stronger, is always against the weaker, creating a negative impact on growth of the country. It studies the interrelationship between both along with conceptual framework and understand if it can be related to violation of human rights which was raised against US by the Inter-American Commission of Human rights.

KEYWORDS: Vulnerable, Indigenous people, Recourse, Interrelationship, Climate Change

INTRODUCTION

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"Climate change is no longer some far-off problem, it is happening here, it is happening now."

-Barack Obama

The increasing amount of green house gases has put a statement of worry for countries across the globe. It is threat not only to the earth but to humans, to development and to human rights. the growing attention of green house gas emissions from developed countries like united states of America and Europe which has impacted the poor countries.[2] The topic was specifically taken up by OECD in 2003, including world bank and various other international organizations, which aimed at reducing the vulnerability of the poor through Adaptation,[3] reportedly after which the united nations convention on climate change came into force in 2002.

The focus for 21st century should not only aim to reduce poverty but to reduce the aftermaths of extreme climatic changes which renders the people in a hopeless situation, from where they have to be redeemed to normal social and economic conditions by giving them a lifeline. The interrelationship between climate change and rights of individual needs to be reiterated and revived to the better survival of the weaker sections of the society. Climate change is continuing to impact the sustainable development and the target of reduction of poverty. Considering the 21st century, a lot of damage has already been done and countries are continuing to do the same i.e., create a negative impact on the climate. The sustainable development goals aim to reduce the industrialized activities which will in turn not disturb the temperature for future. The damage already caused, has to be dealt with, it is to adapt to the changing conditions which is the damage caused as a result of changing climatic condition.

For deeper understanding, the indigenous people are most occupied with the geographical development of the area like cultivating of the local crops and earning a livelihood from the same, who suffer deeply with changing climate. With the development of science, many modern technologies which promoted hybrid crops, has impacted the livelihood of the indigenous people.[4] even though the primary contributors to the climate change are not the

[2] Etchart L (2017) The role of indigenous peoples in combating climate change. *Palgrave Communications*. 3:17085 doi: 10.1057/palcomms.2017.85.

[3] ibid

[4] Shalanda H. Baker, Mexican Energy Reform, Climate Change, and Energy Justice in Indigenous Communities, 56 NAT. Resources J. 369 (2016).

people who suffer the most due to changes which are done to the people. there are more 3500 million indigenous people divided in different tribes who continue live in more than 70 countries all over the world. The vulnerability of the indigenous people can be of various types or can be based on the circumstances as well, like the use of land and resources in a particular geographical area for livelihood and for inhibition. They may be treated vulnerable when the face the direct repercussion of any change in the land or geographical condition, and yet have the insecurity of rights of land, resources, and institutions. They continue to have inadequate representation even in cases where they are the most impacted, being subject to weak governance and policies, unequal treatment of authorities.

Climate change results in the natural hazards, which may be of a short duration, but which leaves its aftereffects for an exceedingly long period of time, sometimes even generations like the leading example of Bhopal gas tragedy, which though was not an impact of climate change but caused irreparable damage to the people of the area. Exploitation of natural resources, depletion of natural resources, loss of land, loss of crops, draught, etc. are some of the examples which will be of importance. It leads to the violation of human rights causing threats to the economic conditions.[5] Migration is common phenomena who then suffer from vicious trap of trafficking or suffer from unorganized labor work. Traditionally, only the climate change was considered to be the disaster, but now the social changes associated needs to be handled in detail.

CLIMATE CHANGE

Climate change brings about changes in the freshwater sources of water, melting of glaciers, disturbs the human settlement, excessive change in weather (extreme cold, extreme heat) which makes survival in the area difficult. The sustainable development goals (goal 13) which aims to reduce the temperature of earth by 2 degree centigrade, which seems like the best possible recourse, but will also require highest measures of mitigation mostly for the indigenous people. In India, Article 21 of the Indian Constitution of 1950 deliberates upon right to life and personal liberty. The judiciary has interpreted Right to life in an overly broad sense meaningfully to include right to health, water, proper sanitation, food, housing. It also requires the man to have a standard of living and not just mere animal existence. A massive hydroelectric project in a

[5] George William Mugwanya, Global Free Trade Vis-a-Vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts towards a More Integrated Approach, 14 J. ENVTL. L. & LITIG. 401 (1999).

local area of a village, will have enough repercussions to adversely impact the human rights. apart from the damage caused due to the project as a result of climate change, there will issues with resettlement of the people, who may be displaced out of their own safe zone and may also result in violation of human rights.

The two ways which have been adapted constantly in dealing with the climate changes are mitigation, which means to avoid or minimize the damage, which is caused and other being adaptation, which helps in developing ways to defy the risks associated. The problem is not as simple as it appears on the face of it: like energy sector, it comes up with projects which use the natural resources and gives it dimensions for human consumption putting it to daily use, in the whole process, they also create employment opportunities for both men and women, as per the ILO report of 2018. So, when it is damaging the environment, it is creating competition and opportunities for others, but at the same time, many people are devoid of their rights, or are displaced or face serious human rights violations. Thinking like any other normal person, to see the action as having positive or negative impact, the aim would be to weigh on its pros and cons, pros being creating employment opportunities, adding to the resources of the country, and cons would be violating the human rights of the indigenous people and causing deforestation, creating conditions, which may lead to change in climatic conditions of the place.

Forest and management of forest is especially important to moderate the temperature of the earth surface. As the number of forests covers continues to decrease, giving a chance to the developmental projects. As an Indian State, Goa iterated that large forest cover, just is not contributing to the growth of the state or adding to the economy or GDP, so they should be used for constructing of railway lines for transportation of material. Such ideology of the people in power, gives them income at the cost of destruction of livelihood of indigenous people. It is also predicted that if climate changes continue at this pace, the overall annual rainfall will decrease near to 20 percent. This is not only disturbing, but then the economy and food conditions will be impacted as lack of adequate rainfall or no rainfall during the season will cause irregularities in production of crops, then other than the farmers livelihood at stake, the food supply of entire nation will suffer, which will lead to increase in the prices of available goods and the hybrid measures of cultivating them.

IMPACT ON INDIGENEOUS PEOPLE

Every region has its type and nature of impact on the people. for the polar regions in Alaska and the Himalayas in India will have different impact. Somewhere the impact is due to forest fire, somewhere due to melting of glaciers, somewhere due to increased rainfall and somewhere due to no rainfall. The reasons of suffering may vary and so it's impact, but the people and their struggle remain the same, expressed in changing dimensions. In a research conducted by the international labour organization, six features specific to the indigenous people have been identified which explains their positioning with respect to climate change policies and its impact.

1. They are most vulnerable to the impacts of climate change because they are already in the bottom in the list of economic conditions.
2. Changes in climatic conditions has a direct impact on the natural and renewable resources which is the primary source of livelihood for the indigenous group, which again exposes them to the maximum risk.
3. Migration is quite common amongst the indigenous people, because instead of fighting with the cause, they avoid it and change their place of habitation, change their livelihood, and start afresh.
4. Due to lack of having enough information, access to resources and support of institution, they often are excluded from the decision-making process, which results in inadequate representations, and not having voiced their concerns, expecting a recourse does not feel as the right way.
5. They share the most complex relationship with the ecosystem and thus continue to be the worst affected by the climate change.
6. Indigenous women are subject to discrimination based on their gender which is not causally related to climate change but is exaggerated by the actions of climate change.

Considering the fact that indigenous people are already in vulnerable position due to vivid reasons like economic conditions, social treatment, inequalities, are faced by the consequences of climate change as not the only reason but are put to even more challenging conditions. The question which arises is does climate change impact the people directly, the answer will be positive. Justifying the answer in a way the change in the climatic conditions is caused by the human activities, so the sufferers are also the human. The only point of difference being, the one who causes the damage is not the one who suffers damages, which finds express mention in intergovernmental panel on climate change. The panel reiterates that indigenous people do

not only suffer for climate change as a reason but, the other reasons added with climate change serve a collective result.

The indigenous people were actually the victims, who were not treated like one, as they suffered the most and yet had no participation in the decision-making process and were side lined deliberately. University of Oxford conducted a symposium in 2007 which indicated the measures for responding to the situation by indigenous people, plan of action laid down for regions and countries in specific[6]. Destabilizing the long-established ecological and agronomic knowledge structure of indigenous people might potentially endanger losing the most viable and effective instruments we have in tackling climate change. Therefore, specialists have recommended the advancement of collaboration amongst indigenous communities, researchers, and policy experts to operate collectively for reforming agricultural practices with reduced carbon and significant environmental footprints.

LEGAL INSTRUMENTS: DOMESTIC AND INTERNATIONAL

Climate change being a matter of concern, as not left the arena of human rights to debate upon. Climate change has serious repercussions of the survival and of the basic necessities of human life. basic necessities have been guaranteed under the fundamental rights or under the international instruments like UDHR[7], ICCPR and ICESCR, which aim to provide a standard of living to every person in the society. It includes access to food, right to life, right against exploitation, right to livelihood, etc.[8] This restricts their access to remedies, boosts their susceptibility to climate change, weakens their ability to alleviate and adapt to climate change, and subsequently poses a risk to the advances made in protecting their rights. for example, the ICESCR which provides for fundamental freedom of food to every person, but the same is affected by loss of agricultural land, by saltwater intrusion, by drought or by flood, all of which are results of climatic changes. A change in rainfall pattern or quantity in an area impacts the right to life, right to health, and the means of subsistence all of which guaranteed under Article 6 of ICCPR, Article 12 of ICESCR, and Article 1 of ICESCR, respectively. When the sea level in a particular area increases due to reasons like flood, salination, sea surges, erosion, etc, it

[6] Oviedo, Gonzalo (2008): Indigenous and Traditional Peoples and Climate Change: Vulnerability and Adaptation. Summary Version. – IUCN, Gland.
[7] United Nations (1948): Universal Declaration of Human Rights. http://www.un.org/Overview/rights.html
[8] Salick, Jan & Byg, Anja (2007): Indigenous Peoples and Climate Change. http://www.tyndall.ac.uk/publications/Indigenouspeoples.pdf

impacts the loss of agricultural land, the availability of food, the injury to the person and a threat to the livelihood to the indigenous people. the actions have its reactions, and impact right to life, right to property, right to culture, standard of living right to water, right to health so enshrined in various documents like UDHR< ICCPR, ICESCR, UNDRIP, CEDAW, etc.

Viewing the indigenous people as a source of victim or nothing at all, was the biggest drawback in the system, whereas they could have been treated as an important source of knowledge and local expertise and techniques. The Kyoto protocol was adapted to reduce the emission of the greenhouse gases which leads to the temperature rise. Ever since, the Indigenous people's group continued to push for playing a role in the process of decision making.[9]

The Kyoto protocol[10] has failed to do justice to indigenous people where they wanted to voice their opinion about the impacts of fossil fuel industries. They wanted to speak about the destruction of caribou herds which reduced by 15 percent due to changes in climate, which hampered them culturally, spiritually, and physically.[11] Kyoto protocol focused on the clean development mechanisms paving a way for funding of projects so as to reduce the rate of emission in developing countries. The forests continued to burn, glaciers continued to melt, marine life was diseased, and due to the continuing industrialized activities. In 2004, the involvement was introduced with the UNFCCC[12]. International indigenous day is celebrated at 9th of August, their knowledge of climate change is traditional and deep rooted, and they are known to adapt unique ways to understand the land and take care of it.[13] Due to climate change, age old techniques have been forced out of actions, fostering way for new agricultural methods to still be able to help people with the activities of generating livelihood. UN has been playing

[9] United Nations Permanent Forum on Indigenous Issues official website: http://www.un.org/esa/socdev/unpfii/index.html

[10] United Nations (1998): Kyoto Protocol to the United Nations Framework Convention on Climate Change. http://unfccc.int/kyoto_protocol/items/2830.phpudhr

[11] Heidi Bachram, "Kyoto Fails indigenous peoples on climate justice" (1St Dec 2005) Available at https://www.tni.org/es/node/10481

[12] UNFCCC (United Nations Framework on Climate Change) (2004a): United Nations Framework Convention on Climate Change- The First Ten Years.

[13] Charters, Claire. "The Rights of Indigenous Peoples." *New Zealand Law Journal (*October 2006): 335–337. http://www.apc.org.nz/pma/cc001006.pdf

an active role to involve the indigenous people and understand their ways of contribution to build independency of energy.[14]

The international organization which from the very beginning remain vocal about the rights of indigenous people is the international labor organization, which voiced the "convention concerning indigenous and tribal peoples of 1991. The United Nations declaration on the rights of indigenous peoples (UNDRIP), 2007 was based on the convention. The representations grew stronger since 2013 in international and national forums where they did not just advocate the protection of their own rights but also the protection of the environment. In the 2015 report submitted by DOCIP (Indigenous People's Centre for Documentation, Research, and Information)[15] highlighted their role of being centrally responsible for promotion and grabbing media attention to relevant issues and creating a positive role. The Rio declaration of 2012 (3rd Earth Summit), in relation with UNDRIP seemingly understood the importance of indigenous people in sustainable developmental goals achievement. They were excluded to be a part of the MDGs but were accepted as their own in the SDGs of 2015 and its drafting.

UNDRIP[16] is a very essential document which voices for the collective rights of the groups which may not be present in other specific charters governing human rights, which came into force after 25 years of efforts by the UN members states and the indigenous groups. The need of enacting a charter so peculiar was necessary because of the existing discrimination which was faced. The right to strengthen the economies is relevant for our topic in concern. Some of the leading nations like Australia, Canada[17], United States, New Zealand are not signatories to this treaty, which creates tension, as it does not have an international instrument to protect their rights, but this positioning seemed debatable in 2010. Speaking of security on issues such as lands, territories, resources, self-determination, traditional organizations, conflict-resolution systems, socio-political organizations, and maintenance of cultural integrity and diversity, is a

[14] UNFCCC, "Indigenous Peoples Central to Climate Change Action" (9Th Aug 2016) Available at https://unfccc.int/news/indigenous-peoples-central-to-climate-action

[15] doCip (Indigenous Peoples' Centre for Documentation, Research, and Information) (2008): UPDATE 81. September / November 2008. http://www.docip.org/Update-online.168.0.html

[16] United Nations, "History (brief)." https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html

[17] Paul Joffe, "Global Implementation of the *U.N. Declaration on the Rights of Indigenous Peoples*—and Canada's Increasing Isolation," September 2009.

critical part of building and enhancing resilience to impacts that are likely to be of considerable magnitude and which could endanger the very survival of the peoples at risk.[18]

UNDRIP advocated for the indigenous people's rights but was kept away from the mentions in global climate change agreements and even in the Paris Agreement of 2015. After which, it forced the creation of Indigenous Peoples Forum on Climate Change (IIPFCC) to voice their opinions as a side event in their own platform.[19] This was a step back, as they felt included and yet excluded which is a worse situation then no inclusion at all. As in case of no inclusion, the claim could be voice remaining unheard. But now the voice is ignored not thinking to be important enough. At the UNPFII 2017 symposium[20], indigenous peoples represented themselves as key participants in the achievement of SDGs 13, 14 and 15, which involve combating climate change, sustainably controlling forests and halting biodiversity loss (UNPFII, 2017).

They take various actions to represent themselves and let their voices be heard, they have not been treated as mandatory as an expert even when their territorial rights are violated most by the enterprises, primarily by fossil fuel extraction and consumption which damaged the water resources in collusion with various human rights group. To achieve a win-win situation, the reduction of greenhouse gases is as essential as inclusion of indigenous groups participation and to protect their rights and promote their wellbeing. Right to life, food, water, health, housing, livelihood, self-determination, speech and expression are all violated in case of climatic changes and in case of not voicing the opinions of the indigenous people.

Mitigation remains the first step to prevent the damage to the rights of the people, an example of which is the REDD (Reducing Emissions From deforestation and degradation)[21] which impacts the indigenous lives across the globe.[22] REDD functions in complement with the UNDRIP, UNDG guidelines, rights-based approach and FPIC. It aims to consider the

[18] Supra at 6

[19] CCBA, Climate, Community & Biodiversity Project Design Standards. 2nd edition. CCBA, Arlington, V.A. December 2008. www.climate-standards.org

[20] Henderson, James Sa'ke'j Youngblood. *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition.* Saskatoon: Purich Publishing, 2008.

[21] Peskett, Leo; Huberman, David; Bowen-Jones, Evan; Edwards, Guy & Brown, Jessica (2008): Making REDD work for the Poor. Prepared on behalf of the poverty Environment Partnership (PEP).

[22] FAO (2008): Indigenous peoples threatened by climate change. World day highlights fundamental role of indigenous peoples in food security.

knowledge and rights of the indigenous groups by fulfilling the international as well as national obligations. It fulfills the right of obtaining consent, providing equitable benefits, conflict resolution, and ensure participation remains the most important one. The attempt is to reduce deforestation and its impact caused to safeguard the people from future damage. The aim was to integrate the environmental justice principles into the framework for climate change targeted to reduce the emissions caused from deforestation and degradation. Passing of guideline though is the first step, the most important step is the implementation and monitoring and compensating. Who should be compensated for the damage caused by individual to the nature, but when along with the nature, the local group suffers.

There have been many significant developments which were worked out to eradicate the fallacies of the climate change, which though in issue, continued to be ignored. The environmental law principles have been the focal points of discussions for implementing the rules regarding climate change. Like the sociologist Robert Bullard highlighted a theory where the minority and poor communities are more likely to be chosen as sites for locally unwanted land users.[23] This theory continued to exist throughout the 1990s and has claims for in the environmental and civil rights law. Ranging from the Bali Action Plan for incorporation of comprehensive measures and strengthening cooperative actions, the issue has intensified in the minds of policy makers specially for indigenous people, and to give them a voice which should be heard. Even after many international instruments, the author feels that both the issues of climate change and its impact on indigenous people has still not been comprehensively addressed. When the global impact of climate change came to be recognized, and it was advocated by many jurists that the issue cannot be handled in a national level and requires international involvement, the impact of climate change was recognized, but the impact of climate change on the marginalized, or the indigenous people is still not recognized, and they continue to struggle for representation of their voices.

CONCLUSION

As suggested already in the report, there are three vital components for the adaptation of the climatic changes, especially for the protection of indigenous groups. First, the improvement in governance, second, empowering the communities, and lastly, access to information related to

[23] Rebecca Tsosie, "The Climate of Environmental Justice: Taking Stock: indigenous people and environmental justice: the impact of climate change, 78 U. COLO. L. Rev., (2007)

climate. Information is more empowering of them all because it allows to make a person correct and informed decision, by considering the exact situation. The common people across the globe should also be given the opportunity to not be a spectator but to also have a role in the decision-making process and be responsible for the compulsive actions and empowerment scheme of the government.

The essence of the moment would be the essential public and private institutions make move to support the indigenous people and incorporate their efforts to have safeguarded and to be allowed to claim their right in the decision-making process and understand their ways of adaptation and mitigation for catering the fallacies of climate change. The international instruments to which various countries are signatories for the welfare of the indigenous people should take the requisite action and fulfil their duty towards the vulnerable class. It is important to include indigenous people in the decision-making process because they know and understand the situation more than any more expert, where the expectation can be to speak for the nature and for themselves, to be beneficial even to the current economic conditions.

PROTECTION OF TRADITIONAL KNOWLEDGE: THE WORK AND THE ROLE OF INTERNATIONAL ORGANISATIONS AND CONFERENCES

- DR. RAM CHARAN MEENA[24] & HEMLATA MEENA[25]

ABSTRACT

The concepts of traditional knowledge, indigenous people and indigenous knowledge have gained broad use in international discussions on sustainable improvement. Nevertheless, their use is usually subjected to confusion. There have been numerous attempts to clarify the notions of traditional knowledge, indigenous knowledge and people. Although there are no globally approved definitions, this paper is devoted to analysing the approaches of international organisations to the protection of traditional knowledge. The study discusses the work of the international organisations: WIPO, UNESCO, WHO, WTO and FAO, as well as international conferences: Conference of the Parties of Convention on Biological Diversity and UNCTAD. The examples of traditional knowledge illustrate the paper: use of turmeric for wound healing in India, use the Hoodia plant to suppress hunger during hunting in South Africa and others. It is noted that today, at the international level, there are no instruments that ensure comprehensive protection of traditional knowledge. The author concludes that WIPO and UNESCO currently carry out the main work aimed at providing the protection of traditional knowledge. However, other international organisations and conferences, such as WHO, WTO, FAO, UNCTAD and Conference of the Parties of CBD in their work are also addressed some aspects associated with the preservation of traditional knowledge.

Keywords: Traditional knowledge, WIPO, UNESCO, WHO, WTO, FAO, UNCTAD

INTRODUCTION

Undoubtedly, traditional knowledge is a foundation of knowledge, know-how, and practices promoted and preserved by local society and conveyed from generation to generation in the community. Traditional knowledge is observed in a wide variety of fields. For instance, it can be knowledge concerning sustainable management of natural resources; knowledge associated

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with traditional architecture and traditional building technologies; knowledge related to traditional music, art, traditional methods of producing and utilising instruments; medical knowledge and knowledge associated with the use of plants, herbs, minerals and animals; traditional hunting and tracking skills; conventional models of nature conservation and biodiversity conservation.

Particular instances of traditional knowledge include:

- The application of turmeric for wound healing in India (Gazizova, 2019);
- Eating the Hoodia plant to suppress hunger while hunting by representatives of the San people living in South Africa (Wynberg & Chennells, 2009);
- Application of traditional methods of cattle breeding in Mongolia (Badaraev, 2016: Stepanova et al, 2019).

There is now no internationally admitted description of ancient knowledge. Some international treaties include provisions on traditional knowledge and/or references to traditional knowledge. Article 8 (j) of the Convention on Biological Diversity refers to "the knowledge, practices and innovations of local and indigenous societies reflecting ancient lifestyles that are related to the protection and constant usage of biological diversity". The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation refers http://ijhe.sciedupress.com International Journal of Higher Education Vol. 9, No. 8; 2020 Published by Sciedu Press 96 ISSN 1927-6044 E-ISSN 1927-6052 to "traditional knowledge connected with genetic sources". Article 9.2 of the International Treaty on Plant Genetic Resources for Food and Agriculture deals with the protection of traditional knowledge related to plant genetic resources for food and agriculture (Halupa, & Caldwell, 2015).

METHODS

The main methods used in the research are the specific historical, comparative-legal and systemic methods.

RESULTS AND DISCUSSION

The main work in the field of the international legal protection of traditional knowledge and traditional cultural expressions is carried out within the framework of such international organisations like the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

i. WIPO

WIPO is directly developing a global legal tool that will guarantee the preservation of traditional understanding, cultural expressions and genetic resources at the international level. This was the challenge for the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore established in 2000. The Committee has developed several versions of definitions of traditional knowledge, has defined criteria for its protection, outlined the range of beneficiaries, scope and conditions of safety, and also proposed to introduce certain sanctions and remedies to combat the misappropriation and misuse of traditional knowledge (WIPO, 2019).

The Committee carried out extensive work and made considerable efforts to develop a document that can ensure effective protection of traditional knowledge. However, in the process of agreeing with the opinions of states regarding the protection of these objects, certain difficulties arose.

Firstly, there is a lack of clarity about the nature of the document being drafted. Will it be a legally binding document, as most developing countries want, or will it be a flexible international document that is not binding, as the US, EU, Russia, and a number of other states wish to?

Secondly, the question of the number of documents being developed remains unresolved: should it be one document combining the protection of genetic resources, traditional knowledge and traditional cultural expressions, or three separate independent documents?

Thirdly, there is disagreement as to whether protection should be provided within the intellectual property system or under a human rights approach. If the choice is made in favour of intellectual property, then the question arises about the application of existing intellectual property rights or the development of a system sui genes.

ii. UNESCO

UNESCO contributes to the protection of traditional knowledge through the safeguarding of the intangible cultural heritage. The definition of intangible cultural heritage contained in the Convention for the Safeguarding of the Intangible Cultural Heritage included customs, representations, knowledge and abilities, and associated tools, materials, artefacts and cultural spaces recognised by societies, groups and, in several cases, through people as part of their cultural legacy. Article 2 of the Convention contains examples of the spheres in which intangible cultural legacy is demonstrated: (a) oral traditions and forms of expression, including language as the bearer of intangible cultural heritage; b) performing arts; c) customs, rituals, festivities; d) knowledge and practices related to nature and the universe; f) knowledge and skills related to traditional crafts. Based on the above definition, we can conclude that

intangible cultural heritage in the understanding of UNESCO includes, among other things, traditional knowledge (Gazizova, 2019).

The first UNESCO legal act to use the term "traditional knowledge" is the 2005 Convention on the preservation and growth of the variety of Cultural Expressions, the preamble of which identifies "the significance of traditional knowledge as a source of intangible and tangible heritage, and particularly knowledge systems of indigenous individuals, and their constructive aid to continual improvement, and the necessity to ensure their proper protection and promotion".

Currently, UNESCO is not faced with the task of protecting traditional knowledge and traditional cultural expressions from misuse and misappropriation. However, certain aspects related to the protection of traditional knowledge and traditional cultural expressions are also consolidated in the process of norm-setting in the field of safeguarding intangible cultural heritage and cultural diversity.

A number of issues related to the protection of traditional knowledge are touched in the activities of other international organisations: the World Trade Organization (WTO), the World Health Organization (WHO), and the Food and Agriculture Organization of the United Nations (FAO).

iii. **WTO**

Within the framework of the WTO, discussions are underway on the possibilities of protecting traditional knowledge in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Negotiations are underway on possible changes that need to be made to the Agreement in order to avoid conflicts with the Convention on Biological Diversity.

The TRIPS Agreement requirement to extend patenting to certain forms of "biological invention" causes a major criticism from many developing countries: "The TRIPS Agreement, as it stands, facilitates the granting of patents for products based on genetic resources and associated traditional knowledge, and does not contain sufficient provisions to preserve these resources and relevant understanding from misappropriation and theft. The lack of such provisions in the TRIPS Agreement may lead to arguments in its implementation and the implementation of the Convention on Biological Diversity" (WTO).

Nevertheless, issues of interest to developing countries continue to be ignored in the course of discussions on the TRIPS Agreement. The latest submission on this issue (WTO, 2011) in April 2011 proposed by the overwhelming majority of WTO Members, required the TRIPS Agreement to be amended to include a new Article 29 bis on the disclosure of the origin of

genetic resources and / or associated traditional knowledge (WTO, 2018). However, no changes have been made so far, and discussions are still on-going.

iv. WHO

Since the goal of WHO is to achieve the highest possible level of health for all peoples, issues related to the protection of traditional knowledge are raised by this organisation in the context of traditional and complementary medicine, as well as public health. Traditional medicine is a medicine that is opposed to allopathic (conventional, Western) medicine. This determines that WHO's attention is focused specifically on traditional medical knowledge, and not on the entire body of traditional knowledge.

At the same time, the traditional medicine of indigenous peoples is defined as follows: it is a body of knowledge and practices, whether explicable or not and used to diagnose, prevent or eliminate physical, mental illnesses and diseases that pose a danger to society. This knowledge or practice can be based solely on past experience and observations passed down orally or in writing from generation to generation. Most often, local traditional medicine is practised at the primary health care level (WHO, 2019). However, WHO notes that the term "traditional medicine" refers to both traditional medicine systems such as traditional Chinese medicine, Indian Ayurveda and Unani Arabic medicine, and to various forms of indigenous medicine (WHO, 2001).

v. FAO

The FAO project “Conservation and Adaptive Management of Globally Important Agricultural Heritage Systems” is essential for the preservation of traditional knowledge. Globally Important Agricultural Heritage Systems (GIAHS) are preeminent land-use systems and landscapes that are rich in globally significant biodiversity resulting from the community's collaborative adaptation to the environment, and also the community's demands and passions for persistent improvement. Traditional knowledge and agricultural practices are one of the core elements of GIAHS. In turn, GIAHS plays an important role in the preservation of traditional knowledge and practices (FAO, 2018).

Currently, 57 sites in 21 states are recognised as globally important agricultural heritage systems, with their largest number in China and Japan. Examples include the Olive Groves of the slopes between Assisi and Spoleto in Italy, which are based on a traditional terrace management system that allows the cultivation of olive trees, and the Oasis of Gafsa in Tunisia, where plant cultivation has been made possible by using the knowledge of local communities about groundwater.

Certain aspects related to the protection of traditional knowledge and traditional cultural expressions have become the subject of international conferences: the Conference of the Parties to the Convention on Biological Diversity and the United Nations Conference on Trade and Development (UNCTAD).

vi. Conference of the CBD Parties

The activities of the Conference of the CBD Parties are focused on the protection of traditional knowledge associated with genetic resources. The Conference of the Parties developed an additional protocol to the Convention on Biological Diversity (Nagoya Protocol), as well as a number of advisory documents (Bonn Guidelines, Tkarihwaié:ri Code of Ethics, The Rutzolijirisaxik Voluntary Guidelines), which draw attention to the need for prior informed consent to gain access to traditional knowledge associated with genetic resources held by indigenous and local communities.

vii. UNCTAD

UNCTAD addresses issues related to the protection of traditional knowledge in trade and development work. UNCTAD's main contribution to the protection of traditional knowledge and traditional cultural expressions is performed through research, business meetings and seminars at the regional and national levels encouraging the participation of indigenous and local communities, and promoting the development and implementation of integrated national strategies for using traditional knowledge for development and trade.

SUMMARY

As follows from the above, the main activities related to the protection of traditional knowledge are currently carried out by WIPO and UNESCO. In recent years, WIPO has carried out extensive work and made considerable efforts to develop documents that can guarantee the efficient preservation of traditional knowledge and traditional cultural expressions. At the same time, UNESCO has done important and consistent work to ensure the preservation of cultural heritage, firstly tangible and then intangible.

Within the framework of the WTO, discussions are underway on the possibilities of protecting traditional knowledge in accordance with the TRIPS Agreement; negotiations are also underway on possible changes that need to be made to the Agreement in order not to conflict with the Convention on Biological Diversity. WHO analyses traditional medical knowledge from a health and innovation perspective. FAO conducts research related to Farmers' Rights, many of which relate to indigenous (or local) peoples. The Conference of the CBD Parties carries out activities aimed at resolving issues of prior informed consent and access to

traditional knowledge associated with genetic resources. UNCTAD addresses issues related to the protection of traditional knowledge in trade and development work.

CONCLUSION

The concept of Traditional knowledge holds a tremendous significance to the international community. The prevalence of traditional knowledge can be observed in various fields, including medicine, agriculture, crafts, biological diversity and so forth. Furthermore, their diversity results in the fact that they become the subject of interest of many international organisations and conferences, each of which regards traditional knowledge based on their intentions and objectives. As a matter of fact, the protection of traditional knowledge is currently the subject of WIPO activity in its policy-making and rule-making. Hence, and it can be foreseen that the preservation of traditional knowledge will soon be organised under intellectual property law.

CHILD MARRIAGE LAWS IN INDIA: A CHASM BETWEEN INADEQUATE LAWS AND ERADICATION OF CHILD MARRIAGE

- **PROF (DR)BHAGWANA RAM BISHNOI**[26]

I. Introduction

In 2019, UNICEF Report highlighted that child marriages have been on decline in India since 2000s.[27]However, it is still home to more than 223 million child brides. Overall, the country accounts for around a third of all child marriages worldwide. Even the National Crime Records Bureau data paints a rather grim picture. It calls attention to the fact that as over 785 cases were reported under the Prohibition of Child Marriage Act in 2020, against 523 cases in 2019.[28]

These figures confirm the pervasiveness of the social ill of child marriage in India, while pointing out only a few of the dangers associated with it. The causes of child marriages may well be connected to a tangled web of religious traditions, social customs, economic considerations, and deeply entrenched prejudices. It is a socially destructive practice that needs to be eliminated from the Indian culture before it closes its claws on innocent boys and girls any further. Some of the primary reasons for child marriage can be poverty, insecurity of parents to miss out on the opportunity of getting their young daughters wedded when the time is ripe, lack of education and awareness, improper implementation of the existing laws towards curbing the incidences. Apart from being a social evil, it also accounts to a gruesome form of child abuse. Many females succumb to death following teenage pregnancies, give stillbirths or become plagued by life-threatening health issues in the prime of their life. The most distressing part that often gets overlooked is that child marriage deprives young boys and girls a fair opportunity to attain education and aspire for a better life.

II. Mapping the Existence of Child Marriage in India

The tradition of child marriage can be traced back to medieval period in the country. Conquest, uncertainty, and a variety of other political and social forces often compelled families to arrange the marriage of their children while they were still in the bassinet. As a consequence

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[27]Shireen J Jejeebhoy, "Ending Child Marriage In India, Drivers and Strategies" 13 (UNICEF, 2019).

[28]Government of India, "Crime in India 2020- Statistics Volume I" 6 & 326 (Ministry of Home Affairs, 2021).

of this uncertainty and tradition, marrying off the children before they attained maturity became acceptable and regarded as a social norm.

For the first time in history, someone spoke out against this tradition in the nineteenth century. Rukhmabai went on to become the first woman to practice medicine in India. She, too, had to go through the ordeal of being a child bride. Under the impact of social demands, she was betrothed by her family at the age of 11 to a guy named Dadaji Bhikaji aged 19. Due to prevailing norms, she did not immediately move and live with her spouse after their marriage. Her education, on the other hand, was rigorously pursued under the continual supervision and encouragement of her stepfather, Dr. Sakharam Arjun.

She was a lot more mature and understanding with the passage of time. She continued staying away from her husband which was unacceptable in the society at that time. In 1885, her husband filed a petition against her for restitution of conjugal rights after completion of 12 years of their wedding. Justice Robert presided over the case. Rukhmabai's position was that she was too young to consent to the marriage at the time. There were no court precedents to help the judge decide the case because it was the first of its type. Given Rukhmabai's standpoint in this case, that she was a kid at the time of the wedding, the court first ruled in her favour, noting that she could not be coerced. However, the case[29] was brought to trial yet again in 1886. It was around this phase that society began to voice its opinion. The verdict was criticized by several Hindus as being in violation of Hindu ceremonies and norms. Others, though, were in favour of the move. In 1887, Rukhmabai was forced to reside with her spouse or face six months in prison. She told the court that she was certain she would not go live with her husband under any circumstances and that she was willing to go to jail if necessary. Rukhmabai subsequently wrote to Queen Victoria after several hearings. The Queen backed Rukhmabai's position and overturned the court's decision. The lawsuit was finally resolved without court's intervention in 1888, when Rukhmabai's spouse, agreed to dissolve their marriage for a sum of two thousand rupees.

Another case that brought calamitousness of child marriage to the fore was Phulmonee’s death. She was just an 11-year-old female child bride wedded to a 35-year-old man. Phulmonee, the sufferer in this case, died as a result of copulation with her husband. Her vaginal rupture caused a haemorrhage leading to her death. This happened because of her husband having forced her

[29] *Dadaji Bhikaji* v. *Rukhmabai,* ILR 10 Bom 301.

for sexual intercourse. The Calcutta High Court did not accuse her spouse with rape since Phulmonee was well over the legal age of consent.[30]

These incidents, along with a number of written works by some of the time's reformers, sparked the introduction of the Age of Consent Act in 1891. A draft memorandum was also delivered to the government by lady doctors, requesting that necessary legislation be enacted to curb child marriage. A total of 1500 women signed a petition to the Queen, asking for similar measures. A committee was set up to look into the matter, and soon after the recommendations were made, the Government implemented the Age of Consent Bill, which rose the age of consent for sexual intercourse from 10 to 12 years for both unmarried and married girls. This was a significant development at the time. The Joshi Committee examined the issue of child marriage in India more thoroughly in 1925, and the Child Marriage Restraint Act of 1929 (hereinafter CMRA) was enacted after a lot of pressure from reformers who wanted a specific law on the subject.

The CMRA failed to fulfil the goal for which it was enacted, and child marriages remained unchecked and unrestrained. The practice was socially sanctioned at the time to ensure its continuation. Some 70-80 years lapsed with hardly any change in the legislation having miniscule effect on the status of these marriages. On the other hand, the country's population continued to grow, making it difficult to enforce the law with unregistered births of children across the length and breadth of India. The passing of the Prohibition of Child Marriage Act, 2006 (hereinafter PCMA) was a significant step forward since it brought about the sought-after changes. Child marriages are now voidable at the minor child's request. This meant that girls who had been married as minors might now petition the court to have their marriages annulled. However, child marriages continue to receive recognition and support from the society. Despite the enactment of the law in 2006, this social menace persists in India.

III. The PCMA: Key Provisions & Critical Analysis

A. Key Provisions

The PCMA was attuned to the needs of the existing times. Some of the salient features of the Act are discussed as follows:

- Contracting party/parties in a marriage who had not attained majority when they got married can have their marriage be declared voidable as per their discretion. The CMRA ruled that these marriages were completely lawful and that there was no

[30] *Queen-Empress* v. *Hurree Mohun Mythee*, (1891) ILR 18 Cal 49.

provision for annulment. The PCMA did not take a leap of faith by declaring such marriage null and void. However, it did provide the contracting parties with the option to have their marriage be nullified if they had been married as a minor.

- CMRA did not have any specific provision in place that could ensure the maintenance and custody of those children that are born from the marriage between a minor and an adult or two minors. However, this lacuna has been addressed under PCMA.
- If a marriage that took place under the aforementioned circumstances gets annulled, the man or the parents of the boy, who is below the age of 18 years during the annulment period, must provide maintenance to the minor until she remarries.
- Under the Act, District Courts have the authority to alter, add to, or cancel any order t -hat concerns the maintenance or domicile issue where the petitioner is a female. Not only that but this authority of District Courts also extends to the matters concerning maintenance and custody of the children that are born to the party/parties of child marriages.
- PCMA has explicitly stated that the children born out of marriages happening under the aforementioned circumstances shall be considered legitimate. Hence, the annulment of the marriage of the child's parents shall not affect his/her legitimacy.
- If a male who has attained majority becomes a contracting party to a marriage where the bride is a minor, he shall be imprisoned for up to 2 years or made liable to pay fine for up to Rs. 1 Lakh, or both.
- In several instances, child marriages have been pronounced null and void. According to Section 12[31], these situations include when a youngster is seized or seduced out of the custody of his or her legitimate guardian, or when a minor is sold with the purpose of making him a contracting party to a marriage and others.
- Under the Act, judges have the authority to impose injunctions in the instances where marriage taking place between two contracting parties fulfils the criteria of child marriage. However, like the CMRA, the courts must provide the defendant with a reasonable opportunity of being heard before issuing an injunction against him. The Act consists of a supplementary provision for an interim injunction that the court can impose in extreme situations or cases of emergency.
- PCMA has declared the offences to be cognizable. Not only that but these offences have also been categorized as non-bailable.

[31]The Prohibition of Child Marriage Act, 2006.

- The penalty has been increased to a maximum sentence of two years in prison and a fine of Rs. one lakh, or both.
- State Governments have the responsibility to oversee the appointment of Child Marriage Prohibition Officers (hereinafter CMPO) and to take measures for the effective implementation of the Act.
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B. Critical Analysis of the PCMA

The PMCA is a stark departure from CMRA, 1929. However, it is ridden with several loopholes and drawbacks that need to be addressed for its effective implementation. Some of these shortcomings are discussed as follows:

1. *The Act declares child marriage to be voidable instead of void*-Given the fact that child marriage is legal under personal law, religious institutions must adhere to the strict guidelines set forth in the PCMA, which allows child marriages to be annulled at the child's desire. Child marriages are only voidable if a motion for annulment is made in district court, and they are only voidable if the minor is taken away without guardian's consent, in conditions of force, fraud, or trafficking, or in defiance of an injunction. The notion that the Act does not inherently declare child marriages null and void, but rather renders them voidable voluntarily, is troubling.
2. *The Act holds the child responsible to establish the onus of proof in order to challenge validity of the marriage*-According to the Act, only the child bride/groom can file a motion to annul their marriage in. If the petitioner is a not an adult under the PCMA (female below the age of 18, man below the age of 21), the petition can only be presented by a guardian or a close friend/acquaintance with the assistance of the PCMO (who must be 18 or beyond).

   Making justice accessible to the children in the afore-mentioned manner may seem ideal on paper, however it could be impractical in reality. It is because many families oppose or threaten their children to discourage them from filing the petition and at times, husband or in-laws, resort to violence or retaliation if the child decides to report them for child marriage. Even if these circumstances do not transpire, children may very well fear the consequences that would ensue upon filing the petition in the Court. In several cases, guardians and parents themselves orchestrate child marriages and expecting them to help out the child with the petition is sheer foolhardiness. This issue needs to be looked into and resolved at the earliest.

3. *The Act holds the parent/caregiver as a criminal without looking into the circumstances that resulted in child marriage*- The fact that the Act criminalises individuals who perform child marriages, mainly parents or carers, without examining the myriad reasons for child marriage, which could include economic disparity, limited educational prospects, concern for their daughters' safety, and so on, is contentious. Several non-governmental organisations (hereinafter NGOs), on the other hand, have suggested that government workers who fail to report such marriages within their jurisdiction should face disciplinary action. This should be taken into account more severely than criminalising families who are susceptible to societal pressure and expectation.
4. *This Act creates a lot of conflicts owing to its inconsistencies with personal laws*-Where several of the personal laws allow for child marriages, PCMA strives to ban it altogether. In a country like India, where different communities rely on their personal laws for the matters such as marriage, maintenance and the others, banning of child marriages without consideration for instances where personal laws are given precedence, is bound to result in a flurry of lawsuits.
5. *The Act does not mandate registration of child marriages*-Registration of child marriages has not been made compulsory under the PCMA. Due to this, innumerable child marriages go unreported and undocumented. Absence of such a hard and fast rule allows perpetrator/culprits of child marriages to escape unscathed. Even the Apex Court pronounced that compulsory registration of child marriage across all the states in India would a positive step towards the objective of eradicating child marriage.[32]

IV. The Prohibition of Child Marriage (Amendment) Bill, 2021: An Overview

The Prohibition of Child Marriage (Amendment) Bill (hereinafter Bill) was introduced in the Lok Sabha on the 20th of December in the year 2021. The principal goal of this law is to rise the legal marriage age for females in India from 18 to 21 years old, which is currently at 18. The basis for this modification is the implementation of the Constitutional mandate of gender equality, which is important given that the legal marriage age for males in India is twenty-one years.

The following significant revisions have been made to the PCMA since its inception:

[32] *Smt. Seema* v. *Ashwani Kumar*, AIR 2006 SC 1158.

- According to Section 2 of the CMAB, a child is defined as any male or female who has not attained the age of 21 years, notwithstanding any legislation or customary practise that is in conflict with this amendment.
- Changing the order of the words Section 3(3) of the PCMA, which deals with a child filing a petition for the annulment of a child marriage, replaces the previous two-year period with a five-year period. Following the passage of this amendment, a kid may file such a petition only if he or she has not reached the age of majority for five years.
- The addition of Section 14A to the Act indicates that these proposed modifications will take precedence over any existing laws or practises that may be in conflict with the amendments in the event that they are implemented.
- Other personal and marriage laws, such as the Hindu Marriage Act 1955, the Hindu Minority and Guardianship Act 1956, and the Foreign Marriage Act 1969, as well as the Indian Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936, the Muslim Personal Law (Shariat) Application Act 1937, and the Special Marriage Act 1954, will be amended in accordance with the new provisions.

A. Legislative Intent Behind The Law

Smriti Iran, the Incumbent Union Minister for Women and Child Development, proposed this Bill, asserting that it will be applicable to all castes and religions in the country. In and of itself, this Bill maintains the values of the fundamental right to equality[33] by ensuring that the marriage age for both male and female citizens remain at 21 years old. After marriage, women will have more time to pursue educational and vocational opportunities because they will have more free time to pursue education or engage in work-related activities, which are typical benefits that are denied to a huge number of women before marriage. In such cases, men become the sole breadwinners of the family, and their wives are compelled to rely on their husbands' earnings for financial support.

As noted in the Policy Brief published by the Centre for Law and Research, the stipulations of the current law place an encumbrance on the child's ability to annul the child marriage within a specified time period. Furthermore, when a kid seeks an annulment, he or she typically encounters a number of roadblocks, including a lack of parental support, cultural pressure, the danger of violence, and financial restraints. Children are frequently deterred from contacting NGOs or Child Marriage Prohibition Authorities due to a lack of information about their rights.

[33]The Constitution of India, art. 14.

It also has a negative impact on the schooling and professional development of these young women. Child marriages also result in the sexual abuse of children and the birth of children too soon, posing major health hazards to both the mother and the child. According to the National Family Health Survey (hereinafter NFHS) conducted in 2016, the under-five mortality rate among mothers who gave birth before the age of 20 years was 59.2 percent. In the year 2021 alone, government officials have intervened in more than 5584 cases of child marriage. Respected former judges M.B. Lokur and Deepak Gupta have observed that child weddings in India are unlawful but not void, which they believe is unusual.

B. Recent Judicial Developments Concerning Child Marriage

On 26th April 2017, the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 was approved, rendering child marriages null and void in law. This was the culmination of state-level initiatives, which included a particular proposal of the Justice Shivaraj Patil Committee (2011), which was established to assess the state of child marriage in Karnataka.

Child marriage is recognised as lawful under the PCMA, but is "voidable" at the minor contracting party's request.[34]Recognizing child marriage as 'voidable' entails all of the repercussions of a legitimate marriage, including conjugal access, and perpetuates the practice's impunity. The reality is that few women exercise their right to petition the court for a judgement of nullity to annul their marriage once it has been consummated. Additionally, courts have been hesitant to declare child marriage void unless the facts of the case definitely fall within the parameters specified in Section 12 of the Act[35]. This aversion to discussing "voidability" pervades the entire legislative and policy discourse on child marriage.

This legislation was lauded by the 2017 Supreme Court judgement, *Independent Thought* v. *Union of India*[36], which was also relied on by the Centre to modify the PCMA to increase the marriage age of women from 18 to 21. However, it made key observations about the statute not declaring child marriages 'void' but 'voidable'. Both justices wrote separate but concurring opinions in which they stated that the PCMA "requires significant review" to ensure its "effective implementation" as a disincentive to "avoid or minimise child marriages. "When it read down Exception 2 of Section 375 (rape) of the Indian Penal Code, the court conveyed its thoughts on the PCMA's flaws. A man cannot be prosecuted with rape if he has sexual relations with a girl between the ages of 15 and 18 if she is his wife. According to the 2017 rape law

[34]*Supra* note 5, s. 3.
[35]*Supra* note 5, s.12.
[36](2017) 10 SCC 800.

verdict[37], it is now legal to have non-consensual sexual relations with a wife who is under the age of 18. On the PCMA, the court observed: "Ironically, despite the fact that child marriages are solely voidable, Parliament has criminalised child marriage and imposed penalties for contracting a child marriage."

The Punjab and Haryana High Court's division bench has held that a marriage contracted with a juvenile girl is legally valid if the child does not declare it void upon reaching the age of 18. The Court determined that such a marriage is voidable, not void. It would become lawful if the 'kid' did not take efforts to declare the marriage null and void upon reaching majority, the High Court declared. *Yogesh Kumar* v. *Priya*[38] was a case involving a couple who married in February 2009 and petitioned the High Court to set aside a family court verdict in Ludhiana. By mutual accord, the couple had petitioned the Ludhiana court for divorce. The Punjab and Haryana High Court relied on a 2012 Delhi High Court decision[39] in which a girl married a boy with whom she had eloped. The Delhi High Court had previously declared that a marriage committed with a bride under the age of 18 or a bridegroom under the age of 21 was not void, but voidable, and would become valid if no efforts were made to declare the marriage void. Accordingly, the Punjab and Haryana High Court decided that the couple's petition for divorce by mutual consent should have been granted on the basis that their marriage was legal in all material respects. The Bench then granted divorce to the parties.

The Ludhiana court had dismissed their divorce petition on the grounds that their marriage was invalid because the wife was under the age of 18 at the time of the marriage in 2009. The High Court Bench of Justices Ritu Bahri and Arun Monga concluded that the Ludhiana Court erred in dismissing the petition because the wife had turned 18 in 2010 and the couple continued to live together till August 2017.

V. Drawbacks In The 2021 Bill

There are some negative aspects of this Bill that cannot be ignored or overlooked. Due to the fact that this Bill possesses overriding characteristics, it will fully negate the provisions of the different personal and marriage laws that pertain to the legal age of marriage. The Hindu Marriage Act, 1955, for example, specifies that the marriageable age for girls is 18 years and for males it is 21 years under Section 5(iii). The Bill would negate this specific clause and

[37] *Ibid.*
[38] FAO-855-2021.
[39] *Lajja Devi* v. *State*, 2012 (4) R.C.R. (Civil) 821.

dictate that both males and females must be at least 21 years old before they can marry. When taking a deeper look at the overall picture, it can be seen that this Bill is another step forward for the Bharatiya Janta Party(hereinafter BJP) on the road to achieving the Uniform Civil Code (hereinafter UCC)[40]

While the notion of UCC is laudable, as uniformity in legal standards can lead to faster trials and greater clarity in the law, its adoption in India may counter a few hurdles due to the country's immense diversity as well as its long history of traditions. Ram Madhav, a member of the Rashtriya Swayamsevak Sangh national executive, told the Print that the UCC is beneficial to the country and that there are a variety of opinions on whether it is necessary.[41] Contrary to this, according to the Law Commission's 2018 study[42] on the viability of UCC and reform of family law, which was proposed by the BJP in 2016, discriminatory personal laws may be repealed or altered, but UCC in India is neither essential nor desirable at this point in time. However, it is pertinent to note that law is dynamic in nature. Even if the need for UCC does not feel desirable or necessary at the given point of time, its value will be acknowledged only when it is adopted as people will realize that its benefits outweigh any legal ramifications it may have.

It cannot be denied that such reforms in personal laws could have major legal ramifications and cause the widespread unrest as a result of a conflict between the legitimacy of the pre-existing personal laws and the validity of the newly formed uniform law that has been established.

The subject of Muslim Personal Law is the most crucial one to consider. It is extremely difficult to achieve harmony between the new amendment and the terms of this law when it comes to the marriage age, because Muslim law specifies that a girl can be married once she reaches puberty, which makes establishing harmony impossible. This age is typically considered to be 15 years old. Since Islamic personal law is a codification of Islamic law, the extent to which legislative and judicial authorities have authority over divine or religious rules is a legitimate subject to consider. However, while the Supreme Court has ruled that all personal laws must

[40]Dr. Renu Singh, "Amendment to Child Marriage Act could usher in social change", *The Times of India*, December 27, 2021, *available at* <*https://timesofindia.indiatimes.com/blogs/voices/amendment-to-child-marriage-act-could-usher-in-social-change/*>(last visited on February 11, 2022).

[41]Madhuparna Das, "Why raising marriage age of women is another step towards BJP's pet goal of uniform civil code", *The Print*, December 24, 2021, *available at* https://theprint.in/india/governance/why-raising-marriage-age-of-women-is-another-step-towards-bjps-pet-goal-of-uniform-civil-code/786878/ (last visited on February 11, 2022).

[42]Law Commission of India, "Consultation Paper on Reform of Family Law" (August 31, 2018).

adhere to the principles and rules of the Constitution, other High Courts have expressed differing views on the subject.

That there were no revisions to the legislation regarding child marriage is the most noteworthy aspect of this legislation. The Bill does not contain any provisions that would render child marriages void under the law. Child marriage is voidable at the request of the underage party to the marriage within two years after gaining adulthood, according to current legal standards, as stated in Section 3(1).[43]

A. Factual Analysis Of The Bill

A cursory examination of the Bill's statement of objects and reasons demonstrates unequivocally that this Bill is a convenient way for the Government to avoid situations where girls are deprived of their rights to pursue higher education, become financially independent and other by allowing them a chance to marry on their own accord. The immediate Bill's objectives and justifications are as follows:

"The Constitution protects gender equality as a component of fundamental rights and also prohibits discrimination on the basis of sexual orientation. Existing regulations fall short of ensuring gender equality in marriageable age between men and women, as required by the Constitution. Women frequently face disadvantages in higher education, vocational training, acquisition of psychological maturity and skill sets, and so forth. Entering the labour force and becoming self-sufficient prior to girls marrying is crucial."

The lingering issue with the Bill is that at the present moment it fails to elaborate how raising the marriage age would address the pervasive problem of gender discrimination in our culture. For instance, when it comes to higher education, the primary, if not the only, reason parents do not provide it to their daughters is poverty.[44] The other cause is illiteracy, which is closely followed by fear of insecurity. Implementing sufficient safety measures is critical in a country where a girl is raped every 15 minutes.[45] Similarly, only education can address the issue of gender bias. Until the current biases and taboos associated with our society's patriarchal

[43] *Supra* note 5, s. 3.

[44] Naveli Sharma, *The Prohibition Of Child Marriage Amendment Bill, 2021: A Critical Analysis*, Legal Service India, *available at*<https://www.legalserviceindia.com/legal/article-7496-the-prohibition-of-child-marriage-amendment-bill-2021-a-critical-analysis.html>(last visited on February 11, 2022).

[45] Madeeha Mujawar, "National Crime Records: One woman raped every 15 minutes in India", *CNBC TV18*, October 23, 2019, *available at*<https://www.cnbctv18.com/economy/national-crime-recordsone-woman-raped-every-15-minutes-in-india-4579141.htm>(last visited on February 12, 2022).

structure are addressed by education and awareness campaigns, families will continue to deny women the possibility of "joining the labour force and contributing to the workforce."

It may be felt that the constitutional imperative violated by this Bill is the freedom of adult women to marry off of their own accord. The Supreme Court declared in *Ashok Kumar Todi* v. *Kiswhwar Jahan*[46] that where a boy and a girl marry on their own volition and are of legal age, and the marriage is officially registered with the notified body, police officers have no participation in their conjugal affairs, and law enforcement officials have no right to meddle with their marital lives; in fact, they are obligated to prevent others from interfering.

People do not realize that women marry before turning 21 because they are deprived of the opportunities to pursue career upon graduating from school due to narrow mindedness of their parents or lack of financial means. Sometimes, parents themselves are responsible for instilling the importance of marriage in their minds since they are 7-8 years old. These disadvantages exacerbate women's reliance on men. There are also compelling reasons to reduce maternal and infant mortality rates, as well as to improve nutrition levels and the sex ratio at birth, as these measures would promote opportunities for responsible parenthood for both father and mother, equipping them to provide better care for their children. It is also critical to reduce the prevalence of teenage pregnancies, which are detrimental to women's overall health and result in an increased number of miscarriages and stillbirths.

Along with rising the marriageable age, the government should also prioritise education for women and knowledge of gender equality among males. Poverty and illiteracy continue to be the primary drivers of underage marriages, female foeticide, dowry deaths, and other issues of gender inequality. What the women of this country require is for the government to adopt welfare schemes and policies such as Kishori Shakti Yojana and Sabala that focus on teenage girls' nutrition, health and development, skill development, and vocational opportunities.

Discrimination against women also obstructs the achievement of sustainable development goals and violates the principles enshrined in the Convention on the Elimination of All Forms of Discrimination against Women, to which India is a party. It is critical to address gender inequality and discrimination and to put in place necessary measures to ensure the health, welfare, and empowerment of our women and girls, as well as to ensure that they have the same status and opportunities as men.

It is widely accepted that the age of marriageability for both men and women is 18. Even the Convention on the Elimination of All Forms of Discrimination against Women establishes 18-

[46] 2011 (3) SCC 758.

year-old as the marriageable age. However, circumstances are different in India. The discrimination against women that this Bill seeks to remedy will be solved to a large extent by rising the marriage age.

Thus, establishing a minimum legal age for marriage may not deter child marriages completely. However, it can be reduced significantly. Moreover, its positive impact can be doubled by expanding women's access to free and obligatory education and employment prospects.

B. Steps to Respect Women's Agency

There are numerous examples of families exploiting laws to simply cancel weddings between different castes or religions. The laws exploited in this manner include requesting nullification under the PCMA, falsely alleging kidnapping and rape under the Protection of Children from Sexual Offences Act 2012, and the Indian Penal Code 1860. The current Bill will also be vulnerable to similar patterns of abuse by parents and family members who are dissatisfied with their daughter's relationship or choice of partner.

However, the Bill appears to be a genuine attempt to solve significant concerns such as gender discrimination, underage marriages, female foeticide, maternal mortality, and women's safety. To resolve these challenges on a large scale, the government must take proactive measures to develop women-centred welfare programmes, offer easy access to education, and raise social awareness about the evils of patriarchy, which are deeply ingrained in our society.

VI. Conclusion

When it comes to women's empowerment, the desired progressive purpose of this Bill is reflected in the primary rationale for the creation of the same. Although this modification to rise the marriageable age to 21 years may seem extremely beneficial in theory only, because it allows for better educational opportunities for women as well as improved nutrition levels, it will have a major influence on society in practice.

Women who are most likely to gain from higher education and professional prospects are those who come from well-off families that encourage them to pursue their goals. Women from rural areas or low castes, on the other hand, would be less likely to be able to take advantage of this benefit because of a lack of awareness about their rights and a lack of legal or family support. Awareness-raising activities, particularly in rural areas, are required if significant change is to be achieved. As a result, apart from focusing on legislation to promote true women empowerment, the emphasis should also be placed on stricter enforcement of laws because structural changes within the society are urgently required.

Additionally, the problem with the previous law was not so much in the content, as in its implementation. On the face of it, it seems like the proposed Bill seeks to improve on its predecessor in this regard. As discussed above, data indicates that the law has not been completely successful in eradicating the social evil of child marriage. Considering all, the Bill may not be the effective solution to eradication of India's child marriage problem if it lacks in the arena of proper implementation. Hence, effective implementation of this Bill once it becomes the law should be Government's primary objective for it to bring about real and significant changes.

ANALYSING THE SPECTRUM OF DARK PATTERNS THROUGH THE PRISM OF CONSTITUTIONAL AND MEDIA LAW PERSPECTIVES

- SRISHTI YADAV[47]

I. INTRODUCTION

The term was first coined by Harry Brignull in 2010. There is no universally accepted definition of dark patterns[48]. However the definition provided by the OECD Committee on Consumer Policy clearly suggests that dark patterns involve using such methods as well as online user interfaces which are designed to manipulate the consumers and directing them towards making choices not serving their interest.[49]

In early August, 2023, The Department of Consumer Affairs (Do CA) came up with a press note urging the E-Commerce industry associations and companies to keep away from using dark patterns. Earlier also, it had issued a similar press note in June addressing the subject of dark patterns on online platforms. As per the Do CA, these ten practices fall under the category of dark patterns:

- Bait and switch: is when the customers are lured with the products of superior quality or efficiency but instead of the shown product, a poor or different product is delivered.
- Basket Sneaking: is when you witness additional products being added to your shopping cart (mostly at the checkout page) and that too without your knowledge.
- Confirm Shaming: is the act of making the consumers guilty into choosing the products or services which they otherwise would not have chosen. Often, the consumers are attacked just because they did not conform to a particular viewpoint. This is often found in the 'Unsubscribe' section of notifications. Example: 'No thanks, I hate saving money'.[50]
- Disguised advertisements: is when the celebrities or influencers advertise about a particular product or service to make it look like an organic product which they have

[47] Fifth Year Student, Amity University Noida
[48] 5 RIGHTS FOUNDATION; https://5rightsfoundation.com/uploads/Disrupted-Childhood-2023-v2.pdf (Last visited: September 27, 2023)
[49] MONDAQ: CONNECTING KNOWLEDGE AND PEOPLE; https://www.mondaq.com/india/dodd-frank-consumer-protection-act/1358384/asci-guidelines-on-dark-patterns-and-the-way-forward (Last visited: September 26, 2023)
[50] NEILSON NORMAN GROUP, Stop Shaming Your Users for Micro Conversions (nngroup.com) (Last visited: September 27, 2023)

used personally. But in reality, they are getting paid for it. Paid advertisements can also lead to misleading the consumers in case it is not disclosed.

- False urgency: which involves creating a sense of urgency among the consumers so that they end up making the required purchase. Examples are the advertisements claiming 'LIMITED STOCKS AVAILABLE'.[51]
- Forced Action: is when a customer is being forced to take the actions which otherwise wouldn't be taken by him. Example is when a customer has to first sign up for the ancillary products or services before gaining the access of the originally intended ones.
- Hidden Costs: which involves including in the bill, the additional costs (often on the checkout page) at the time when the consumer has already committed to purchase the product. Example includes the convenience fee, packaging fee, handling fee, etc getting levied during checkout.
- Interface Interference: which makes it difficult for the consumers including the cancelling of subscription or deleting an account. Example is when you try cancelling a pop up advertisement and are redirected to another page.
- Nagging: which refers to making repetitive, persistent and constant requests for action. Example is when the 'Subscribe now' and 'Sign up' boxes keep popping on totally unrelated webpages.
- Subscription Trap:[52] is when it has been made quite easy for a customer to subscribe to a particular service but it has been made difficult to unsubscribe.

II. UNDERSTANDING THE MECHANISM BEHIND THE WORKING OF DARK PATTERNS:

Breach of cognitive and informational privacy:

Cognitive liberty refers to the ability of an individual to have self-determination over their mind. The usage of dark patterns leads to significant impediments to this ability of the consumers by:

- Negatively influencing their behavior
- And subsequently leading to a violation of their individual autonomy

[51] CYRIL AMALCHAND MANGALDAS, https://corporate.cyrilamarchandblogs.com/2023/08/dark-patterns-an-un-fair-trade-practice/ (Last visited: September 26, 2023)
[52] SCC ONLINE, https://www.scconline.com/blog/post/2022/08/15/yes-or-yes-the-reality-of-dark-patterns/ (Last visited: September 26, 2023)

While surfing through the E-Commerce websites, individually involuntarily lose the control over their thoughts, which ultimately leads them to purchasing the products they otherwise won't. For instance, the online market places engage in displaying false information regarding the number of live purchases and even send 'HIGH DEMAND' messages on the products which have been viewed by the consumer. Through this, the platform clearly intends to influence the consumer's decision-making by creating a misleading façade about the product's demand. Consequently, the consumer ends up purchasing the product.

Violation of informational privacy goes a step further. There is a close relationship between mental privacy and informational privacy. This is because the breach of mental privacy ultimately leads to a situation in which the user easily gives out the information which he would not have shared otherwise, hence, breaching even the informational privacy. A noteworthy example for the same is PRIVACY ZUCKERING[53]. Here, the consumers' thinking abilities are manipulated by mentioning lengthy terms of use which the users don't even read before giving consent. This, at times, includes default grant of consent with respect to sharing of data. Some practical examples are:

- LinkedIn: It's not uncommon for the users of this platform to receive to receive sponsored as well as unsolicited messages from the influencers. It's quite difficult to disable this option as it involves multiple steps.
- Amazon: The platform received a lot of criticism in EU owing to its multi-step cancellation process of the Amazon Prime subscription. This created a lot of confusion for the users. But later, the process was made easier for the users in European countries.
- You Tube: The platform often keeps on sending pop-ups to the users regarding you tube premium. Also, the final seconds of the video are often obscured by showing the thumbnails of other videos. This creates hindrances in creating a smooth user-experience.
- Instagram: which often shown suggested posts that the users don't even wish to see, thereby, the users face problems in permanent setting of preferences.[54]

III. CONSTITUTIONAL PERSPECTIVE ON DARK PATTERNS IN INDIA

[53] AZB & PARTNERS; https://www.azbpartners.com/bank/shedding-light-on-dark-patterns-in-advertising/ (Last visited: September 27, 2023)
[54] *Ibid.*

As far as the Indian legislations are concerned, none of them explicitly recognizes the breach of cognitive liberty or informational privacy. However, there are certain legal experts who seek to contend that cognitive liberty is one of the manifestations of Article 19 and Article 21 of the Indian Constitution. The freedom of thought expounded under Article 19 includes within its ambit, the right to self-determination as well (which is deciding about yourself without coming under any external influence. Further, having privacy over one's thoughts and decisions forms a crucial aspect of Article 21. K.S. Puttaswamy judgment[55] is a landmark one in this regard where the apex Court held informational privacy to be an important facet of Article 21. The Court gave clear directions to the Parliament to forward with a data protection law to address the threats to the informational privacy of people. Implementing those directions, Justice B.N. Krishna Committee was formed to form a data protection legislation. Dark patterns violate privacy. Therefore, it becomes essential that India's data protection laws address the issue of dark patterns.[56]

Why India needs a regulation on dark patterns?

The digital space has definitely become an inseparable part of consumers' life, having a significant influence on their consumption of goods, services and most importantly, information. There are only certain aspects of the online digital infrastructure which actually acts as a guide in making consumer choices. However, they may easily become a cause of concern when they are manipulated excessively in a manner detrimental to the interests of the customers. Secondly, there has been an increasing penetration of internet in India accompanied by ever-increasing smartphone usages as a result of which e-Commerce has become the most preferred mode for shopping. In this context, it becomes crucial to ensure that digital/online platforms don't use dark patterns as a tool of unfair trade practice.

IV. UPTO WHAT EXTENT DOES THE INDIAN LEGAL SCENARIO REGULTES DARK PATTERNS?

A) Guidelines by the 'Advertising Standards Council of India' (ASCI)

On June 15, 2023, the ASCI issued certain guidelines on 'Online Deceptive Design Patterns'. They have been released under the broader framework of the 'Code for self-regulation of Advertising Content' in India. These guidelines have been made applicable in a number of

[55] *Ibid.*
[56] CONSTITUTIONAL LAW SOCIETY, NATIONAL LAW UNIVERSITY, ODISHA; https://clsnluo.com/2023/08/03/unmasking-dark-patterns-preserving-cognitive-liberty-and-safeguarding-informational-privacy/ (September 27, 2023)

areas including e-Commerce, food delivery, airline, etc. and various other digital platforms. Although the term 'Digital Media' has not been defined in the guidelines but the 'GUIDELINES FOR INFLUENCER ADVERTISING IN DIGITAL MEDIA' (Influencer Guidelines) can be taken as a reference point. According to these influencer guidelines, digital media refers to a means of communication whose transmission can over internet or digital networks and it also includes communication which can take place by through a digital media platform. Going by this definition, Digital Media covers:

- Internet
- Mobile Broadcast
- On-Demand Platforms
- Digital Home Entertainment
- Terrestrial Television, etc.[57]

The main features of the guidelines are:

i. Prohibition of Drip Pricing: This practice amounts to misleading the customers. As per the guidelines, all the prices quoted in the advertisements must be displayed or be affront on the listing of the products. This includes non-optional taxes such as, fees, charges, duties, etc.

ii. Bait and switch: Under the guidelines, the advertisers are obligated to ensure that the very same or the exact product shown in the advertisement is being made available to the customers. This includes the price, the specific model, etc.[58]

iii. False urgency: The ASCI has come out with a mechanism to address this issue as well where it would be an obligation over the advertisers to demonstrate that there is actually limited quantity available when the messages regarding the same pop up on the screen. And the availability has to be at such levels so as to justify that the urgency did not mislead the consumers.

iv. Disguised Advertisements: Here, the advertisers should ensure that whenever the advertisements are published in the manner of an editorial or organic content, it must be clearly disclosed that the same is an advertisement. This will ensure clarity for the viewers where they will be able to segregate between paid reviews, influencer posts and advertisements from editorial content.[59]

[57] CNN BUSINESS, How companies subtly trick users online with 'dark patterns' | CNN Business (Last visited: September 27, 2023)
[58] *Ibid.*
[59] *Ibid.*

B) Consumer Protection Act, 2019 (CPA) and E-Commerce rules, 2020

CPA prohibits the unfair trade practices (UTPs) which exhaustively lays down the scope of these practices. E-Commerce rules serve as an additional set of protection where they apply to all the transactions regarding goods and services made over the digital platforms. As per these rules, both the e-Commerce entities as well as the sellers operating through them are prohibited from engaging in any UTP. The violation of these rules will attract similar consequences as have been mentioned under the CPA.

The Central Consumer Protection Authority (CCPA) is having the power to issue guidelines for preventing unfair practices as well as to pass orders for product withdrawal or reimbursement. Non-Compliance with the authority's directions can invite serious consequences leading to the imprisonment up to six months or a fine up to 20 lakh rupees or both. Creating misleading advertisements detrimental to the interests of the consumers also invites penal consequences with imprisonment up to two years and fine up to 10 lakh rupees. Further, the citizens can take recourse to the District Commissions where the commission on being satisfied, can even order for the discontinuation of these practices.

As per the e-Commerce rules, the consent of a consumer shall be recorded by an e-Commerce entity only when it has been expressed explicitly or through affirmative action. The consent should not be recorded automatically (e.g. through the way of pre-ticked checkboxes). A variety of dark patterns can be dealt with by just ensuring the direct enforcement of this one rule.[60] Hence, from the discussion done above, it can be concluded that the CPA and the e-Commerce rules must now recognize the dark patterns and further include the appropriate provisions to protect the consumers from them. Additionally, including the dark patterns within the scope of an UTP can help in furthering this objective.[61]

V) LESSONS FROM AROUND THE WORLD

US:

The Federal Trade Commission (FTC) of US has been quite vigilant in taking note of dark patterns and associated risks. It released a report in September 2022 where it listed more than thirty dark patterns. The report also highlighted the legal action taken by the body against Amazon in 2014 for an allegedly 'free' children's app which tricked the young users to engage

[60] SCC ONLINE, https://www.scconline.com/blog/post/2022/08/15/yes-or-yes-the-reality-of-dark-patterns/ (Last visited: September 26, 2023)
[61] *Ibid.*

in in-app purchases. But their parents had to bear the burden of payment. Further, Section 5 of the FTC act also inclined towards the promotion of decisional privacy.[62]

EU:

The enactment of the Digital Services Act is a welcome step for creating a safer digital space and protecting the fundamental rights of the users. The Act regulates those digital services which act as 'intermediaries; while connecting the consumers with goods and services and content. This brings companies like Amazon, App stores and even Facebook and Google within the scope of the Act. Any violations will attract severe consequences like paying fine of six percent of the global turnover as well as temporary suspension of services in most serious cases. Further Article 25 of the General Data Protection Regulation (GDPR) puts a requirement upon the data controllers to implement privacy through design and default. Although this step can help in doing away with default settings, small print or other dark pattern usages, but it is incapable of completely preventing their use.[63]

VI) CONCLUSION:

The following could help in tackling the menace of dark patterns up to a large extent:

- Industry self-regulation: The e-Commerce platforms including Zomato, Amazon, Google, Meta have been asked by the government to come up with a self-regulatory framework on this issue. This may include measures such as developing a consumer-friendly digital choice infrastructure as well as empowering the regulators.
- Reporting of cases: The users of various e-Commerce platforms must be encouraged to support such instances. Also, the platforms must provide the platforms with clear channels so that they can provide their valuable feedback. The Union Ministry of Consumer Affairs (MCA) has come up with a National Consumer Helpline, 1915 through which the consumers can flag such instances.
- MSME merchants: It is important to make the MSME merchants aware about such instances as they constitute a huge proportion of online sellers.

In India, although there is just a minute fraction of the population which has enough digital so as to identify as well as escape these dark patterns. However, taking into consideration India's

[62] INDIAN EXPRESS, Dark patterns: Govt releases guidelines for public consultation | Business News - The Indian Express (Last visited: September 27, 2023)
[63] *Ibid.*

class differences and socio-economic situation, dark patterns need to be regulated through a legislation. If this does not happen, then it can result in breach of privacy.

JABALPUR JUSTIFIED BY JEREMY & JOHN JUSTIFYING THE ADM JABALPUR CASE BE POSITIVE LAW THEORY

- AKSHITA GROVER

INTRODUCTION

The ADM Jabalpur v. Shivkant Shukla[64], also referred to as the Habeas Corpus case, was a landmark decision given by the Supreme Court of India in 1976 during a period of emergency declared by the Indira Gandhi government. This decision of the apex court has been strongly critiqued since then for delivering one of the most terrifying judgements in India's history[65].

While this judgement and the period is held to be the darkest period in the Indian Democracy, the author of the following paper takes a different road of unpopular opinion and attempts at justifying of the most controversial cases of Indian History through the lens of two famous positive law proponents & jurists; Jeremy Bentham & John Austin.

I. Rule Of Law In The Indian Constitution mirrors Positive Law

Legal positivism holds law as analogous to positive norms made by the legislative. John Austin centralised the idea of sovereign and the laws made by them in his definition of positive law. For him, positive law is, "*every law that is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme*". Positive Law Theory emphasizes the importance of legal certainty and predictability, which are essential elements of Rule of Law. The Indian legal system builds upon this and recognizes the importance of these principles by requiring that individuals must be able to rely upon laws to guide their behaviour and protect their rights. Thus, the Constitutional Makers adopted the theory of Rule of law from England and incorporated many provisions in the Indian Constitution, to hold it as the supreme authority above all[66].

The SC in the multiple cases has incorporated this idea and held Rule of Law to be the most central feature[67] and the core[68] of the Indian Constitution. For example, Minerva Mills Ltd.[69]

[64] ADM Jabalpur v. Shivkant Shukla, Air 1976 Sc 1207
[65] Siddhartha Sethi, *Case Commentary On ADM Jabalpur Vs Shivkant Shukla*, 5 Int'l J.L. Mgmt. & Human. 1708 (2022).
[66] Qwerty9729, *Rule Of Law*, Legal Service India
[67] Chief Settlement Commissioner, Punjab V. Om Prakash, Air 1969 Sc 33.
[68] Secretary, State of Karnataka and Ors. v. Umadevi, (1992) 3 SCR 826
[69] Minerva Mills Ltd. And Ors. V. Union Of India, Air 1980 Sc 1789

reinstated that *"...legislature, executive and judiciary are all bound by the Constitution, and nobody, is above or beyond the Constitution".*

Further,

a. Kesavananda Bharti[70], established Rule of Law to the an essential part doctrine of basic structure,
b. and given that Positive Law forms the Rule of Law as per both Austin & Bentham,

It can be argued (by clubbing both a. & b.) that positive law is an indispensable element of the doctrine of rule of law in India. This is precisely what Justice Beg held in the Jabalpur Judgement[71], when he argued that *"the Constitution is the only Rule of Law recognised by the courts, it is an "embodiment of the highest positive law"* and a *"reflection of all the rules of natural or ethical or common law Lying behind it which can be recognised by courts".* Thus, ADM Jabalpur was not in defiance of the law but only in furtherance of judicial precedents and the theory of positive law.

II. Article 359 is Positive Law

Article 359 of the Constitution allows for a legal "suspension of enforcement of the rights conferred by Part III during emergencies". The Constitution literally permits for suspending the fundamental rights *if* there is an emergency. This provision as given by the *supreme authority*, that is the Indian Constitution backed by *sanctions*, that is the Orders of the President on behalf of the Council of Ministers is the ultimate law.

Austin's basic definition of law had three elements; command, sovereign and sanction and he held that law is *"a command that is given by sovereign which is backed by sanction".* And within this definition, Article 359 is given by the sovereign's authority and cannot be legally limited. Jabalpur argued the same. Justice Beg wrote how the Indian citizens have notionally surrendered their rights to a Sovereign Republic via *"a legally supreme Constitution"* clubbed with another argument that the Constitution has the authority to confer rights and that the Courts are the bodies to enforce the Rule of Law.

[70] Kesavananda Bharti V. State Of Kerela, (1973) 4 SCC 225.
[71] ADM Jabalpur v. Shivkant Shukla, Air 1976 SC 1207

The petitioners had argued that Fundamental Rights have to be upheld and that no authority can halt the citizens from exercising them in Jabalpur. But, at the same moment, one needs to accept the restrictions that come with the fundamental rights which also form the Rule of Law and are equally indispensable, especially during emergencies.

Article 359 thus obstructs the enforcement of all the fundamental rights mentioned in the Order and thus renders it infeasible for any person to move court for enforcement, regardless of who is violating the rights in question, the legislature or the executive. This is consistent with the exceptions of reasonable restrictions under Article 21 which recognises the right of liberty. These restrictions are limitations imposed by Article 359 and have been expressed as a positive law.

Thus, in a positivist perspective, it is impossible to hold Article 359 against the Rule of Law and so one of the core arguments of the petitions fall. If the locus standi of the person to move the court is absent, then the Courts will not be able to interfere and the Rule of Law, that is Article 359 which empowers the President to declare emergency and to temporarily suspend the rights of the people will **only** prevail. Article 359(1) explicitly mentions "any court", thus this includes all courts that the petitioners can approach for enforcing their fundamental rights. The Constitution enacted by a constituent assembly and adopted by the people of India, has the ultimate and absolute legal authority thus rendering it to be the supreme law of the land. Therefore, unless another positive law enacted by the sovereign republic of India makes a law in contra or in furtherance of how the limitations will enflower, Article 359 will be binding and supreme law as the Constitution makes have clearly intended for it to be.

III. Reasonable Restrictions In The Form Of Sanctions

In continuation of the argument of Justice Bhagwati in Jabalpur[72] that the reasonable restrictions are essentially part of the positive law, he holds that *"there is no legislation in our country which confers the right of personal liberty by providing that there shall be no deprivation of it except in accordance with law".* He holds the statutory provisions are not words of advice but enactments of the Parliament meant to be complied with and not contravened. The rules of law are the authority which govern the society and compliance of the same is not optional.

[72] ADM Jabalpur V. Shivkant Shukla, Air 1976 Sc 1207

As Austin in parallel holds that, laws set by subjects as subordinate political superiors are positive laws. After being clothed with legal sanctions and imposed with legal duties, they become hard in stone forming Positive Law. Austin held Sanctions to be an integral part of law and to quote the jurist, *"It is only conditional evil that duties are sanctioned or enforced*"[73]. Justice Bhagwati enforced this by holding that *"it is the presence of legal sanctions which distinguished positive law from other systems of rules and norms"*[74].

Thus in a legal system, legal sanction to maintain compliance of law is imperative. In the given context of the emergency, the executive authorities are bound to exercise power under the given statute and only conform to the same.

During the emergency, Article 359[75] of the Constitution empowers the President of India to suspend the right to habeas corpus as a reasonable restriction under Article 21. This provision is a basic feature and this emergency measure must be enforced keeping in mind the position of this provision in the supreme authority of law, the Indian Constitution as argued by Justice Chandrachud[76].

The court thus, took a positivist approach to uphold the adjournment of the right to habeas corpus during the emergency period on the basis of this constitutional provision. Further, the courts were not straightaway rejecting habeas corpus petitions but only doing so after duly considering the bar of the Presidential order[77], which is a limitation to be complied with. And as Justice Beg claims[78], that the rights *per se* were allowed to be exercised, but the procedure to enforce them through the mechanism of courts was suspended and allowing otherwise would be stand in violation of the law, *"which is neither warranted by the language of Article 359 of the Constitution nor by that of the Presidential order of 1975"*.

IV. Applying the Pain & Pleasure Principle by Bentham

To assume anything beyond this law would be an area of legal fiction, precisely what Bentham argued against. His entire idea of legal positivism aims to eliminate all legal fictions from all law[79]. The notion of "negative liberty" that is freedom from restraint or compulsion is "natural" and the default rule. As per him, this is the Greatest Happiness Principle.

[73] Sujay Ilnu, Austin, Hart And Kelson On Sanction As An Integral Part Of Law, Legal Services India
[74] ADM Jabalpur V. Shivkant Shukla, Air 1976 Sc 1207
[75] India Const. Art. 359
[76] ADM Jabalpur V. Shivkant Shukla, Air 1976 Sc 1207
[77] Ibid
[78] Ibid
[79] William Sweet, Jeremy Bentham (1748—1832), (Internet Enclyopedia Of Philosophy)

We can place Jeremy's argument in what Justice Bhagwati and Justice Chandrachud held when they argued that the courts interfering in this would be an over-arching stretch of law, which is not permitted by the Rule of Law.

This is what John Austin described as Utilitarianism Principle by reasoning that "aggregate happiness is served by identifying the law with sovereign will"[80]. Further, Bentham in his theory proposed the Pain & Pleasure Principle, wherein liberty pleasure and the restriction of liberty is painful and prima facie evil, but necessary[81]. For these rights of liberty under the pleasure element to be enforced, the caveat of restricting them to protect the security of the state has to be present.

Thus, when a Presidential Order is issued as permitted by the law, then the Fundamental Rights mentioned in the Order have to be suspended to uplift the restriction while the order is in operation for the Rule of Law to prevail.

V. Positive law vs Natural law

The petitioners in Jabalpur had majorly relied on the argument of natural rights, and claimed *"the right of the detenu to enforce his natural rights regardless of the suspension of his fundamental rights".*

In the historical context, the idea of positivism developed in clear opposition to classical natural law theory[82]. Jeremy Bentham defined natural rights to be a "pervasion of language, anarchial and ambiguous" entailing a freedom from all legal restraint and would thus not work in any legal system[83] and lead to "pure anarchy". To quote him, *"simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts".* He strongly believed that law is not rooted in a "natural law" but rather is a reflection of the command of the sovereign. This ideology was furthered by Austin as an essential component of this theory of Legal Positivism[84].

To apply this ideology in this case, Justice Beg in Jabalpur[85] held that the concepts of Natural Law are conflicting and to be secured, they must be recognised and accepted by a positive law. In the context of emergency, emergency provisions are a recognition and extension of the

[80] Suri Ratnapala, Jurisprudence, (Cambridge 2017)
[81] William Sweet, Jeremy Bentham (1748—1832), (Internet Enclyopedia Of Philosophy)
[82] Suri Ratnapala, *Jurisprudence*, Cambridge 2017
[83] Kenneth Einar Himma, *Legal Positivism*, Internet Encyclopaedia Of Philosophy
[84] William Sweet, *Jeremy Bentham (1748—1832),* Internet Enclyopedia Of Philosophy)
[85] ADM Jabalpur V. Shivkant Shukla, Air 1976 Sc 1207

natural laws. The right to personal liberty are expressions of positive laws, which include the reasonable restrictions. Justice Bhagwati similarly held that natural rights are to be incorporated at the discretion of the state[86], without sanctions they cannot be enforced and even although called "rights", do not mean that they will automatically be enforceable in courts, not until recognised by positive laws of the state.

Justice Bhagwati cited Justice Chandrachud who had similar views with regards to natural rights, *"intrinsic evidence to show that the theory of natural rights is repudiated"*. GolakNath[87] rejected the theory of natural rights and A. K. Gopalan[88] held that law in the meaning of natural law would be vague standards, and in the Indian context, law means the legal rules created by the state, that is positive State made law.

Thus, there is no scope for natural rights to be enforced, if the Fundamental rights are suspended by the Presidential order. Thus, positive law proponents recognized the imperativeness of the principles of natural justice as procedural requirements for fair decision-making, but they did not view them as fundamental rights or positive law. Thus, the natural argument of the petitioners failed, and the Positive Law Theory was upheld in Jabalpur.

VI. Indian Judiciary & Austin's Idea Of Legal System

The idea of a legal system given by Austin stands in contra to the powerful role of judges and is premised on the idea that *"all judge-made law is the creature of the State*[89]". The law is a sovereign command and if made by judges is a product of the *"tacit commands of the sovereign"*[90]. In his theory, the judges are bound by the laws of the sovereign as the member of a sovereign assembly is superior of the judge. Thus, the judicial control over the executive actions was minimal.

This fits in with Justice Beg's argument that a "constitutionally" appointed judicial organ has to fulfil two conditions for it to be in authority to enforce the rights; *"a. its recognition by or under the Constitution as a right and b. possession of the power of its enforcement by the judicial organs"*.

[86] Ibid
[87] I.C. Golaknath And Ors. Vs State Of Punjab And Anr, 1967 Air 1643
[88] A. K. Gopalan V. State Of Madras Air, 1950 Sc 27
[89] John Austin, *The Province Of Jurisprudence Determined*, Cambridge University Press 1832
[90] Suri Ratnapala, *Jurisprudence,* Cambridge 2017

The first criteria is fulfilled as Article 226 recognises its recognition but the second criteria is not because as per the order of the President the possession of power is absent. Bentham reinstated this and held "clear and detailed legislative codes" had a higher status over judge-made law especially in a Common Law system, such as the one followed in India. Bentham stated that judges are mere agents of the sovereign and have no role in the law-making function[91].

As Justice Beg, rightly says, *"To permit such circumvention of the suspension is to authorise doing indirectly what law does not allow to be done directly",* which as per Bentham is impermissible. He iterated that the function of judges is strictly law adjudication and not law making. Jeremy and John both *"hated ex post facto judicial"*[92].

The verbatim reading of the Presidential Order of 1975 unconditionally suspends the enforcement of rights conferred[93]. Per Justice Chandrachud, "The Presidential order deprives a person of his locus stand; to move any court, be it the SC or the HC, for enforcement of his Fundamental Rights which are mentioned in the Order". Justice Beg concluded that "Presidential declarations under Art. 352(1) and 359(1) of our Constitution are immune from challenge in courts even when the emergency is over". He cited John Codman Hurd, an American author and held that "judicial authorities constituted by the State can only carry out the mandates of the positive".

Thus the court cannot assume power or imply power and adjudge for the enforcement of the rights deemed to be violated as claimed by the petitioner.

VII. Parliamentary Supremacy & Sovereign's unlimited powers

Parliamentary supremacy is an essential element of the Indian Constitution and is a catalyst to maintain the democratic system of governance in the country. It ensures that the elected representatives of the people have the power to make and amend laws in accordance with the needs and aspirations of the people. Parliamentary supremacy is based on the principle that Parliament is the ultimate source of legal authority in the country. The absence of the Parliament, representative of the government would mean anarchy and civil war in Austin's theory and that the powers of the sovereign are unlimited, with absolute power and not subject to ethical, moral or practical limitations. He reasoned why delegated legislation is "absolutely

[91] Ibid
[92] H. L. A. Hart, *Essays On Bentham Jurisprudence And Political Theory*, Oxford 1982
[93] ADM Jabalpur V. Shivkant Shukla, Air 1976 Sc 1207

necessary"[94]. Even if law is not based on consent or may command morally questionable or morally evil actions will still be law and will prevail as in the definition of Jeremy Bentham[95].

Under the Indian legal system, the legislations passed by the Parliament and the State Legislature are the primary sources of law. India is a parliamentary democracy, which means that Parliament is the supreme legislative body in the country and has the power to make and amend laws on any subject within its legislative competence in line with the Constitution. Justice Beg cites, the maxim *"omnia praeswumuntur rite esse actus"* to mean that *"all official acts are presumed to have been rightly and regularly done"*. Thus especially in this context of the emergency situation, the burden to prove would be on the detenu and the demand in his petition to have an enquiry done would be not possibly be allowed.

Further, as the State argued in this case, Article 359(1) is merely procedural to bar moving the SC under Article 32 and HC under Article 226 and is not in any way protecting illegal orders of the Executive or the Parliament.

Thus, the status quo simply does not permit the Courts to interfere and allow petitions under Article 226 when their power and authority is at halt.

VIII. Separation Of Powers & Doctrine Of Necessity

While expanding of Doctrine of Necessity (essential to positive law), Justice Bhagwati emphasised on how the Sovereign State has to assume extraordinary powers, such as detention, when the matters concern the security of the state during an emergency. To exercise the powers of detention, the detaining authorities have been given the authority to act upon their subjective satisfaction and thus the courts cannot interfere over their decisions to allow the Rule of Law to prevail.

Justice Beg countered the petitioner's argument of violation of separation of powers by holding that the principles of preventive detention are exclusively within the domain of the Executive, which is in cases of delegated legislation is a representative of the Legislature and no provision in the Indian Constitution can hold otherwise. Ram Jawaya Kapur[96] held that the no particular provision of the Constitution mandates judicial superintendence in a case of preventive detention. The State in Jabalpur argued that the executive is bound by the law during the times of an emergency and cannot flout the law, in this case; preventive detention under MISA which

[94] John Austin, *The Province Of Jurisprudence Determined*, Cambridge University Press 1832
[95] William Sweet, *Jeremy Bentham (1748—1832),* Internet Enclyopedia Of Philosophy
[96] Rai Sahib Ram Jawaya Kapur V. The State Of Punjab, Air 1955 Sc 549

was mentioned in the Order of the President. Thus, every order of the detention will have to be consistent with the conditions prescribed under that law. To quote Justice Bhagwati, *"it is the basic characteristic of martial law that during the time it is in force, the individual cannot enforce his right to life and liberty by resorting to judicial process".*

Thus to preserve separation of powers, the Order of the President under Article 359 will have to be held as the law of the supreme command. And during an emergency, the courts must defer to the executive's exercise of authority under the principle of separation of powers.

CONCLUSION:

The facts of the case in ADM Jabalpur perfectly met the criteria of Article 359 of the Constitution. An emergency declaration via an Order of the President had been declared and was currently in force. The President further decreed that none of the Fundamental Rights, including the right to life under Article 21, would be enforceable in the courts via Article 32 or 226.

The Constitution, that is the supreme law of the land, enacted by a constituent assembly and adopted by the people of India, has the ultimate and absolute legal authority. When a Presidential Order is issued as permitted by the law, then the Fundamental Rights mentioned in the Order have to be suspended to uplift the restriction while the order is in operation for the Rule of Law to prevail. Overall, positive law proponents recognized the imperativeness of the principles of natural justice as procedural requirements for fair decision-making, but they did not view them as fundamental rights or positive law. It has also been proved that the courts cannot assume power or imply power and adjudge for the enforcement of the rights deemed to be violated as claimed by the petitioner.

Hence, The status quo simply does not permit the Courts to interfere and allow petitions under Article 226 when their power and authority is at halt, thereby justifying the judgement of Jabalpur in the context of positive law.

ROLE OF FORENSIC SCIENCE AND ARTIFICIAL INTELLIGENCE: FUTURE OF CRIMINAL JUSTICE SYSTEM IN INDIA

- RAGINI THAREJA[97]

"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. Forensic science is a discipline that operates within the legal framework and can make a meaningful impact to investigate crimes and other serious offences. The uniqueness of the criminal perpetrator is discussed in forensic science. Artificial Intelligence, alongside digital forensics, will facilitate investigators 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, A.I. Robots

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

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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 meaning "forum."[98]Forensic science is concerned with the preservation, acquisition, and analysis of evidence that can be used in a criminal court to convict an offender.[99] 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 as an integral part of the puzzle of a criminal case. Criminals cannot be sentenced unless an eyewitness is present, which is unattainable without the use of forensic science. While detectives and law enforcement organisations are involved in acquiring evidence, either physical or digital, forensic science is concerned with examining that evidence to establish facts admissible in Court. Murderers, robbers, drug traffickers, and rapists would be free to wander in a world without forensic science.[100]

Forensic science is such a broad and diversified area that it has now 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.[101]

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

[98]2021. [Online] Available at: <https://www.merriam-webster.com/dictionary/forensic> [Accessed 17 September 2021].
[99]'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 17 September 2021
[100]'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 18 September 2021
[101]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

contaminated and are sent in a scientific and safe manner 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.[102] 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.[103]

It has made vital contributions to the criminal investigation. It is beneficial to interrogate the suspect, victim, and even the witness in order 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, hence eliminating notorious third-degree methods of interrogation, which frequently turn disastrous. A criminal investigation is a pragmatic science that entails the study of facts in order to categorise, 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 in a scientific and safe manner to a lab where the most cutting-edge techniques are used.[104] Identification and analysation 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 so as not to harm the evidence. For instance, Microscopy (the technique of using,

[102](Nicfs.gov.in) <https://nicfs.gov.in/nicfs/public/pdf/Final-29.08.2019.pdf> accessed 25 September 2021
[103]ibid
[104]Schiro G, "Collection and Preservation of Blood Evidence from Crime Scenes" <https://www.crime-scene-investigator.net/blood.html> accessed September 25, 2021

designing, or production of microscopes for studying the structure of cells)[105] has been proven to be of vital importance in the real world of the forensic scientist, as it is a non-destructive method for evaluating body fluids as well as other forensic materials such as drugs or fingerprints. This allows for the evidence to be evaluated while still being preserved.[106]

ROLE OF COMPUTER FORENSICS IN CRIMINAL INVESTIGATIONS

Crime has existed since the 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 as a result of the advancement of science and technology, and the Court and its judicial system is no exception to this general trend. Nations all over the world have taken a more liberal approach to accepting scientific procedures, and the usefulness of these approaches in criminal inquiry may be deduced from the fact 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[107]or the body of the offence. Crime has existed since the human evolution.[108]

Cyber Forensics, is the discipline of collecting, analysing, and examining digital evidence, is critical for preventing cybercrime from recurring. The collecting and investigation of numerous evidences discloses information about the attacker as well as 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 analysing evidence and preserving it.[109]

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

[105]"Microscopy" (Cambridge Dictionary) <https://dictionary.cambridge.org/dictionary/english/microscopy> accessed September 25, 2021
[106]Lee HC, "Applying Microscopy in Forensic Science" (1998) 4 Microscopy and Microanalysis 490
[107]Facts and circumstances constituting a crime
[108]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
[109]Supra note 6

be found on a hard disc, as well as a cell phone.[110]Electronic crime, or e-crime, such as child pornography or credit card fraud, is frequently associated with a 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 offences, law enforcement organisations are implementing digital evidence collecting and processing, commonly known as computer forensics, into its 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.

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 analyse evidence – has grown in relevance in solving crimes and other legal problems. Much of the data acquired by modern devices is never seen by the average individual. 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.[111] The cars are installed with sensors, cruise control, advance braking systems and other technologies working on A.I. Similarly, this information, on the other hand, can be critical in resolving a crime, and computer forensics is commonly utilised to identify and preserve it. Forensic science with the emerging use of A.I. plays a crucial and important role in the 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 investigation in India, many times are not up to the mark, it is often observed that crime scenes are manipulated to tamper with evidence. Many times, it so happens that, the criminals often try to bribe the authorities to get away with the crime. Digital Forensic in way of computers can play a very crucial role to capture 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 the all the evidences produced and points argued. In this era of the internet, where the world is

[110]'Digital Evidence and Forensics' (National Institute of Justice, 2021) <https://nij.ojp.gov/digital-evidence-and-forensics> accessed 24 September 2021.
[111]Nimbulkar S, 'Role Of Forensic Science In Criminal Justice System' https://www.ijalr.in/2021/08/role-of-forensic-science-in-criminal.html accessed 19 September 2021

going virtual, social gatherings are significantly seeing a downward slope in the society, the role of computer in this virtual reality all of 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.

The role of forensics and computers in investigating crimes started long back in the 1970's. The courts in the case of R.M. Malkani vs. State Of Maharashtra[112] 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[16][113] of and Section 7[17] [114]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 State of Maharashtra vs. Dr Praful B Desai[115]"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 EVIDENCES

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

[112]R.M. Malkani vs State Of Maharastra, AIR 1973 SC 157
[113] Indian Evidence Act, 1872
[114] ibid
[115]State of Maharashtra vs. Dr Praful B Desai, AIR 2003 SC 2053

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 perjure itself, and it cannot be wholly absent. Only human failure to find it, study and understand it, can diminish its value."[116]

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 original 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.[117]

Characteristics of Digital Evidence:

Any probative information recorded or transferred in digital form that a party to a court case may utilise 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.[118]

Following are essential characteristics of digital evidence:

[116]"Trace Evidence" (Trace Evidence: Principles) <http://www.forensicsciencesimplified.org/trace/principles.html> accessed September 26, 2021
[117]Mohay, G., Anderson, A., Collie, B., Devel, O. and Mckemmish, R., 2021. Computer and intrusion forensics. Artech House, pp.145-160.
[118]"Electronic Evidence - Free Legal Information: Legal Line" (FREE Legal Information | Legal Line) <https://www.legalline.ca/legal-answers/electronic-evidence/> accessed September 26, 2021

1. Admissibility: It must be in accordance with common law and legal standards. There must be a relationship between the evidence and the fact being established.
2. Reliability: The evidence must be of undeniable validity.
3. Completeness: The evidence should indicate the culprit's actions and aid in reaching a conclusion.
4. Convincing to judges: The judges must be satisfied by the evidence and understand it.
5. 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 a lot of 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 obvious, like DNA typing or identification of drugs.[119] Hence, forensic investigators have different roles, such as analysing 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 specialised degrees, they have one thing in common: they apply science to discover, gather and analyse 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

[119]Tilstone WJ, Savage KA and Clark LA, Forensic Science: An Encyclopedia of History, Methods, and Techniques (ABC-CLIO 2006)

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 was found guilty for his murder. Mathieu Orfila was later on considered the 'Father of Toxicology'.[120] With the evolution of time, many new techniques were discovered to uncover various substantial evidence that couldn't 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 &analyse evidence:

1. 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 crystallisation, solvent extraction, and distillation. It can separate all of the components of a multicomponent chemical mixture without requiring extensive knowledge of the identity, number, or relative amounts of the substances present.[121]

Gas chromatography is a chromatographic technique in which the mobile phase is gas.[122] 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,

[120]"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

[121]Keller R and Giddings CJ, "Elution Chromatography" (Encyclopædia Britannica November 10, 2020) < https://www.britannica.com/science/chromatography/Elution-chromatography> accessed September 21, 2021

[122]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_AnalysisAugust 2019)

each component is swept towards the detector and divided between the stationary and gas phases. Molecules with greater attraction for the stationary phase spend more time in that phase and therefore take longer to reach the detector.[123]

- Ballistics: Ballistics is a specialized branch of forensic science that deals with the motion, behaviour, 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.[124]There are many applications of ballistics within the 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 bullet and fired cartridge cases. Every gun produces a unique pattern on the cartridge cases and ammunition that is very specific to that handgun only. The actual bullets can be utilised 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.[125] This information assists researchers in determining the identity of the gunman. Once these indications have been recognised, 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 aid in 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

[123]Cirimele V, "ANALYTICAL Techniques | Gas Chromatography" [2000] Encyclopedia of Forensic Sciences 146
[124]"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
[125]"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 latter link is established by inspecting obliterated serial numbers to identify the weapon's registered owner.[126]

In Mohan Singh vs. State of Punjab[127], 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 1 were fired from a L.G. cartridge, and the shot received in parcel 2 was either an L.G. shot or S.G. shot. It was possibly a 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 2 was factory-made. From the photographs of the injuries inflicted on both the deceased and the lady, he concluded that the injuries on the deceased and the injured lady were probably caused by one gunfire only. But 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 mean to study.[128] Forensic toxicology goes even further, involving several related disciplines such as analytical chemistry, pharmacology, and clinical chemistry to aid in the detection and interpretation of drugs and poisons in medico-legal death investigations, human performance issues such as driving under the influence, compliance, and other related issues.[129] The three primary objectives investigations are:

• Determining whether or not toxicants are present and capable of causing death.

[126]Iskandar V, "What Is Forensic Ballistics?" (News-Medical.netJuly 28, 2021) <https://www.azolifesciences.com/article/What-is-Forensic-Ballistics.aspx> accessed September 23, 2021

[127]Mohan Singh vs. State of Punjab,AIR 1975 SC 2161

[128]Gupta PK, "Introduction," Fundamentals of toxicology: Essential concepts and applications (Elsevier 2016)

[129]"Toxicology" (Toxicology: Introduction) <http://www.forensicsciencesimplified.org/tox/> accessed September 23, 2021

• Determining whether toxicants are present and capable of contributing to death; or cause behavioural 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.[130]

In Jaipal vs. State of Haryana[131], 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.

4. 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 individual to an object or a crime scene. Because every nucleated cell in the body contains DNA, any biological fluid, skin, or viscera can provide DNA for analysis.[132] 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

[130]"A Simplified to Toxicology" (Toxicology: How It's Done)
[131]Jaipal vs. State of Haryana, 2002[(crl.) 705 of 2001]
[132]"DNA Profiling: How Is It Used in Criminal Justice?" (Maryville OnlineJanuary 6, 2021) <https://online.maryville.edu/blog/how-is-dna-profiling-used-to-solve-crimes/> accessed September 23, 2021

(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 DharamDeo Yadav v. State of U.P.[133], A 22 years 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 was of the opinion 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

In criminal trials based on circumstantial evidence, forensic science plays a very important role in establishing the evidence of 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 certain cases the courts have relied upon the forensic evidences and sentenced the accused to death by the Sessions Judges for brutal murder of child aged 10 years after subjecting the offender to carnal intercourse and then strangulating him to death, based on scientific evidences including DNA profiles and oral evidences.[134]

[133]Dharam Deo Yadav v. State of U.P., (2014) 5 SCC 509
[134]Anthony Arikswamy Joseph vs State Of Maharashtra, (2014) 4 SCC 69.

In the case of NitishKatara[135], the identification of the deceased was difficult as only small portion unburnt palm finger was found. In this case DNA profiling helped identifying the body remains by comparing those to the deceased's parents.

In the case of SujeetKumar[136], the court after examining the child's testimony and various other methodologies it approved the findings based on upon various DNA reports and other forensic evidences and held the accused guilty and had to set aside the order of acquittal.

In the case of SheryaSinghal[137] , the validity of Section 66 A of the Information Technology Act was thoroughly reviewed. As a result, the decision is significant in terms of forensic cyber 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 both constitutionally valid.

ARTIFICIAL INTELLIGENCE (A.I.) AN EMERGING FIELD IN THE CRIMINAL JUSTICE SYSTEM

Smart 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 that is primarily concerned 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.[138] The advancement of A.I. technologies is assisting law enforcement and security personnel in criminal 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, analyse criminal risk factors, and identify criminal networks. Machine Learning is a part of artificial intelligence that allows a machine

[135] , Vishal Yadav v. State of U.P 2014 SCC OnLine Del 1373
[136] State of NCT Delhi v. Sujeet Kumar, 2014 SCC Online Del 1952
[137] SHERYA SINGHAL v/s. UNION OF INDIA, AIR 2015 SC 1523
[138] 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 18 September 2021

or computer program to learn from historical activities or patterns to predict new output values by using specific algorithms.

The implementation of 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 programme must first comprehend the document and its contents.[139] The computer may learn from experience over time, and 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.[140] Such dependency has a knock-on effect that diminishes the efficiency of the judiciary and, as a result, people's access to justice.[141]

ARTIFICIAL INTELLIGENCE AND INDIAN JUSTICE SYSTEM IN 2050S'

The growth of computers and digitalisation 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").[142]

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.[42][143] Section 4 of the I.T. Act

[139]Pant K, 'A.I. In The Courts' Indian Express (2021) <https://indianexpress.com/article/opinion/artificial-intelligence-in-the-courts-7399436/> accessed 26 September 2021
[140]'National Judicial Data Grid' (Njdg.ecourts.gov.in) <https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard> accessed 26 September 2021
[141]Supra note 31
[142]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].
[143]ibid

specifically recognises 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),[144] the Supreme Court, for the first time dealing with the admissibility and evidentiary value of electronic evidence, 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.

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[145] 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 recognised and appreciated the significance of Section 65B of the Evidence Act in this instance.[146]

The judiciary has widely accepted and has frequently relied upon the evidences 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 very limited number of people. In this scenario, A.I. has played a very 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.[147]He further said that the system will 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.[148]

We are likely to see more advanced and unique methods used to administer the justice system in India. Approaching in 2050, it is more likely that A.I. robots will take over the investigation

[144]State (NCT of Delhi) v Navjot Sandhu (2005) 11 SCC 600
[145]Anwar PV v P.K. Basheer and Others [(2014) 10 SCC 473]
[146]Supra note 31
[147]'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 26 September 2021
[148]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 26 September 2021

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.[149] Saudi Arabia is the first country to give legal status to the robot which works on its own intellect.

Imparting similar intelligence in robots can help the investigation authorities to examine the crime scene and help reduce the 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. The robot can be taken to the crime scene to pick up all the evidences possible such as fingerprints and another piece of evidence related to the biology of a man, after which the robot can give a report on how many persons were actually present at the spot. This can help the authorities to find the criminal quickly moreover it all reduces the human effort of analysing the testing each and 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[150] would be apt in the near future.

With technology taking over the judicial processes, we are more likely to 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 for 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

[149]'Sophia, Robot Citizenship, And A.I. Legal | Cartland Law' (Cartland Law) <https://cartlandlaw.com/sophia-robot-citizenship-and-ai-legal/> accessed 26 September 2021

[150]"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 26 September 2021

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 the use of such technology in criminal investigations and trials. The Commissions on Criminal Justice Reform have underlined that the use of technology in crime detection can help the system run more efficiently. The appropriate laws have been modified on a regular basis to allow for the use of forensic technologies in crime investigation and prosecution. According to Justice Yatindra Singh, "controlling cyberspace is a 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 IT, in the way we live, perceive, and conduct business." [151]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[152]. Participation of international organisations, 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 the development of 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 on the upcoming technologies i.e., AI there is an urgent need to reform laws and the existing laws should be revisited, especially in context of privacy of an individual. Approaching the era of robots, we need legislations that would not only be strong on paper but should equally be effective on ground. The effectiveness of the laws on ground is a major flaw in our justice system. Forensic science proves to be a scientific evidence and gives a great boost to criminal justice. To use this technology to its highest capabilities we have to overcome all the weakness existing in our system in short stretch of time. If the aforementioned measures are taken care of for proper and successful execution, forensic science can contribute significantly to bringing immediate justice to modern society.

[151]Raveena Rai, CHALLENGES TO CYBER CRIME INVESTIGATION: A NEED FOR STATUTORY AND INFRASTRUCTURAL REFORMS, CNLU LJ (5) [2015] 62
[152] ibid

PROPERTY DISPUTES AND THE PLEA OF 'ORAL PARTITION'

- SUNIDHI S. RATHOD

ABSTRACT-

In India there have never been a shortage of cases in property law. The dispute between the family members is rising so much. There's at least one property case in every other house everywhere in the country. There are innumerous number of cases of partition pending before the court of law in the country. To avoid the families fighting withing each other and commit fraud with their own flesh and blood Hindu succession act 1956 which provides detailed provisions for devolution of property in cases of intestate succession was passed. Even after passing the act and having it enforced it is seen a lot that the parties' resort to the plea of 'oral partition' which some how in many ways defeats the rights of the family members. Oral partition has been affected prior in times in between the family members and the shares in the property are prayed to be determined in the terms of the oral partition and not as per the provisions of the Hindu Succession act. The article will be explaining partition and will be focusing more on Hindu Succession Act, the oral partition, related case laws, and if there's any need of prevailing the laws? And conclusion.

PARTITION:

In simple words partition means division of joint family status by the members of the Hindu undivided family. In Hindu families having a joint family is very common. That's why in the eyes and thoughts of law every family is a joint family until shown as separate through status. Partition of a joint family is basically done together by the co-owners. Every co-owner has their sperate share in the property together with the other members of the family who have the other shares. As all the co-owners have their shares in the property there's no definite rights/ interest/ ownership rights of them over that property. At the time of partition of that property when the property is divided the co-owners who have their allotted pieces of land becomes the sole owners of his/her portion of the property. Basically, in joint Hindu families all the members have inherited titles of the property by birth so all the members have joint title to the entire property and have joint enjoyment of the title and the title gets converted at the time of partition into separate title of the individuals for their enjoyment. After the partition the divided property gets a whole new title and an owner and the owners gives up their interest in the favour of the other owners. Hence, partition is a process of release and transfer of rights in the

property. Partition basically collapses the joint ownership between the family members and destroys the harmony of joint ownership and possession, because a huge piece of land divides into bits in the name of different owners and disturbs the peace between the members of the family. The better way to understand partition is that it is neither a gift nor a transfer of property to someone. It breaks one joint right into many rights and complicate things. As I have mentioned this before it is a combination of release and conveyance of the right of the property in favour of individuals whose rights already exists and not acquisition or exchange of property and this right can be expressed or executed through writing or orally. But for clarity and records it is advised to do the partition in the written form for the documentation purpose just in case if anything goes wrong in future there should be documents to produce in the form of evidence. There are ways to avoid fraud or misunderstandings while going through the process of partition which includes writing down the names of all the members of the family between whom the property is to be divided, then listing down all the properties movable, immovable area and cost of each one of them just to be cleared if it's a joint family property or self-acquired property. As the joint family property is mostly ancestral the chart should specifically mention the direct descendants of the common ancestor. After having a clear view of all the members, direct descendants the division of the property should be done in the presence and knowledge of everyone who have the co-ownership over the property in the process of partition. Before deciding the formula for division of the property the rights of the widow should also be considered. The division of the property will happen with mutual understanding because it is not necessary that everyone will get equal portion. When there is difficulty with dividing the property cause not all the properties can be divided so in that case partition can be affected by paying the cash to the sharer for their share in the property. The documents which are release to show that the executers will be getting the money that document becomes the instrument of partition.

According to the concept of partition under Hindu law partition is mainly done by two schools Mitakshara and Dayabhaga school. Both the schools have different meaning for the term partition..

HINDU SUCCESSION ACT [AMENDEMENT], 2005 (Act 39 of 2005):

Hindu succession act does not talk only about properties, partitions but also the Hindu codes which includes The Hindu Marriage Act, 1955, The Hindu Minority and Guardianship Act, 1956 and The Hindu Adoption and Maintenance Act, 1956. All of the above-mentioned acts have brought great changes in Hindu law in past few years. The year of 2005 brought a very revolutionary change in The Hindu Succession Act for the females of Hindu families. The

Hindu Succession (amendment) Act 2005is provided for the daughters of the coparcener in a joint Hindu family governed by the Mitakshara law shall become a coparcener in her own right by her birth in the same manner as the son having same rights and liabilities. Before 2005 during the process of partition women who use to leave their house and go to matrimonial house were not considered as the co-owners of the ancestral property and were not given any peace of land while going through partition but after the 2005 act was passed women who were alive before and from 2005 are to be given equal rights in the property and become an absolute owner of the property as the male members of the family and even the widows are given the right regarding succession of her late husband's as also of her father's property.

ORAL PARTITION:

CASE:

KALE AND ORS. Vs. DEPUTY DIRECTOR OF CONSOLIDATION AND ORS[153], the Supreme court of India in its judgment dated 21/01/1976 while dealing with a memorandum of family arrangement through family settlement, held that the family arrangements are governed by a special peculiar to themselves and that the family arrangements may have been oral in which case no registration is necessary and that the registration would be necessary only if the terms of the family arrangements are reduced into writing."

While passing the amendment the Supreme court has observed that

"By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and will be enforced if honestly made although they have not been meant as a compromise but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights actually are or of the points on which their rights actually depend

The whole object of the arrangement is to protect the family from long drawn litigation which marks the unity and solidarity of the family and create hatred and bad blood between the various members of the family. It promotes social justice through wider distribution of wealth.

[153] 1976(3) SCC119

Family therefore has to be construed widely. It is not confined only to people having legal title to the property

Court always leans in the favour family arrangements and their development. Technical or trivial grounds are overlooked. Rule of estoppel is pressed into service to prevent unsettling of a settled dispute. Family arrangement may be even oral in which case no registration is necessary. Registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between the document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable"

It clearly appears from the above that the courts have taken a very liberal and broad view of the validity of all the families and their settlements and halve always tried to keep up with it and maintain it to its best. At the end there was an idea which was approached by the courts that once the matters are settled, orders are passed, everything is done, the parties are no at all allowed to reopen the case under any circumstances at all.

Partition is done in two ways either in written or in oral form usually written form was most preferable because if the parties have the things written down it becomes easy to prove it by providing it as a document and it becomes strong evidence to have the case in your favour as there were no strong laws on oral partitions and it led to lots of frauds and created many disputes in between families. It is very unfortunate hoe the plea of oral partition is abused to infuse life and prolong a purely false and frivolous civil suit which otherwise deserves to be rejected at the very threshold. But in recent years even oral partitions are made easy to do. It is now cleverly engineered by the most cleaver lawyers to support and prolong false civil suits and makes the parties go through a lot. A plea of oral partition can be proved either by deposing the beneficiary of that partition or to those who are acquainted with the same which involves friends and any other relatives. To support the case of oral partitions even the revenue records can be used sometimes. Oral partition is also use to defeat the owner in who's name the property is by using their name as a common residence by all the family members. As back in the days where there were no records of payments or any transactions done in between two parties while buying or selling of a property in such cases the courts tend to regard the parties to buy the properties through the family joint funds even though it's registered in an

individual's name. But even today there is no precedents that can guide the trial courts as to how to deal with plea of oral partition and how it should nipped in the parties and save them from civil trial. There are still some judgements that should be looked upon while dealing with the case but they don't guarantee to prevent any abuse in the cases of civil suits based upon the false plea of oral partition.

"In Shri Virender Kumar Garg. V. Shri Ravinder Kumar Garg[154], reported as, that the Hon'ble Delhi High Court while hearing an appeal from the Trial Court's order dismissing the suit gave some comprehensive insights to deal with a plea of oral partition. The Court cautioned that a plaint premised upon a plea of 'oral partition' should contain necessary particulars as to how the plaintiff's father bought the suit property out of ancestral property funds, the description of such property, the approximate date, or even year of sale of such property and some particulars of such property. The pleadings must also contain as to how and when the oral partition took place, who were parties to it, and even the approximate month and year when it occurred. The Court essentially laid down that a plea of 'oral partition' can never be a sketchy or vague assertion, but a cogent and clear averment supported by facts. Although the judgments of the Hon'ble Delhi High Court shed some light upon the plea of oral partition, they are, however, fact-centric observations that cannot be objectively applied as a uniform proposition of law. It may also be noted that except for the third judgment as mentioned above, others have rejected the plea of oral partition only after the conclusion of a full-fledged trial and have even acknowledged that a plea of 'oral partition' should generally be relegated to trial."

According to the authors understanding oral partition is suppose to be sought by two co-owners and not the members of a Hindu undivided joint family. The co-owners belonged to different families and different castes. Few years back the plea of oral partition was not accepted and any Sale Deed made on the basis of such oral partition use to be null and void. Oral partition or any family arrangements are extremely valuable power whereby the peace, happiness and welfare of a family are secured to avoid long going litigations. It specifically was helpful in the case of illiterate members of a family or the people who have no means to bear expenditure of legal process or advice etc. Oral partition when done in between a group of people for example if 4 people agree to go for oral partition of a particular property and after a period one of them decides to backout of the oral partition then the oral partition which was done earlier comes to an end and the owner loses the property. And this can create a lot of problems.

[154] 2013 SCC On Line Del 4661

There's still a way to prove oral partition and that's by the way of circumstantial evidence. The recent judgment given by Supreme court says that the oral partition can only be accepted in exceptional cases if supported by public documents. It was observed by the Supreme Court of India that a plea of partition for the purpose of Section 6(5) of the Hindu Succession Act based on the oral evidence it cannot be accepted alone. The court held that the plea of oral partition can be accepted in exceptional cases where it is supported by the public documents. The bench comprising of Justice Arun Mishra, Justice S. Abdul Nazeer, Justice MR Shah observed that the Statutory Fiction of partition contained in the original Section 6 of the Act did not bring about the disruption of the coparcenary and actual partition. Section 6 of the Hindu Succession Act states that Sub-Section (5) of Section 6 shall apply to a partition, which has been effected before the 20th day of December 2004. A similar provision to Section 6(1) provides that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December 2004. The explanation appended to Section 6 further clarifies that for the purposes of Section 6, 'Partition' means effected by any registered partition or deed or effected by a decree of a court.All genuine transactions are of the past, including oral partition effected by the parties are safeguarded by the explanation of the Section, this was one of the contentions raised. The contention was supported by the Solicitor General, he submitted before the court that the requirement of the registered partition deed may be interpreted as the only directory and non-mandatory in nature considering its purposes. The legislation has recognized partition under Section 6 and according to that rights are to be worked out. When the rights are subsequently conferred, the preliminary decree can be amended, and the benefit of law have to be conferred, this was held by the court in various decisions. The court stated that they have no hesitation in rejecting the effect statutory fiction of proviso to section 6."

Conclusion:

The concept of oral partition under the Civil Procedure Code (CPC) in India is both intriguing and controversial. The provisions regarding oral partition can be found in Section 2(2) of the CPC, which allows for the division of joint properties among co-owners without the need for a written instrument. It is evident that oral partition is a unique provision in the CPC that provides an alternative method for dividing joint properties. However, it is important to note that the Supreme Court in various judgments, including Amrithlal Nathubhai Shah v. Hiralal Chunilal Shah and others, has held that oral partition can only be recognized if it is followed by actual and physical division of the property. Furthermore, the jurisdiction of the court in matters of partition depends on the value of the property involved. If the property is of a value

exceeding the pecuniary jurisdiction of the District Court, then the jurisdiction would lie with the Civil Court having original jurisdiction in that area. It is also crucial to understand the limitations of oral partition. While it may be recognized under the CPC, it may not hold legal weight in other aspects. For example, an oral partition may not be enforceable against third parties who are not party to the partition agreement. Therefore, it is advisable to have a written document to safeguard the interests of the co-owners and to ensure the enforceability of the partition.

Additionally, it is essential to consider the evidentiary requirements for proving an oral partition. The burden of proof lies on the party claiming the oral partition, who must provide cogent and conclusive evidence to establish the oral agreement and its terms. Such evidence can include oral testimony, witness statements, and other corroborating evidence. Oral partition presents an alternative method for dividing joint properties among co-owners without the need for a written instrument. However, it is essential to exercise caution and be aware of the limitations and requirements associated with oral partition. It is always advisable to consult a legal professional to ensure compliance with the provisions of the CPC and to safeguard the interests of the parties involved.

ADOPTION LAWS IN INDIA: UNDER HINDU ADOPTIONS AND MAINTENANCE ACT AND JUVENILE JUSTICE ACT

- NETHRA KATIKANENI

Abstract

The subject matter of this paper deals with a comprehensive analysis of adoption law in India. Adoption is a legal process where a child's rights and privileges are legally transferred from his biological parents to the adoptive parents. A set of rules and regulations have been laid down for the effective governance of the procedure of adoption. Adoption affects the kid who is being adopted as well as their immediate family, extended family, and community. Adoption is creating a bond between a parent and a kid who are not genetically related to one another. Through the help of the adoptive family, the adopted kid is able to benefit from the rights, benefits, and obligations of a child. In India, there is only one personal law pertaining to adoption which is the Hindu Adoptions and Maintenance Act 1956. The Hindu Adoptions and Maintenance Act provides the detailed provisions that are essential for the adoption to be safe and legal and is followed by Hindus, Sikhs, Buddhists, and Jains. Because religions like Muslims, Christians, Jews, and Parsis do not have their own personal laws governing adoption, they can only be named the child's guardian according to the Guardians and Wards Act of 1890. This paper focuses on the adoption laws in India and deals with various provisions laid down by Indian legal system over a long period of time.

Key Words- Hindu Adoptions and Maintenance Act, guardian, consent, inter-country, child welfare.

Introduction

Adoption is considered a socially acceptable way to provide a permanent home for a child who has been abandoned by their biological parents. Adoption in India is regulated by The Hindu Adoptions and Maintenance Act of 1956 (HAMA) and the Juvenile Justice Act of 2015. For adoptive parents, each law has a different set of requirements. Finding an available kid, applying to an adoption agency or organisation, going through a home study and background check, participating in pre-adoption counselling, training, and finalising the adoption in court are all phases in the adoption process in India. The adoption process in India can take a considerable amount of time, and there are various challenges and issues that need to be

addressed, such as the lack of transparency, delays in the process, and the need for greater awareness and education about adoption.

The idea of adoption was thought to be the most effective way to give a child who had lost his or her biological parents a family again. The idea was that the adoption meant the removal of the child from the natural family and his settlement in the adoptive family, so much so that his or her ties with the natural family were severed and all ties in the adoptive family came into existence. The prospective adoptive parents must be in good physical, mental, emotional, and financial health, be free of any serious medical conditions, and they must not have ever been convicted of a crime of any kind or accused of violating a child's rights.

1.Evolution of adoption

1.1 Hindu Adoptions and Maintenance Act

The Hindu Adoptions & Maintenance Act (hereafter "HAMA"),1956 replaced the common Hindu law and to a great extent has codified the law on adoption. In India, personal law does not differ from State to State. Each community is governed by one single system of law. Though its members may be settled, domiciled, or residing in any part of the country, they will be governed by the same law. HAMA extends to the whole of India except the State of Jammu and Kashmir. The act also doesn't apply to Goa, Daman, and Diu. In these territories, adoption is regulated by the Goa Hindu Usage Decree of 1880 and its substitute. Section 2 of this Act states that it applies to all those who identify as Sikh, Jain, Buddhist, or Hindu in any of their forms or developments. HAMA therefore applies to all Buddhists, Sikhs, Jains, and Hindus.[155] Only father or mother or a legal guardian of a child can give the child in Adoption under Section 9 of the Act.[156] The child who is to be adopted must be actually given and taken in adoption by the parents or guardian, as the case may be, in accordance with Section 11. The involved parties' intentions must be evident from their actions.[157] According to Section 12, a child who is adopted loses all ties to their biological family and is raised by their adoptive family as if they were their natural parents. All rights accorded to a natural born kid in the adoptive family are also granted to an adopted child.[158] Section 15 states that once an adoption is recognised as legal by the court, neither the adoptive parent nor the adopted child may

[155] Hindu Adoptions and Maintenance Act, 1956 S.2.
[156] *Id* ., S.9.

[157] *Id* .,S.11.
[158] *Id* .,S.12.

renounce the adoption and return to their biological family. Both the parents and the kid must abide by its finality and binding nature.[159]

1.2 Juvenile Justice Act

The Juvenile Justice (Care and Protection of Children) Act is to provide care, protection, and rehabilitation to children under the age of eighteen years in need of care and protection. It is a special enactment dealing with children in conflict with law and children in need of care and protection. The major purpose of the Juvenile Justice Act (hereafter "JJ") is to protect the rights of children who come into contact with the court system, particularly those who have been accused of committing crimes. The legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religion. The Act emphasises rehabilitation and reintegration into society because it acknowledges that children should be handled differently from adults. According to this Act, a juvenile is someone who has not reached the age of 18. This Act also extends to the whole of India except to the State of Jammu and Kashmir.

In *Vinay Pathak and his wife v. unknown*[160], a petition was filed with the question of whether a Hindu couple can adopt a daughter under JJ Act when they already have a biological daughter living. The Bombay High Court held that a child could be adopted by a Hindu couple under the provisions of the JJ Act if the child completed the description of the specific class of children for whom the JJ Act was made and since in this case the child fulfilled those conditions, the adoption was allowed.

The revised JJ Act, 2015, which replaced the earlier Juvenile Delinquency Law and the JJ Act, 2000 provided that teenagers between the ages of 16 and 18 will be considered as adults in cases of heinous crimes. A variety of measures, including the creation of Child Welfare Committees and the provision of foster care and adoption services, are included in the 2015 Act for the care, protection, treatment, and rehabilitation of children. There is a clear distinction between children in conflict with the law and children in need of protection and care in the amended act and The Central Adoption Resource Authority (CARA) is given statutory status under this Act. The JJ Act 2021 amended the 2015 Act providing changes to some key areas of the law, including adoption, the classification of offences, the choice of courts, and the

[159] *Id* ., S.15.
[160] Vinay Pathak and his wife v. unknown ,2010 (1) Bom CR 434.

qualifications for Child Welfare Committee members. Following the enactment of JJ Amendment Act, 2021, the Government of India notified the JJ (Care and Protection Amendment) Model Amendment Rules 2022. According to the 2022 updated guidelines for administering the JJ Act, anyone connected to a group receiving foreign funding is prohibited from serving on child welfare committees and it modified several aspects of the Act such as government adoption and foster care.[161]

1.3 Central Adoption Resource Authority

The Central Adoption Resource Authority (hereafter "CARA") is a statutory organisation that reports to the Indian government's Ministry of Women and Child Development. Set up in 1990,it ensures the smooth processing of in-country and inter-country adoption of children in India. The authority chiefly handles the adoption of orphaned, surrendered, and abandoned children through its recognised/associated adoption agencies. In conformity with international standards like the United Nations Convention on the Rights of the Child, CARA is generally seen as a progressive law.[162] In India, adoptions are handled by a number of mandated bodies in addition to CARA such as the State Adoption Resource Agency (hereafter "SARA") and the District Child Protection Unit (hereafter "DCPU"). SARA monitors and promotes adoption and non-institutional care coordinating with CARA within the state. DCPU a department placed at the district level by the state government to track down abandoned, surrendered, and orphaned children.[163]

2.Requisites for a valid adoption

It is defined under Section 6 of HAMA that no adoption shall be valid unless-

(i) the person adopting has the capacity and also by the right, to take in adoption

(ii) the person giving in adoption has the capacity to do so

(iii) the person adopted is capable of being taken in adoption

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.[164]

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[161] Central Adoption Resource Authority ministry of women & child development government of India CARA, <https://cara.nic.in/> (last visited April 9, 2023).

[162] Central Adoption Resource Authority ministry of women & child development government of India *CARA*, <https://cara.nic.in/> (last visited April 9, 2023).

[163] Central Adoption Resource Authority ministry of women & child development government of India CARA, < https://cara.nic.in/Regulation/SARA.html> (last visited April 12, 2023).

[164] Hindu Adoptions and Maintenance Act, 1956 S.6.

Clause (i) discusses about the capacity and right of adopter to adoption which is dealt by Section 7 and Section 8 which states that every Hindu, male or female, has capacity to adopt if he or she is not a minor and of sound mind.[165]

Clause (ii) details the capacity to give the adoption and lays down that giver of the child should have the capacity to give the child in adoption in Section 9. The father can give the child in adoption but can exercise this right without the consent of the child's mother. After the father, the mother has the capacity to give the child and after the mother, it is the guardian who has such capacity.[166]

Clause (iii) talks about capacity to be adopted and states that if a child lacks capacity to be adopted, his /her adoption will be void. Section 10 enacts as to who can be legally taken in adoption.[167]

Clause (iv) brings up other conditions, compliance to which it is mandatory. For instance, no adoption will be valid if essential formalities or ceremonies of adoption are not complied with.

3.Social Changes in Indian Adoption

3.1.Gender bias in right to adopt in India

Section 8 of HAMA deals with capacity of a female Hindu to take in adoption. Before 2010 Amendment of the HAMA, any female Hindu who is of sound mind, is not a minor, is not married and if married , whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption. Post the 2010 Amendment, any female Hindu who is of sound mind and is not a minor has the capacity to take son or daughter in adoption provided that if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.[168]

Under the HAMA, females have been given a limited right to take and give in adoption under certain conditions: an unmarried girl and a divorcee can adopt; a widow can adopt to herself;

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[165] *Ibid*.

[166] Hindu Adoptions and Maintenance Act, 1956 S.9.

[167] *Id* ., S.10.

[168] *Id* ., S.8.

and a girl can be adopted too. Section 8 clearly implies that a married female cannot adopt, not even with the husband's consent, unless her husband suffers from the disabilities referred to in the section, that is, he has ceased to be a Hindu, has renounced the world, or is of unsound mind.[169] A husband, on the other hand, may adopt with the consent of his wife. Likewise, in the matter of giving a child in adoption, the father has a superior right. If he is alive, he alone can give away the child, with mother's consent.[170] The mother may give the child in adoption only if the father is dead, or has renounced the world, or has ceased to be a Hindu, or is of unsound mind.

In *Malti Roy Chowdhury v. Sudhindranath Majumdar*[171], while conceding that a wife has no right to adopt but only to give consent, and that it is the husband who is to take decision and initiative, the court yet states that gender discrimination in the matter of adoption which prevailed prior to the Act has been eliminated. Even though the actual physical handing over of the child and the adoption ceremony were performed in front of the husband without him raising any objections, the adoption of the appellant was determined to be invalid because the deceased had adopted her while she (the deceased) was in a married state. Even the husband's consent to the adoption made by his wife is insufficient to make it legitimate. Law should give equal rights in the matter to both spouses, and in circumstances (such as in this case) where there is evidence of consent or approval, the adoption should be held to be legally valid irrespective of the fact that the child is adopted by the female or male.[172]

In the case of *Vijayalakshmamma v. B.T.Shankar*[173], the court stated that the legislature had on purpose omitted the requirement of consent from the co-widow. This was an indication of the legislature's intention to give independent authority to women to adopt keeping up with the social changes and to recognise equal rights and status for women. Therefore, where a woman adopts a child under HAMA, she need not take consent of a co-widow because she is adopting the child in her own capacity.

3.2.Inter-Country Adoption

[169] *Ibid.*

[170] *Ibid*.

[171] Malti Roy Chowdhury v. Sudhindranath Majumdar, AIR 2007 Cal 4.

[172] Kusum, *GENDER BIAS IN ADOPTION LAW: A COMMENT ON MALTI ROY CHOWDHURY V. SUDHINDRANATH MUJUMDAR*, 49:1 JILI 76, 76-80 (2007), (last visited April 3,2023).

[173] Vijayalakshmamma v. B.T.Shankar, (2000) 4 SCC 538.

The term "Inter-Country Adoption" as defined at the European Seminar on Inter-Country Adoptions, May 1960 "represents an adoption in which the adopters and the child do not have the same nationality as well as in which the habitual residence of adopters and the child is in different countries." HAMA contains no provision about inter-country adoption. The JJ Act also has no bearing relating to inter-country adoptions. Such adoptions in India have been carried out by utilising the provisions of the Guardians and Wards Act,1890, which requires a prospective foreign adoptive parent to apply to be appointed as the child's guardian[174] before a district court.[175] The court will only grant the requested order if it is satisfied that it is for the child's welfare.[176]

In 1984, Sri Laxmikant Pandey challenged the genuineness and validity of such inter-country adoptions before the Supreme Court through a Public Interest Litigation , which was based on a news item published in a British newspaper, highlighting the sale of babies in West Bengal. Having given a careful consideration to this, the Supreme Court laid down the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents so that the abuses to which inter-country adoptions, if allowed without any safeguards, could be considerably reduced, if not eliminated, and the welfare of the child would be protected. Thus, the law applicable to inter-country adoptions in India came into existence through the judgements of the Supreme Court *in Laxmikant Pandey v. Union of India*[177] case.

All adoption orders were issued by courts, in accordance with existing regulations. As of September 1,2022, all adoption-related proceedings were brought before District Magistrates, and they approved the adoption orders. CARA expected the District Magistrate's to resolve adoption cases much more quickly, within the specified time limit of 2 months, which courts rarely adhered to, and this seemed to be the cause of the lengthy delays in courts clearing adoption cases.

The number of orphans, abandoned and surrendered children adopted during the last three years as of 2023 given by the Minister of Women and Child Development, Smt. Smriti Irani are as under[178] :-

[174] Guardians and Wards Act,1890 S.9.
[175] *Id* ., S.4.
[176] *Id* . ,S.7.
[177] Laxmikant Pandey v. Union of India, AIR 1984 SC 4.
[178] Press Information Bureau Government of India, <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1907184> (last visited March 16, 2023).

Year	In-country Adoption	Inter-country Adoption
2019-2020	3351	394
2020-2021	3142	417
2021-2022	2991	414

Despite the present guidelines in India, there have been abuses in adoption process as various cases that came to light in recent past bring out. [179] The incidents in Andhra Pradesh[180] highlighted the sale and purchase of babies with accompanied malpractices of falsification of records, inadequate monitoring, and charging of extra money from adoptive parents.

Typically, the adoptive parents are relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor family belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world. Some say that it promotes the illegal buying and selling of children. The claim is that the high demand in the developed world for children in the developing world creates a "black market in kidnapped babies".

3.3.Adoption by Same Sex Couple

LGBTQ stands for " lesbian, gay, bisexual, transgender, queer". In India, homosexuality was made legal in 2018 by the landmark judgement of *Navtej Singh Johar v. Union of India*[181] however same-sex unions are still not accepted. A couple in a legal marriage or a single person may adopt under the JJ Act. So, an LGBTQ person can adopt a child as a single parent only. The law still does not treat LGBTQ+ people equally by allowing them to adopt children together. Same-sex couples are forbidden from adopting since the child shouldn't grow up in a family that doesn't tone with the traditional norms of the society. Article 14 of the Constitution of India states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"[182] . In the case

[179] India Today , 7 May 2001 at 32-38.

[180] *Ibid.*

[181] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.

[182] INDIA CONST. art. 14.

of *NALSA v. Union of India*[183], the Supreme Court's learned judges ruled that the term "person" used in Article 14 of the Constitution includes transgender people and as a result, they are entitled to the same civil and citizenship rights as other citizens of this nation. Therefore, the LGBTQ community has a claim to equal rights, such as the freedom to adopt children and to marry.

The National Commission for Protection of Child Rights (hereafter "NCPCR") in April 2023, filed an intervention application in the Supreme Court in the ongoing case matter of *Amburi Roy v. Union of India*[184], opposing adoption by gay couples. NCPCR expressed that children of same-sex parents will not be exposed to "traditional gender roles" to the same this will ultimately affect their personal growth. They stated that adoption by same-sex couples would not be in the best interest of the child as it is against the child's welfare and interest. The Delhi Commission for the Protection of Child Rights has expressed a different opinion about the same issue and has backed petitions for marriage equality and the right to adopt for same sex couples.[185]

3.4.Adoption under Muslim Law

The Muslim Personal Law does not allow adoption but the 'Kafala system' exists for the purpose of the child' welfare. According to this system, a Muslim can become the child's Kafil and can take care of the child's maintenance and well-being, including providing financial assistance, even though he is not the child's biological parent. Being a Kafil does not amount to adopting the child. In the landmark judgement of *Shabnam Hashmi v. Union of India*[186], it recognised the right for any individual to adopt a child regardless of their religion. The Supreme Court held that the JJ Act applies on all including Muslims and thus Muslims can apply for adoption under the JJ Act. The court stated that the JJ Act was an enabling law and seeks to achieve a Uniform Civil Code.

3.5.Single women's right to adopt

In 2000, actor and model Sushmita Sen adopted a girl child with the petition being approved by the High Court four years after she applied. In her second attempt to adopt another

[183] NALSA v. Union of India, (2014) 5 SCC 438.
[184] Amburi Roy v Union of India, W.P.(C) No. 000129 of 2023.
[185] Desk, E. (2023) ,*Same-sex marriage case: Why child rights panel thinks adoption by same-sex couples may harm children*, The Indian Express, :< https://indianexpress.com/article/explained/same-sex-marriage-case-why-child-rights-panel-thinks-adoption-by-sa> (last visited April 18,2023).

[186]Shabnam Hashmi v. Union of India, (2014) 4 SCC 1.

girl child, she wasn't allowed to adopt two children of the same sex as per the HAMA. This changed after she fought against it in the Bombay High Court and played a crucial part in the amendment of adoption laws in India. According to the guidelines under CARA, any single female who is above the age of 24 can adopt a child of any gender.[187]

In the case of *Mrs. Ubhayakar Lalitha v. Union Of India*[188], the petitioners challenged the constitutional validity of Section 8 of HAMA[189]. The Karnataka High Court decided that the husband's consent for adoption is compulsory, and that the requirement was not violative of Article 14 of the Constitution of India[190] as a woman in marital status falls into a separate section i.e., Section 7 of HAMA[191]. Such judgements show the mindset of our patriarchal society and women being burdened with unequal rights in comparison to men including the rights to adopt a child.

A single working woman's request to adopt a kid was recently rejected by a Civil Court, but the Bombay High Court overruled that decision. The 47-year-old divorcee who wanted to adopt her sister's child was turned down for adoption on the grounds that "being a working lady, she will not give personal attention to the child". The Single-judge bench consisting of Justice Gauri Godse mentioned that the JJ Act, which acknowledges a single parent's eligibility to be an adopter; because their employment situation is inferred, they cannot be deemed to be ineligible to adopt. The court declared the lady to be the adoptive parent for the child and noted that the order the Civil Court issued had a "medieval mindset".[192]

Actor Sushmita Sen faced a lot of criticism that she was single woman who wanted adopted a child at the age of 24. But now with a change in social norms and values, people have started accepting adoption by single women and laws are also being amended making it easier for single women to adopt.

3.6.Adoption and Caste Intersection

[187] Central Adoption Resource Authority ministry of women & child development government of India CARA, < https://cara.nic.in/parents/eg_ri.html> (last visited April 14,2023).

[188] Mrs. Ubhayakar Lalitha v, Union Of India, AIR 1991 Kant 186.
[189] Hindu Adoptions and Maintenance Act, 1956 S.8.
[190] INDIA CONST. art. 14.

[191] Hindu Adoptions and Maintenance Act,1956 S.7.
[192] Shabnam Jahan Moinuddin Ansari v. State of Maharashtra, Civil Revision Application No. 127 of 2022.

Caste is one of the most important factors in Indian social system. It plays a huge rule pertaining to the social composition and behavioural attributes. There is no express prohibition in HAMA that adoption has to take place only within the community. However, there are some unsolved issues in the law of adoption for which the judiciary itself has not formulated binding legal principles. In *A.S. Sailaja v. Principal , Kurnool Medical College*[193], the Court considered the aspects of adoption under HAMA and the issue of discrimination under Article 15(4) of the Constitution of India[194]. Citizens belonging to a group of backward classes identified by the appropriate authority or the commission fulfilling the traits of socially and educationally backward among that particular group, would alone be eligible for admission as backward class citizens under Article 15(4)[195]. Therefore, the petitioner, though because of her adoption became a member of the backward class, was not eligible for admission in that medical college under Article 15(4) since she did not deal with any disadvantages which the members of the backward class deal within their life.

The Karnataka High Court had declared that a boy who belonged to a forward caste adopted by a backward class citizen is not provided the benefits of reservation under Article 15(4) in the significant judgements of *K. Shanthakumar v. State of Mysore*[196] and *R. Srinivasa v. Chairman, Selection Committee*[197].

Such judicial decisions by the courts not only widen the gap between caste differences in the society but also don't take into consideration the aspects of HAMA that look at integration of the society, especially of caste, creed, and class[198].

4.Conclusion

The concept of adoption has undergone significant modification over time. Prior to recent changes, adoption in Hindu law had a religious motivation but now the welfare of the child is being given the importance in India. The best interests for the child must be achieved through these adoption processes. Due to religious beliefs, a natural process like childbirth and adoption are being pulled under religious politics in India. The welfare of the kid and the restoration of his or her right to a family are the main goals of adoption. Children who are

[193] A.S. Sailaja v. Principal , Kurnool Medical College, AIR 1986 AP 209.
[194] INDIA CONST. art. 15(4).
[195] *Ibid*.
[196] K. Shanthakumar v. State of Mysore, (1971) 1 Mys LJ 21.
[197] R. Srinivasa v. Chairman, Selection Committee, AIR 1981 Kant 86.
[198] Balu, N,"*ADOPTION - SOME UNSOLVED ISSUES*.", Journal of the Indian Law Institute, vol. 45, no. 3/4, 2003, pp. 537–42,JSTOR (last visited April 13, 2023).

silently suffering are a vulnerable group that require attention from CARA and the government. In order to foster an atmosphere of acceptance, growth, and well-being and to acknowledge children as equal participants in the adoption process, it is necessary to adopt an inclusive strategy that prioritises the needs of the adopted child. In order to simplify the adoption process and make it easier for adults to adopt, it is necessary to carefully review all of the adoption rules and procedures that govern it. This would make more people to step up to adopt and a child would live and prosper with care, love, and support from his or her family.

A CRITICAL LEGAL VIEWPOINT ON WOMEN'S RIGHTS AND MAINTENANCE

- RUKHSANA GAURI[199]

ABSTRACT

This legal article delves into the intricate intersection of women's rights and Muslim maintenance obligations, providing a comprehensive legal perspective on the subject. It explores how Islamic law, cultural norms, and international standards influence the rights and protections afforded to women in matters of maintenance within the Muslim community. The article evaluates the evolving landscape of women's rights within the context of Muslim maintenance, emphasizing the need for legal reforms to enhance gender equality and ensure justice for women facing maintenance disputes. It also analyzes the challenges, controversies, and opportunities in promoting gender justice while respecting cultural norms and Islamic legal principles. The legal perspective presented in this article contributes to the ongoing dialogue about the rights and protections for women in Muslim-majority countries and serves as a valuable resource for legal practitioners, policymakers, and scholars seeking to navigate this complex and vital legal terrain.

Keywords: *Women's rights, Muslim maintenance, legal perspective, gender equality, Islamic law, family law, marital obligations, gender justice, cultural norms, international standards, legal reforms.*

I. INTRODUCTION

Maintenance includes all the basic necessities of life, which is required by a person for the sustenance of his or her life. The term "Maintenance" is not defined in Muslim Law as such but reference can be given of Hindu Law[200] on maintenance which defines the term as follows: *"in all cases, provisions for food, clothing, residence, education and medical attendance and treatment; in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage."*

[199] PhD Scholar, RNB Global University, Bikaner, Department of Law

[200] Section 3 (c) Hindu Adoption & Maintenance Act, 1986. Taken from Marriage & Divorce Laws (Bare Acts), Universal Law Publishing Co. 2011.

According to Halsbury's law of England,[201] maintenance is the name given to the weekly or monthly payments which may be ordered on a decree of divorce, or nullity to be made for the maintenance and support of the wife during the joint lives of the spouses, maintenance for the children is a similar provision for their benefit, which may be made in proceedings for divorce, nullity, judicial separation and restitution of conjugal rights. Maintenance varies according to the position and status of the persons concerned. So maintenance is a term which must vary according to the requirement of the time and the status of the persons entitled to get maintenance and the person liable to maintain.

Under Sharia[202], maintenance is payable to wife children and parents. It is an obligation imposed on the part of the parties to a marriage agreement which creates a familiar relationship between the spouses. Islam provides some concept of maintenance[203] which must be taken into account while providing maintenance.

1. Islam permits only those people except wife to be maintained by others who are bound to depend on others, either because of immaturity (or old age) or because they have no means to support themselves. A person is entitled to be maintained by others only in the extreme situation when there is no alternative except begging for one's livelihood.
2. The obligation to maintain, and to bear the burden of fooding and lodging, etc., of others, is reasonably restricted in Islam. The Islamic principle is that a person should not be allowed to suffer any monetary loss in maintaining others. In other words, maintenance of a person, except that of a wife, is to be provided out of the properties of the person who is being maintained whether that person is infant or adult. This is because under Islam the property is basically an individual property, there is no concept of any joint family property.

These two basic principles of Islamic law of maintenance may appear to be contradictory to each other This is because the texts and the authorities on Muslim law have not clearly separated the moral obligation from the legal one. The ancient lawyers do not observe the modern distinction between a legal and a moral obligation[204]. Therefore, it is not always easy to say what is legally enforceable and what is merely an ethical recommendation.

[201] Halsbury"s law of England, 3rd Edn, Vol. 12, p. 290
[202] Muslim Personal Law
[203] 5 Dr. Rakesh Kumar Singh, TEXTBOOK ON MUSLIM LAW, Universal Law Publishing Co., 2011 Edition, at page no. 158.
[204] Asaf A. A. Fyzee: OUTLINES OF MUHAMMADAN LAW, Oxford University Press, 5th Ed. 2008, at page no. 173

Under Muslim law the term "maintenance" is called nafaqa and it comprehends food, raiment and lodging, though in common parlance it is limited to the first. There are three causes for which it is incumbent on one person to maintain another:

1) Marriage
2) Relationship and
3) Property.

The highest obligation arises on marriage; the maintenance of the wife and children is a primary obligation. The second class of obligations arises when a certain person has "means" and another is "indigent".

II. MUSLIM WIFE'S CLAIM OF MAINTENANCE: LAW, ISSUES & REFORMATION

For the claim of maintenance of Muslim wife, the obligation is casted on the husband and this obligation arises out of marital relationship. According to the ordinary sequence of natural events the wife comes first. The wife is entitled to maintenance from her husband although she may have the means to maintain herself and although her husband may be without means.

Muslim wife's claim of maintenance is divided in two different branches of law. One under Muslim Personal Law and another under general law of maintenance as is reflected in Code of Criminal Procedure, 1973[205] which is a secular remedy.

The husband's duty to maintain commences when the wife attains puberty and not before; provided always that she is obedient and allows him free access at all lawful times. If a wife deserts her husband, she loses her right to maintenance. In addition to the legal obligation to maintain there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called *kharch-e-pandan, guzara, mewa khore* etc. If husband refuses to pay maintenance, the wife is entitled to sue for it. Her right may be based on the substantive law, or she may sue under the provisions of Code of Criminal procedure which provides for general law of maintenance under Section 125 wherein the term "wife" is widely defined and explained so as to cover the claim of "legally wedded wife" as well as of divorced wife. So in short Muslim wife's claim of maintenance arises in following circumstances:

[205] To the extent of application of Section 125 of Code of Criminal Procedure to the Muslim wife, law is yet not clear and there is divergence of opinions amongst jurists and judges so far as the application of Section 125 is concerned.

1) Out of the status of Husband & Wife (During the subsistence of marriage & out of the legal obligation imposed on the husband.)
2) Out of pre-nuptial agreement and
3) Out of divorce[206]. (After dissolution of marriage)

With respect to maintenance of divorce wife, right of maintenance commences on divorce or when she comes to know of the divorce and ceases on the death of her husband, for the her right of inheritance supervenes. In other cases where husband is alive and has divorced the wife, she can claim maintenance only during the Iddat[207] period and not beyond that. The widow is therefore not entitled to maintenance during the Iddat of death. On this point there was a great controversy among the judiciary when the Supreme Court[208] has taken a landmark step and has led to the conflict of law between two different branches of law: Muslim Personal law and general law under Section 125 of Criminal Procedure code, 1973 so far as the claim of (Muslim) divorced wife is concerned, which subsequently led to the enactment of new piece of legislation/law[209] applicable exclusively to the Muslim divorced wife.

So with respect to the claim of Muslim women's right of maintenance, law is divided and reflected in following legislations:

1) Muslim Personal Law (Shariat Application) Act, 1937.[210]
2) Code of Criminal Procedure, 1973
3) Muslim Women (Protection of Rights on Divorce) Act, 1986

The rule that, after divorce, the wife is entitle to maintenance during the period of Iddat and until her delivery if she is pregnant, is clear and has been a debated provision since many years. Often judiciary encountered with the difficulty surrounding this rule which provides a minimum right of maintenance as compared to the Hindu divorced lady. This rule has been a bone of contention and on this count there has been a debate in a society as to uniformity[211] of

[206] No question of maintenance arises after death of the husband since her succession right supervenes.
[207] It is duration to be observed by Muslim wife in case of divorce by the husband or death of the husband and serves as a prohibition for any person to marry with her. Sec. 2 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 defines "Iddat": " iddat period" means, in the case of a divorced woman i) three menstrual courses after the date of divorce, if she is subject to menstruation; and (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is enceinte (pregnant) at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;"
[208] In the case of Mohammad Ahmed Khan V/s. Shah Bano Begum (AIR1985SC945)
[209] Muslim Women (Protection of Rights on Divorce) Act, 1986
[210] Wherein Section 2 lays down that in the event of ambiguity or controversy or questions or dispute, (uncodified) Muslim Personal Law shall prevail or shall be applicable.
[211] For the first time concern was shown in the case of Mohammad Ahmed khan V/s Shaha Bano Begum (AIR 1985 SC 945)

the personal laws. Since in Muslim law it is very easy for the husband to get or to give divorce to the Muslim wife, he can very easily escape the liability of providing maintenance to the wife. As mentioned above it is no longer obligatory for the erstwhile husband to provide maintenance beyond Iddat period.

A wife's right to be maintained by the husband has been recognized by all personal law in varying degrees. So far as Muslim wives are concerned, the position is same. But when comes to the claim of divorced wife is concerned, law is different on this issue. A Muslim husband's duty to maintain his divorced wife extends up to the period of Iddat and thereafter his liability is over. Under other personal laws a divorced wife is entitled to maintenance until she remarriages or indulges in post-divorce adultery. But the Muslim law does not provide for any maintenance to a divorced wife after the period of Iddat.

Muslim law as well as all the other matrimonial Laws except Special Marriage Act, 1954) apply to persons only on the ground of professing a particular religion and if all such Laws grant to the divorced wives such larger right to post-divorce maintenance, but the Muslim law denies such right, the Muslim wives have obviously been discriminated against and that too because of their professing Muslim religion and such denial may be violative of Article 15 (1) of the Constitution of India.

Section 125 of Cr. P.C is also applicable to the Muslims including divorced Muslim woman, irrespective of fact that in Muslim personal law, wife ceases to be wife on Talaq. Muslim husband is liable to provide maintenance for divorced wife who is unable to maintain herself, so long as she had not remarried.[212]

The fictional relationship of the wife even after the divorce has been created by the statue in view of the social conditions prevalent in the country to prevent former husband to drive their erstwhile wives to a state of poverty and destitution till they remarry. So it is clear that woman continues to be the wife within the meaning of section 125 of Code of Criminal Procedure, 1973 irrespective of religion and application of personal law.

If we look at the Muslim Personal law, on the point of claim of Muslim divorced lady that it is no longer obligatory for the erstwhile husband to provide maintenance beyond Iddat period, it comes in conflict with right of Muslim divorced lady "to claim maintenance u/Sec. 125 of Code of Criminal Procedure. The Code of Criminal Procedure, 1973 is a general law applicable to all the persons irrespective of their religion. Muslim personal law is a special law applicable to

[212] Harron Rashid V/s. Requeeba Khatoon, 1997 (1) BLJR 93. Available at: Dr. Rakesh Kumar Singh Universal Law Publ. Co. Ltd., Ed. 2011, at page 163

those who are professing Muslim religion and those who are convert to Muslim. In the event of conflict between a special law and a general law, it is accepted judicial principle that special law shall prevail over the general law.[213]

III. MOHAMMAD AHMED KHAN V/S SHAH BANO BEGUM: A REFORMATORY STEP

The Supreme Court is landmark has paved way towards the unification of personal laws. The judgment was described by Mathew, J as

" This (Shah Bano Begum case) is the most brilliant decision and we must compliment the five-judge Bench for this teleological, schematic and purposive interpretation to ameliorate the conditions of the Muslim wives who can be discarded by their husbands whenever they choose to do so, for reasons good, bad or indifferent and indeed, for no reason at all.. This is in perfect consonance with the spirit of our Constitution which, while banning all discriminations on the ground of sex in Art 15 (1), has nevertheless encouraged, special provisions for the women. Since Judiciary is also the State or at least a part thereof..."[214]

Factual matrix: The case was with respect to Ms. Shah Bano, a 62-yearold Muslim woman Madhya Pradesh was divorced by her husband in 1978 and was subsequently denied maintenance. Thereupon she filed a petition under Section 125 of Cr. P.C. in the court of Judicial Magistrate, Indore asking for maintenance at the rate of Rs. 500 per month. During which husband divorced her by pronouncing Talaq. She did not remarry. In defence to Shaha Bano‟s petition for maintenance, he took the pleas that since she is ceased to be wife after Talaq, hen has no obligation to maintain her. However, Magistrate ordered him to pay monthly allowance to his divorced wife, of Rs. 25 per month. Against this order of the Magistrate Shah Bano filed a revision application in the MP High court praying for the enhancement of maintenance allowance. The MP High Court increased the maintenance rate to Rs. 179.20 per month. Mohd. Ahmed Khan preferred an appeal to the Supreme Court. The Supreme Court dismissed the appeal and confirmed the judgment of the High Court.

Judgment and Principle: The Supreme Court by setting a landmark precedent for the for the Courts within the territory of India held that Section 125 of Cr. P.C., 1973 applies to all irrespective of the religion practiced by the persona and section 125 overrides the persona law

[213] S. Arumuganainar vs M/S. Jeenath Roadways

[214] Keshvananda Bharati AIR 1973 SC 1461(1949). Available at: A. M. Bhattacharjee, MUSLIM LAW & THE CONSTITUTION Eastern Law House, 2nd Ed., at page no. 153

if there is anyh conflict between the two. To this extent the judicial pronouncement is instrumental. The court also held that:

"It would be incorrect & unjust to extend the rule of maintenance under Muslim Law to the cases in which the divorced wife is unable to maintain herself, so if the divorced wife is able to maintain herself, the husband"s liability ceases with the expiration of the period of Iddat, but if she is unable to maintain herself after the period of Iddat, she is entitle to have recourse to Section 125 of Cr. P.C."

Thus it seems from the above mentioned observations of the Supreme Court that there is no conflict between the provisions Section 125 of Cr. P.C and those of the Muslim personal law on the question of Muslim Husband"s obligation to provide maintenance for a divorced wife who is unable to maintain herself.

So with the help of this judgment Supreme Court has set a new law applicable in the case of Muslim divorced lady that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of Cr. P. C. after the expiry of period of Iddat also, as long as she does not remarry.

The case created considerable debate and controversy about the extent of having different civil codes for different religions, especially for Muslims in India. This case caused the government, with its absolute majority, to pass Muslim Woman (Protection of Rights on Divorce) Act, 1986 which weakened the judgment of the Supreme Court and, in reality, denied even entirely destitute Muslim divorcees the right to maintenance from their former husbands.

IV. JUDICIAL POSITION FOLLOWING THE PIVOTAL RULING IN THE SHAH BANO CASE

Judiciary started interpreting the provisions of the Act in different directions, since as stated above provisions & words (including Preamble) of the Act seems unclear and ambiguous.

AP High Court has observed that use of word „within" does not permit an interpretation to be put to the section that the liability of the husband to make a reasonable and fair provision and maintenance to his divorced wife extends beyond the period of Iddat.

With respect to the controversial nature of this Act, a writ petition under Article 32 of the Indian Constitution was filed challenging the constitutional validity of the Act in the case of *Daniel Latifi V/s Union of India*[215] by making Section 3 of the Act as the pivotal point since this provision was interpreted restrictively.

[215] AIR2001SC3958.

By analyzing the Preamble of the Act, Statement of Objects and Reasons of the Act, and the judgment given by Supreme Court in Mohammad Ahmed Khan V/s Shaha Bano Begum, Court has advocated the validity of the Act and came to the following conclusion:

1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.
3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.
4) The provisions of the Act do not offend Articles 14 15 and 21 of the Constitution of India

Supreme Court once again in *Iqbal Bano V/s. State of U.P*[216]. and in the case of reiterated that divorced women can claim maintenance beyond the period of Iddat and held at the same time that provisions of the Muslim Women Act do not offend Article 14, 15 & 21 of the Indian Constitution. The court further observed that "right under Section 125 of Cr. P.C. extinguishes only when she receives "fair or reasonable" settlement u/Sec. 3 of the Muslim Women Act. The wife will be entitled to receive maintenance u/Sec. 125 of Cr.P.C. until the husband fulfills his obligation u/Sec. 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986[217].

V. CONCLUSION

Unlike other personal laws, a Muslim divorced woman is placed separately and differently. Even the application of general law (Section 125 of Cr. P.C.) was subjected to the requirement of statuses & "religion" of a person (Muslim Divorced woman). When a deserted or destitute Muslim (divorced) wife who is unable to get maintenance by virtue of prohibition in Muslim

[216] (AIR 2007 SC 2215)
[217] Kunhimohammed v. Ayishakutty (2010 2 KLT 71) Available at: Flavia Agnes, FAMILY LAW: VOLUME II-MARRIAGE, DIVORCE, AND MATRIMONIAL LITIGATION, Oxford University Press, 2011, at page no. 164.

Law, approaches & files application under Section 125 of Cr. P.C., the usual ploy adopted by the husband was to plead that he has already divorced his wife and hence he is not labile to pay maintenance. This argument became stronger after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Fortunately, the judiciary has shown awareness towards the pitiable position of Muslim woman and has in real sense empowered Muslim women, especially divorced woman whose miseries are uncountable. The decision given by the Supreme Court in Danial Latifi case settles the law in favour of the divorced Muslim wife and vests her with a "constitutional right" to livelihood through maintenance (the beginning of which was made by a path breaking judgment of Supreme in Shaha Bano Case). The present Act invites more criticism than praise. The content of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has left an opportunity to the judiciary to not only provide some relief to the deserted Muslim wives but also spur a countrywide debate on the need to look after them and not abandon them to destitution. It has expanded the horizons of the egalitarian motive of the Act. In fact, it becomes a need of the hour to do away with (maintenance) laws which are based on religion and which restrict the application of general laws with respect to the basic "livelihood" of the person as is guaranteed & envisaged under Article 21 of the Indian Constitution. So keeping in mind the guarantee of Livelihood State cannot enact or enforce those laws which takes away egalitarian "right to be maintained" by those who are under legal or/and moral obligation to maintain someone. State must try to enforce the mandate or requirement of a common civil code under Article 44 of the Indian Constitution at the least with respect to the some essential & basic aspects of personal laws.

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NEW DIMENSIONS OF MENTAL CRUELTY AS A GROUND FOR DIVORCE

- **DR. MANOJ KUMAR SHARMA**[218]

ABSTRACT

This article delves into the evolving concept of mental cruelty as a valid ground for divorce in contemporary legal frameworks. As societies become more attuned to the intricacies of emotional well-being and psychological health, the understanding of mental cruelty within the context of marriage has evolved significantly. The article explores the expanded dimensions of mental cruelty, considering the impact of digital technology, social media, and changing societal norms. It also discusses the legal implications, challenges, and precedents surrounding this nuanced issue.

Keywords : divorce, mental cruelty, emotional abuse, legal implications, digital technology, social media, and evolving societal norms.

I. INTRODUCTION

India, being a country of diverse faith & religions has seen a paradigm shift in the way religious customs were practiced. Not so long ago, Hindu families and their customs were mostly based on the ancient traditions where marriage was considered as a compulsory affair between two individuals. For Hindus, it was a pious association of two families, more than just contractual relationships. Scriptures also suggests that they believed it to be a union of seven births planned by the almighty.

The Hindus were supposed to follow the ashram system, where they were guided through different ashrams in their life cycle. The four ashrams were; Brahmacharya (student); Grihasta (housekeeper); Vanaprashtha (forest dweller) and Sanyassa (abandoning the world). It is unchallenged belief that grihastha was the most important of all ashrams.

Customs are an important source of law and nevertheless many of our personal laws are based upon ancient customs. Reluctantly, attempts were made as early as 1920 to codify Hindu personal law. However, correct codification took place in 1955 and 1956, when Congress passed four important laws. The legislations were The Hindu Marriage Act, 1955; The Hindu

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Adoption and Maintenance Act, 1956; The Hindu Succession Act, 1956 and The Hindu Minority and Guardianship Act, 1956. Legally, religious Hindus, Jains, Buddhists, and Sikhs are considered Hindus and are therefore subject to the above law.[219] Similarly the Muslims are governed by The Muslim Personal Law (Shariat) Application Act, 1937 which are unlike the Hindu law, un- codified.

For centuries, Indian women had to face cruelty in various ways at every stage of their lives. In marital relationships, they suffered emotional and physical trauma, yet they were expected to remain loyal and obedient to their husbands. With the adoption of a rights-based constitution, attempts were made to change the low status of this woman. Many laws have been passed to protect women and their rights from harm, giving them the freedom and power to oppose the cruelty committed against them. Cruelty in marriage were not recognized as a reason for divorce until 1976, after which through the amendment of the Hindu Marriage Act of 1955 it was included as a valid reason of divorce. The cruelty of a wife to her husband appeared a while ago and is just as important.

Cruelty is a conduct of such a character as to have caused danger to life or health, bodily or mental, gives rise to reasonable apprehension of such danger. Under the Hindu Marriage Act, Special Marriage Act, Parsi Marriage and Divorce Act and Divorce act it is a ground for both Judicial Separation and Divorce.

The concept of Cruelty has changed a lot, it is not as same as it was hundred and fifty years back. In the earlier times, Cruelty basically means physical Cruelty like beating, or torching someone physically. Earlier, it was basically against men but now it is both against men and women.

The formulation contains the basic element of cruelty and includes both mental and physical cruelty, though it embodies the typical nineteenth century emphasis upon the necessity of protecting the petitioner and the belief that no conduct can amount to cruelty in law unless it has the effect of producing actual or apprehended injury to petitioner's physical or mental health. It also emphasizes the injury need not be actually suffered; a reasonable apprehension of injury is enough. But where there is no probability of injury, offence is not committed. The difficulty of applying this test arises on account of the fact that the respondent's conduct may not cause any injury to a normal person, but it may cause injury to a hypersensitive petitioner.

[219] Hindu Marriage Act, 1955.

II. OUTLINING CRUELTY AS A VALID GROUND FOR DIVORCE UNDER THE HINDU LAW

Of all marital crimes, cruelty is the most difficult to define. Parliamentarians and judges deliberately refrain from developing a definition of cruelty because there are no fixed and defined parameters for what constitutes cruelty. Skull v. Tripathi, the court found, "attempts to edit the complete list of cruelty can never be successful." In addition, what is considered cruel in one case is entirely dependent on the facts and circumstances of one case and may not be the case in another. Lord Denning in the case of Sheldon v. Sheldon[220] said,

"The categories of cruelty are not closed. Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

"Cruelty was held to be a conduct of such character as to have caused danger to life or health, bodily or mentally, gives rise to reasonable apprehension of such danger. The definition includes both physical and mental cruelty within its scope but it also emphasizes on the typical nineteenth century belief that no act can amount to cruelty unless it creates an apprehension or actually causes injury to the petitioner".[221]

In a recent ruling, the Supreme Court observed that "cruelty is being used in relation to human conduct or human behaviour, it is all the more difficult to define it. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other."[222]

Before the amendment of the Hindu Marriage Act in 1976, cruelty was a ground for judicial separation only. The 1976 revision of the law made cruelty a reason for divorce taking into account changes in social morals.[223] The amendment also clarified that there is no need to be afraid of danger or harm to his/her life while cohabiting to compose cruelty. Article 10 (1) (b) of the Act omitted the phrase "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party".[224] The Hindu Marriage Act states that a marriage "dissolved by a decree of divorce on the ground that... after the solemnization of marriage, treated the petitioner with cruelty."

[220] Sheldon v. Sheldon, (1966) 2 All E.R. 257.
[221] Russel v. Russel, 1997 A.C. 303.
[222] Shobha Rani v. Madhukar Reddi MANU/SC/0419/1987
[223] V. Bhagat v. D. Bhagat, MANU/SC/0155/1994.
[224] 13(1) (i a), Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955, (India).

Therefore, after marriage, if either the husband or the wife treats the other cruelly, both the husband and the wife are free to obtain a divorce decree. However, the general idea is that it is usually the husband who treats his wife cruelly. But that's not the case. Under the Indian Divorce Act of 1869, cruelty was only available to the wife as a reason for divorce, while the Special Marriage Act of 1954[225] was available to both husbands and wives. Defendants have treated the petitioner cruelly since their marriage. It is also important to note that the term "respondent" also includes "a child who beat her father at the request of her mother".[226] If the husband does not protect his wife from his persistent parents, he will be guilty of cruelty.[227]

The defendant's intention is one of the common lookouts made by the court in determining whether a particular act is cruel. The word "treated" by law means the intentional act of a respondent which was found to be cruel. Still, intent is not an integral part of cruelty. In the case of Bhagwat v. Bhagwat[228] of the Bombay High Court ruled that the husband did not intend to be cruel to his wife, but his actions were cruel. He suffered from schizophrenia, which was not a good defense against the cruel plea of a woman.

Recently, while hearing a matter on cruelty as a reason for divorce, the Supreme Court ruled that defendants' actions must be significant in order to constitute cruelty. At the same time, it indicates whether a rational person is acceptable to live in such a situation. Marriage is a gentle and pious bond, so the judgment of cruelty must be based on the psychological changes in spouse's behavior. Small quarrels and petty arguments are not enough to justify cruelty. The Supreme Court also said that forgiveness and coordination are needed to continue the marriage, and therefore slight spousal differences and controversies cannot be exaggerated enough to apply for divorce.

Marital cruelty can be physical, mental, emotional, or sexual. Because India is a patriarchal society, women have always been treated inferior to men. They are treated like their property and are intended to serve them throughout their lives. There is no one type of cruelty which makes it increasingly difficult to pinpoint exactly what it is. Mental cruelty involves causing agony and suffering to a partner in some way that makes it difficult for either person to live with. Physical cruelty includes beatings, slaps, and other forms of physical violence. Sexual cruelty, on the other hand, include forcing a partner to indulge in sexual intercourse or unnatural

[225] 27(d), Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).
[226] Savitri v. Mulchand, MANU/DE/0296/1986.
[227] Shyam Sunder v. Santa Devi, A.I.R. 1962 Or 60.
[228] Bhagwat v. Bhagwat, MANU/MH/0126/1967.

sex. Indian courts also recognize the denial of sexual intercourse in marriage as a component of mental cruelty.

III. MENTAL CRUELTY - STILL AN ABSTRACT CONCEPT?

Mental cruelty under Section 13(1) (i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together".

The Black's Law Dictionary (8th ed., 2004) describes the term "mental cruelty" as "(without actual violence) the behavior of a spouse that endangers life, physical health, or mental health of the other spouse. Mental cruelty does not fit the strict definition since the constituents of mental cruelty are neither limited nor constant. Changes in lifestyle, education, family patterns, modernization and globalization, and increased use of social media are some of the factors contributing to the changing dimensions of mental cruelty. Therefore, what may not be called an act of cruelty in past times, can fall in its sphere today.

In the matter of *Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan*, the Supreme Court acknowledged that the concept of legal cruelty changes as social concepts and living standards change and evolve. Some of the factors recognized as mental cruelty by the Supreme Court are indifference from the spouse, persistent abuse, regular ridiculous remarks, refraining from making sexual relations, and blaming the spouse for it. Not only these, but the constant threat of dissolving marriage and harassment was recognized as the basis for mental cruelty.

In the case of *Samar Ghosh v. Jaya Ghosh*, the Supreme Court gave a list of illustrations which depict mental cruelty. The list however, is not exhaustive.

"Unilateral decision of refusal to have intercourse for a considerable period without any physical incapacity or valid reason may amount to mental cruelty. Unilateral decision of either husband or wife after marriage not to have a child may amount to mental cruelty. Frequent rudeness of language, petulance, and indifference, sustained abusive and humiliating treatment calculated to torture or render miserable the life of the spouse could amount to mental cruelty."

Apart from that, if the husband or wife is sterilized without the knowledge or consent of the spouse, or (in the latter case) abortion, it can also be mental cruelty. In the case quoted here, the husband filed a lawsuit for mental cruelty because his wife did not cook for him, and she cooked for herself only. The Supreme Court recognized the wife's conduct as an act of mental cruelty.

Another point of debate is the Supreme Court and other High Court decisions that ruled that denial of sex constitutes mental cruelty. The court has approved this proposal, but the issue of marital rape has not yet been decided by the court. Marital rape has not yet been criminalized, but it is itself a mental cruelty against wife. This means a lack of respect, dignity and sensitivity to his wife and violates her right to life and freedom under Article 21 of the Indian Constitution. The woman cannot be treated as someone "who does not have a say over her body and someone who has no right to deny sexual intercourse to her husband."[229] The Delhi High Court correctly ruled that "marriage is not a contract for legal sexual pleasure." If denial of sexual intercourse is equivalent to inflicting mental cruelty on the husband, then forcing the wife to do the same is inflicting mental cruelty on her. Therefore, the court or parliament needs to clarify this legal issue by addressing the exception of Section 375 IPC, thereby making marital rape a criminal offense.

Various personal laws in India have established cruelty as a reason for divorce. Section 2 (vii) of the Dissolution of the Muslim Marriage Act of 1939 states: "A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on the ground that the husband treats her with cruelty..." Under Section 32 (dd) of the 1936 Parsi Marriage and Divorce Act, the word cruelty is the basis for the dissolution of marriage as under: "That the defendant has since the solemnization of marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the plaintiff to live with the defendant."

The Indian Divorce Act, under Section 10 provides "Any wife may present a petition to the District court or the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof (her husband) has been guilty of adultery coupled with such cruelty as without adultery would have entitled her to a divorce."

Interpretation of the word "cruelty" can be found in Sec. 27 (d) of the Special Marriage Act, 1954 as: "The respondent has, since the solemnization of marriage, treated the petitioner with cruelty".

Section 13(1) (ia) of Hindu Marriage Act, 1955 provides. "The other party has, after the solemnization of marriage, treated the petitioner with cruelty." Cruelty as a reason for divorce was introduced into this law by the 1976 amendment. Prior to that, it was not a valid reason for divorce, but for judicial separation only.

[229] Independent Thought v. Union of India, MANU/SC/1298/2017.

Apart from these personal laws, Indian criminal law also makes cruelty against women criminal offense under section 498A of the law. The section reads as: "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine."[230] The section mandates the offence as non-bailable, cognizable and non-compoundable. It includes not only physical cruelty, but also mental cruelty in the form of "torture and abnormal behavior".

Parliament has passed the Protection of Women from Domestic Violence Act, 2005 (PWDVA) in order to protect the feminine gender from family violence and make their right to life under Article 21 of the Indian Constitution more meaningful.[231] The law provides for one year's imprisonment and a maximum fine of Rs. 20,000 when wife is exposed to domestic violence. However, Section 498A IPC provides relief only to women who have faced cruelty by their husband or their husband's family. Husbands exposed to cruelty, especially mental cruelty, do not have remedies under this section.

IV. THE EMERGING CONCEPT OF CRUELTY AGAINST MEN

The law on a wife's cruelty against her husband is not as clear as the other way around. It is difficult for women to accept that they are inflicting cruelty on her husband, as men continue to dominate women in our country. However, with increasing awareness of women, a wave of feminism, and increasing education and independence of women, women are beginning to abuse legal provisions for their husbands to meet their needs and demands. Indian courts have noted this several times and have allowed husbands to divorce because of the mental cruelty committed by the wife.

In one case where the wife always asked her husband for money and he did not give it to her, she would threaten him to falsely drag him into a dowry case, kill her children, and thereby blame him, the Supreme Court ruled that the husband could end the marriage due to the mental cruelty committed by his wife.

In another case in which a woman filed a complaint under Article 498A, the Court after investigation found that the complaint, she had made was incorrect solely to embarrass and imprison her husband and her family. The court granted divorce because filing a false proceeding was considered cruel on part of the wife. According to established procedural law, false complaints by one spouse are always cruel and the other spouse can apply for divorce.

[230] 498A, Indian Penal Code, 1860, No. 45 of 1860.

[231] Reena Jaiswal, Right to Live with Dignity - A Basic Human Right (With Special Reference to Gender Based Violence and Discrimination), 24 Australian Law Journal32, 36 (2016-17).

Section 498A was inserted as a statute with the praiseworthy purpose of punishing cruelty inflicted by a husband or his relatives against the wife, especially if the cruelty could lead to suicide or the murder of a woman. Many of these complaints are registered in malicious intent. At the time of filing the complaint, the impact and consequences are not visualized. Such complaints are against the defendants as well as the complainant.[232]

It is an accepted fact that the abuse of Section 498A is increasing due to the imprisonment of husbands and their families, as well as relatives including old parents and grandparents. The wives try to blame the husband based on false or exaggerated claims. This leads to mental harm and distress, which causes mental cruelty. Vague claims without verifiable evidence leads to harassment and even arrest of innocent families, including women and the elderly. The same has been acknowledged by the courts in several decisions. As a result, as soon as the woman files a false report, police lodge a F.I.R., arrests her husband, and in some cases his relatives who have no opportunity to speak. All burden of proof rests on the husband to prove that he is innocent.

V. CONCLUSION

"No one can be tortured, cruel, inhumane, or degrading or punished."

Against this background, cruelty by either husbands or wives is a breach of fundamental right to dignity and freedom. The Constitution of India i.e., the basic norm of India, guarantees the right to live with dignity as it is part of the right to life under Article 21. Inflicting physical and mental distress and inflicting suffering on others is the same as injuring others.

Due to the modernization and collapse of the family system, the divorce rate in India is increasing year by year. According to reports from the National Crime Investigation Bureau, the number of complaints filed under Section 498A of the IPC has increased proportionately since the beginning of the 21st century. Very few cases have been convicted in proceedings, but in most cases the husband is acquitted.

Indeed, some laws have been prejudiced against women to compensate for the abuse they have endured and are currently undergoing over the past few years. To support the dissertation, Section 32(2) of the Protection of Women against Domestic Violence Act, 2005 can be expressed as an example here, which says "Upon the sole testimony of the aggrieved person, the court may conclude that an offence under sub-section (1) of section 31 has been committed by the accused." However, without investigating whether the complaints filed are correct or incorrect, the husband and his family can face social stigma and mental distress.

[232] Rajesh Sharma v. State of U.P., MANU/SC/0909/2017.

On the contrary, we must not forget the loopholes in the law that are not at all advantageous to women. Therefore, the laws related to cruelty need to be clearly stated in all forms and types. Therefore, the legislature is expected to provide a foundation to the expression on which it can stand, rather than leave it as a hanging concept. Until the concept of cruelty becomes clear, it is always the responsibility of the judiciary to determine whether an act is cruel, depending on the facts of the situation and the parties to the dispute.

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BALANCING PROGRESS AND PRESERVATION: THE IMPACT OF ENVIRONMENTAL LAWS ON REAL ESTATE DEVELOPMENT IN INDIA

- BHARGAV GOWDA M R[233]

Abstract:

This research paper delves into the intricate interplay between environmental legislation and the burgeoning real estate sector in India. As real estate development in the country witnesses remarkable growth, it also brings forth significant environmental repercussions, ranging from resource depletion and biodiversity loss to air and water contamination. In response, India has enacted a comprehensive legal framework, including the Environment Protection Act, Forest Conservation Act, and Wildlife Protection Act, alongside state-specific laws. These regulations mandate developers to secure clearances, implement resource conservation strategies, and adhere to environmental preservation laws.

The legal framework, although complex and time-intensive, is pivotal in curtailing the environmental impact of construction activities and fostering sustainable development. The rising trend of green buildings, supported by the Indian Green Building Council's Green Building Rating System, underscores the increasing importance of environmental considerations in real estate projects.

The paper also explores the challenges faced by the real estate sector, including increased costs, delays in development, limited land availability, reputational risks, and potential legal liabilities arising from non-compliance with environmental laws. International comparisons, specifically with Europe, reveal differences in legal frameworks, enforcement mechanisms, and cultural attitudes toward sustainability.

Case studies, such as the Aarey Forest Case and the Art of Living Case on Yamuna Flood Plain, illustrate the significance of environmental laws in regulating real estate development. Furthermore, international cases like the Pulp Mills case and Chevron case provide insights into the complex dynamics between economic development and environmental protection.

The research concludes by emphasizing the need for a delicate balance between economic progress and environmental preservation. It advocates for increased awareness, incentives, and

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sustainable practices to promote eco-friendly development. The paper underscores the challenges faced by developers in adopting environmentally friendly methods due to higher costs and suggests policy measures, such as tax exemptions, to encourage sustainable practices. Ultimately, the research highlights the crucial role of effective implementation and enforcement of environmental laws in achieving a harmonious equilibrium between development goals and environmental sustainability in the Indian real estate sector.

Key Words:

Environmental law, real estate development, sustainability, green buildings, legal framework, India, environmental impact assessment, sustainable development.

INTRODUCTION

This essay underscores the influence and facets of environmental legislation on the advancement of real estate in India. The development of real estate in India carries noteworthy environmental repercussions, encompassing aspects such as the depletion of natural resources, the diminution of biodiversity, and the contamination of air and water. In response to these issues, India has instituted various environmental laws, such as the Environment Protection Act, the Forest Conservation Act, and the Wildlife Protection Act, along with several state-specific laws. These regulations necessitate that developers secure requisite clearances and approvals, implement strategies for the preservation and efficient utilization of natural resources, and adhere to pertinent laws and regulations governing environmental conservation. The legal framework overseeing environmental protection in real estate development is intricate and time-intensive, yet crucial to ensuring the curtailment of the environmental impact of construction activities and the advancement of sustainable development within the country. Furthermore, there is a rising trend of green buildings in India, with the Indian Green Building Council (IGBC) introducing the Green Building Rating System[234], which outlines a structure for the planning, construction, and operation of environmentally-friendly buildings in the country.

The real estate sector in India has experienced significant expansion in recent decades, marking notable growth. Nevertheless, this swift development has concurrently presented an array of environmental apprehensions and predicaments that necessitate attention within the legal parameters guiding real estate growth.

[234] https://igbc.in/green-rating-system.php

Environmental issues have surfaced due to the surge in real estate activities and infrastructure development, spanning from heightened air pollution to the diminishing annual yields in agriculture and fisheries. This persistent rise in atmospheric carbon concentrations is particularly notable in densely populated urban centers like Mumbai, Pune, and Kolkata, where the air quality index has fallen below acceptable levels.

Nevertheless, the 42nd Amendment Act of 1976 to the Constitution explicitly incorporated provisions for the safeguarding and advancement of the environment by introducing articles 48A and 51A (g) in the Directive Principles of State Policy (DPSP) and Fundamental Duties, respectively. Consequently, both the government and the Government of India have responded earnestly to address this concerning trajectory. As per Article 48A of the Indian Constitution, "the State shall endeavor to protect and improve the environment and to safeguard the country's forest and wildlife," while Article 51A stipulates that "it shall be the duty of every citizen of India to protect and enhance the natural environment, encompassing forests, lakes, rivers, and wildlife, and to exhibit compassion for living creatures.[235]

Environmental laws in India are primarily governed by the Environment Protection Act, 1986, which establishes the legal framework for the prevention, control, and alleviation of environmental pollution and related aspects. Other relevant laws include the Forest Conservation Act, 1980, Wildlife Protection Act, 1972, Water (Prevention and Control of Pollution) Act, 1974, and Air (Prevention and Control of Pollution) Act, 1981. Appropriate authorities have been appointed under the aforementioned statutes to oversee the implementation and regulation of the same.

A paramount focus of environmental law in the context of real estate development in India pertains to the repercussions of construction activities on natural resources such as land, water, and air. Extensive construction endeavors frequently entail the clearing of forests and other natural habitats, resulting in biodiversity loss and ecological imbalance. Furthermore, construction activities produce substantial amounts of waste, encompassing debris, construction materials, and hazardous substances, posing potential threats to both human health and the environment.

To address these issues, environmental laws in India stipulate that real estate developers must secure requisite clearances and approvals from pertinent regulatory bodies before initiating construction activities. These approvals typically encompass environmental impact assessments, which evaluate the potential environmental consequences of a project and propose

[235] Nazneen Zafar, Real Estate and Environmental Issues, Indian Society for Legal Research, 2017

measures to mitigate such impacts. The Environmental Impact Assessment (EIA) process is overseen by the Ministry of Environment, Forests, and Climate Change (MoEFCC) at the national level and by State Environmental Impact Assessment Authorities (SEIAAs) at the state level. In Bengaluru, the State Environment Impact Assessment Authority (SEIAA) holds the responsibility of granting Environment Clearance (EC) for projects. Builders are not permitted to prepare the construction site without obtaining EC. The entire procedure of securing environmental clearances can be intricate and time-intensive, with variations based on the project's size and nature. Nonetheless, this process is indispensable to ensure the minimization of the environmental impact resulting from construction activities.

Additionally, Entities/ Individuals concerned with development of Real Estate builders are required to obtain permits for activities such as excavation, mining, and blasting, which have the potential to cause environmental damage. In some cases, builders may be required to obtain clearance from multiple regulatory bodies, such as the MoEFCC, the National Green Tribunal (NGT), and the State Pollution Control Board (SPCB).

Another aspect of concern in Indian real estate development pertains to the handling of waste generated throughout construction activities. The Construction and Demolition Waste Management Rules of 2016 dictate that builders must adopt measures for the collection, transportation, and proper disposal of construction and demolition waste. The aim is to mitigate its environmental impact and encourage recycling and reuse. These regulations also require the incorporation of recycled construction and demolition waste in construction activities, serving as a strategy to conserve natural resources and diminish environmental consequences.

Water conservation stands as a crucial facet of environmental law within the realm of real estate development in India. Given the escalating scarcity of water resources, real estate developers are obligated to institute strategies for the preservation and effective utilization of water during construction endeavors. The Water (Prevention and Control of Pollution) Act of 1974 mandates that builders secure requisite permits from local authorities for water usage and institute measures for the treatment and reuse of wastewater generated throughout construction activities.

Builders are also required to comply with the Building Code of India (National Building Code 2016)[236] and the Energy Conservation Building Code 2017[237], which provide guidelines for the design and construction of buildings that are energy-efficient and sustainable. The codes cover

[236] http://www.bis.gov.in/index.php/other-division/national-building-code-2016
[237] http://www.beeindia.gov.in/content/ecbc-2017

various aspects such as site planning, building envelope design, energy and water efficiency, and indoor air quality, among others. Compliance with these codes can help reduce the environmental impact of buildings and promote sustainable development.

Air pollution constitutes another substantial environmental apprehension in the context of real estate development in India and is regulated by the Air (Prevention and Control of Pollution) Act of 1981, which directs the control and prevention of air pollution across the country. Construction activities have the potential to produce significant quantities of dust and other particulate matter, posing considerable consequences for air quality and human well-being. Builders are obligated to adopt measures like dust suppression systems and appropriate disposal of construction waste to mitigate the adverse effects of construction activities on air quality.

In recent times, there has been a heightened emphasis on sustainable development in India, with environmental considerations playing an increasingly pivotal role in real estate development. The popularity of green buildings, designed to mitigate the environmental impact of structures, is on the rise in the country. The Indian Green Building Council (IGBC) has introduced the Green Building Rating System, offering a comprehensive framework for the planning, construction, and operation of environmentally friendly buildings in India. This rating system encompasses diverse aspects, including site selection, energy efficiency, water conservation, and indoor environmental quality, among others.

Real estate regulations have wielded substantial influence since their inception, with environmental clearances emerging as a notable impediment to developers' progress. The broader notion of ease of doing business in India encompasses challenges in advancing, and the struggle with environmental clearances constitutes a significant aspect of this difficulty. The government's goal is for India to rank in the top 50 countries, but in the most recent World Bank rankings for the ease of doing business, India only managed to claim the 77th spot.[238]

IMPACT OF ENVIRONMENTAL LAWS ON REAL ESTATE DEVELOPMENT

Environmental laws can have a significant impact on international real estate development in a number of ways. Some of the key impacts are:

1. **Increased costs:** Environmental laws often require builders to undertake costly measures to comply with regulations, such as conducting environmental impact assessments or implementing pollution control measures. These costs can add up and make it more expensive to develop real estate in certain areas. A developer's entire

[238] Akash Pharande, Delayed environmental clearances contribute to delayed projects, EPCWorld, 2021

project expense can increase by up to 12% as a result of bureaucratic delays in receiving environmental certifications and other clearances.

2. **Delays in development:** Compliance to environmental laws can lead to delays in the developmental timeline. Before 2014, the timeframe for obtaining environmental approvals varied by city, taking an average of 1-2 years. This duration was subsequently reduced to 108 days, at least in theory. The government then suggested a fixed time limit of 60 days for securing the required permissions. For instance, if an environmental impact assessment uncovers potential risks or concerns, builders may be required to adjust their plans or seek additional permits, introducing potential delays to the project timeline.
3. **Limited availability of land:** Environmental laws have the capacity to restrict the utilization of specific land types or regions, such as wetlands or protected wildlife habitats. This limitation can curtail the availability of land for real estate development, especially in regions governed by stringent environmental regulations.
4. **Reputation and public relations:** Non-compliance with environmental laws can lead to adverse publicity and harm the reputation of the developer. Furthermore, environmental groups and local communities might resist real estate development projects perceived as causing a detrimental impact on the environment.
5. **Potential legal liabilities:** Failure to adhere to environmental laws can expose builders to legal liabilities, encompassing fines, penalties, and lawsuits initiated by government agencies or affected parties.

As urbanization flourishes in India, the environmental impact of the real estate sector has become a persistent question within the construction industry. The real estate industry carries substantial responsibility for effectively managing its adverse environmental effects. Amidst continuous growth and the pursuit of enhanced living standards, sustaining environmental responsibility poses a considerable challenge. The real estate sector has initiated the implementation of solutions to address this concern.[239]

The Future is Green

Early in the 1990s, interest in green building really began to grow, but it took over ten years for it to become widely recognised. It was always regarded as unique and raised the bar for later structures.

[239] https://www.aparnaconstructions.com/the-impact-of-the-real-estate-sector-on-the-environment/

With ‘green’ becoming the trend, there is an increased demand for buyers looking for environment-friendly projects. The basic sustainable solution is to use the resources sustainably. This could mean a solution as simple as having better ventilation in the house for improved quality of indoor air, resulting in the reduced use of air conditioners. So, the basic idea is to utilize the natural resources in such a way that the resource needs of future generations are not compromised.

Sustainability is the Key

In the early 1990s, interest in green building began to gain traction, but it took more than a decade for it to achieve widespread recognition. It was consistently seen as innovative, setting a higher standard for subsequent structures.

With 'green' emerging as a trend, there is a growing demand among buyers for environmentally friendly projects. The fundamental sustainable approach involves the responsible use of resources. This could involve relatively simple solutions, such as implementing better ventilation in homes to enhance indoor air quality, leading to reduced reliance on air conditioners. Therefore, the core concept is to harness natural resources in a manner that does not compromise the resource needs of future generations.

Challenges in India

The rapid pace of real estate development in India is exerting significant pressure on the environment. While many builders have embraced the green concept, some still adhere to conventional methods. The main challenge for green buildings in India revolves around misconceptions and a lack of information. Essential technology and the construction costs present formidable hurdles for numerous builders and projects. Despite these challenges, the Indian real estate sector is gradually adopting the 'green' trend, driven by the escalating demand for environmentally sustainable projects.

AWARENESS AND INCENTIVES: A SIGNIFICANT STEP

Maintaining a delicate balance between development and the environment is a crucial aspect in real estate projects. The lack of awareness among both the public and developers remains a significant reason for the persistence of conventional methods. The Ministry needs to take substantial measures to foster an eco-friendly culture in development. Raising awareness is a pivotal step to achieve a consensus between development goals and environmental concerns. The government should establish a platform where developers receive sustainable plans and methods to enhance their real estate projects in harmony with environmental protection.

Introducing schemes that incentivize and support developers in adopting eco-friendly methods is a crucial step towards promoting sustainable development. One such measure involves

offering tax exemptions to builders and developers, encouraging them to embrace eco-friendly projects like green buildings.

The primary hurdle for developers is that environmentally friendly development tends to incur higher costs compared to conventional real estate projects. Consequently, the property value would also rise proportionally with the increased costs. This poses a challenge as potential buyers or consumers may hesitate to invest in such expensive real estate properties. This reluctance could have an adverse impact on developers, discouraging them from opting for more costly, environmentally friendly methods.

There are a few **RECENT JUDGMENTS** related to environmental laws and real estate development:

1. ***Aarey Forest Case***[240]**:** In this case, the Supreme Court of India ordered a status quo on the felling of trees in Aarey forest case in Mumbai for the construction of a Metro Rail car shed. People have been protesting the Mumbai Metro Rail Corporation Limited (MMRCL)'s decision to cut about 2600 trees in Aarey Milk Colony. The background The Aarey Colony, measuring 1,287 hectares and located adjoining to the Sanjay Gandhi National Park, is known as a major green lung of Mumbai. According to the Central Pollution Control Board (CPCB) data, the air quality in Mumbai was the worst in 2018 in the last 20 years. What are the protesters saying? Aarey forests are known as the 'lungs' of Mumbai.
2. ***Art of Living Case on Yamuna Flood Plain; National Green Tribunal***[241] **:** The National Green Tribunal (NGT) held the Art of Living Foundation of Sri Ravi Shankar responsible for the alleged damage caused to the Yamuna floodplains due to the World Cultural Festival organized in March 2016. NGT Panel found that the organizers of the Art of Living Festival violated the environmental norms and it has severely damaged the food plan area at the bank of Yamuna River in Delhi. Earlier, the Government of Delhi and Delhi Development Authority (DDA) had permitted the Art of living festival organizers, but it was under some conditions. The NGT panel imposed a penalty of Rs. 5 Crore on Art of Living Foundation as environmental compensation after coming down heavily on the foundation for not disclosing its full plans. The panel also warned AOL Foundation that in case of failure to pay the penalized amount the grant of Rs.2.5 crore which the ministry of culture is supposed to pay AOL will be attached. While

[240] https://www.rset.edu.in/download/gscc/save-aarey-forest-mumbais-green-lung.pdf

[241] Sristi Raichandini, 15 Landmark Judgments on Environmental Protection, Legal Desire

reacting with dismay to the verdict, the Art of Living Foundation expressed disappointment and claimed that it had complied with all environment laws and norms and its' submissions were not considered by NGT. The Art of Living Foundation said in a statement that-"We will appeal to the Supreme Court. We are confident that we will get justice."

3. ***Goa Foundation v. Union of India:*** In this ongoing case, the Supreme Court of India is considering a petition filed by the Goa Foundation, a non-profit organization, which seeks to protect the Western Ghats region from environmental degradation caused by mining activities. The court has ordered a ban on mining in the region and is currently considering a report by a court-appointed committee on the issue[242].

These judgments demonstrate the importance of environmental laws in regulating real estate development and protecting natural resources. They also highlight the need for effective enforcement of these laws to prevent unauthorized construction and other activities that can harm the environment.

There have been several **INTERNATIONAL CASES** related to environmental law and real estate development. Here are a few examples:

1. ***The Pulp Mills case (Argentina v. Uruguay):*** In this case, Argentina accused Uruguay of violating environmental regulations by authorizing the construction of two pulp mills on the Uruguay River. Argentina claimed that the mills would cause pollution and harm the environment in the surrounding areas. The International Court of Justice (ICJ) ruled that Uruguay had violated some procedural obligations under international law but did not find that the mills themselves caused significant harm to the environment[243].
2. ***The Chevron case (Lago Agrio case):*** This case involved a lawsuit brought by Ecuadorian indigenous groups against Chevron for alleged pollution caused by the company's operations in the Amazon rainforest. The plaintiffs claimed that Chevron had dumped toxic waste in the region, causing environmental damage and health problems. The case was heard in various courts in the United States and Ecuador, with

[242] Goa Foundation v. Union of India, Writ Petition (Civil) No. 460 of 2004.

[243] "Pulp Mills on the River Uruguay (Argentina v. Uruguay)." International Court of Justice, https://www.icj-cij.org/en/case/135.

mixed outcomes. In 2018, an international tribunal ruled that Ecuador had violated its obligations under international law by failing to protect Chevron's rights [244].

3. ***The Arctic Sunrise case (Netherlands v. Russia)*:** In this case, the Netherlands accused Russia of violating international law by seizing the Arctic Sunrise, a ship owned by Greenpeace, and detaining its crew. The ship was protesting against Russia's oil drilling operations in the Arctic. The Netherlands claimed that Russia had violated the United Nations Convention on the Law of the Sea and other international environmental agreements. The International Tribunal for the Law of the Sea ruled in favor of the Netherlands and ordered Russia to release the ship and its crew[245].

These cases illustrate the complex issues that arise when balancing environmental protection with economic development, particularly in the context of real estate development. International law provides a framework for addressing these issues, but effective enforcement can be challenging, particularly when different countries have different priorities and legal systems.

COMPARISON BETWEEN INDIA AND EUROPE

When it comes to environmental law and real estate development, India and Europe have significant differences in their approach, legal framework, and enforcement mechanisms[246]. Here are some key differences[247]:

1. ***Legal framework***: Europe has a more robust legal framework governing environmental protection in real estate development compared to India. The European Union has several environmental laws and regulations that apply to real estate development, such as the Environmental Impact Assessment Directive, the Birds and Habitats Directives, and the Water Framework Directive, among others[248]. These laws mandate builders to assess the environmental impact of their projects, obtain necessary permits and approvals, and implement measures for the conservation and efficient use of natural resources. India also has several environmental laws that apply to real estate

[244] "Chevron Corporation v. Republic of Ecuador." Permanent Court of Arbitration, https://pca-cpa.org/en/cases/176/.
[245] "The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)." International Tribunal for the Law of the Sea, https://www.itlos.org/cases/list-of-cases/case-no-22/.
[246] "India Real Estate Market Outlook 2021." Knight Frank, https://www.knightfrank.co.in/research/article/2021-01-27-india-real-estate-market-outlook-2021.
[247] "The Role of Environmental Law in Real Estate Development in Europe." Lexology, 27 Oct. 2020, https://www.lexology.com/library/detail.aspx?g=98328c1b-f03e-432c-88e1-90305764e02b.
[248] "EU Environmental Law." European Commission, https://ec.europa.eu/environment/legal/envir_law_en.htm.

development, but they are often criticized for their inadequate enforcement and lack of effective implementation[249].

2. ***Enforcement mechanisms***: Europe has stronger enforcement mechanisms for environmental laws compared to India. The European Union has a dedicated agency, the European Environment Agency, which monitors environmental issues and provides support to member states in implementing environmental laws[250]. In addition, European countries have robust judicial systems that ensure effective enforcement of environmental laws[251]. In contrast, India's enforcement mechanisms for environmental laws are often criticized for their inadequate enforcement and lack of effective implementation.
3. ***Culture of sustainability***: Europe has a stronger culture of sustainability compared to India. Many European countries have a long history of environmental activism and awareness, and sustainable development is often a priority for policymakers and the public. In contrast, India's culture of sustainability is still developing, and there is a lack of awareness and understanding of environmental issues among policymakers and the public[252].

Despite these differences, both India and Europe face significant challenges in promoting sustainable real estate development. These challenges include balancing economic development with environmental protection, addressing the impacts of climate change, and ensuring effective enforcement of environmental laws. However, Europe's stronger legal framework and enforcement mechanisms provide a better foundation for promoting sustainable development compared to India.

Challenges: Both India and Europe face challenges in promoting sustainable real estate development. In India, one of the primary challenges is balancing economic development with environmental protection. The real estate sector is a significant contributor to India's economy, and policymakers often prioritize economic development over environmental protection.

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[249] "India's Environmental Challenges." Yale School of Forestry & Environmental Studies, https://environment.yale.edu/india/article/indias-environmental-challenges.

[250] "The European Environment Agency." European Environment Agency, https://www.eea.europa.eu/about-us.

[251] "Environmental Law in Europe." Europa.eu, https://europa.eu/european-union/topics/environmental-law_en.

[252] "Environmental Awareness in India." Indiacelebrating.com, https://www.indiacelebrating.com/essay/environmental-awareness-in-india/.

Furthermore, the impacts of climate change, such as floods, droughts, and heatwaves, are exacerbating the challenges of sustainable development in India.

In Europe, the main challenge is to address the impacts of climate change and achieve climate neutrality. The real estate sector accounts for a significant portion of Europe's greenhouse gas emissions, and there is a need to reduce these emissions through energy-efficient buildings, renewable energy, and sustainable urban development. In addition, Europe faces challenges in ensuring effective enforcement of environmental laws and regulations, particularly in countries with weaker legal systems.

Despite these challenges, sustainable real estate development is essential for both India and Europe to achieve their environmental and economic goals. By promoting sustainable development, both regions can ensure the efficient use of natural resources, reduce greenhouse gas emissions, and enhance the quality of life for their citizens.

In conclusion, India and Europe have significant differences in their approach to environmental law and real estate development. Europe has a more robust legal framework and enforcement mechanisms for environmental protection, while India is still developing its culture of sustainability and effective enforcement mechanisms. However, both regions face significant challenges in promoting sustainable development, and addressing these challenges is essential for achieving their environmental and economic goals.

=, To reiterate and summarise, the concerns of environmental law in real estate development in India are crucial in ensuring sustainable and environmentally responsible development. India has enacted several environmental laws that mandate builders to obtain necessary clearances and approvals, implement measures for the conservation and efficient use of natural resources, and comply with relevant laws and regulations governing environmental protection. The legal framework governing environmental protection in real estate development is complex and time-consuming, but it is essential in ensuring that the environmental impact of construction activities is minimized, and sustainable development is promoted in the country. Green buildings are also becoming increasingly popular in India, and the Indian Green Building Council (IGBC) has developed the Green Building Rating System, which provides a framework for the design, construction, and operation of green buildings in India. Overall, it is necessary to strike a balance between economic development and environmental protection in real estate development in India, and effective implementation and enforcement of environmental laws are critical to achieving this balance.

CONCLUSION

In conclusion, the intersection of environmental law and real estate development in India stands as a pivotal juncture where sustainability, economic progress, and environmental responsibility converge. The multifaceted legal framework, encompassing acts like the Environment Protection Act, Forest Conservation Act, and Wildlife Protection Act, underscores the nation's commitment to mitigating the environmental impact of burgeoning real estate activities. Despite the undeniable challenges, including delays and increased costs associated with compliance, India is witnessing a transformative shift towards green building initiatives, exemplified by the Indian Green Building Council's comprehensive rating system. This reflects an emerging consciousness within the real estate sector, emphasizing the need for environmentally responsible practices.

The recent emphasis on sustainable development signals a positive trajectory, aligning with constitutional mandates and international standards. However, bridging the gap between economic imperatives and environmental preservation remains a delicate endeavor. As the nation forges ahead with urbanization, striking a harmonious balance between development and environmental stewardship is imperative. Effective implementation and stringent enforcement of environmental laws, coupled with initiatives promoting awareness and incentives for eco-friendly practices, will be instrumental in sculpting a future where real estate development in India not only thrives economically but also thrives in its commitment to environmental sustainability, thus fostering a legacy of responsible growth for generations to come.

UNRAVELLING DEEPFAKES: A COMPREHENSIVE ANALYSIS OF THEIR IMPACT ON SOCIETY

- AYUSH SRIVASTAVA[253]

This paper looks more closely at our society's legal reaction to deepfakes. It explores the different effects of deep fakes in various fields and discusses related law, with a focus on potentially illegal applications that could violate traditional legal norms. The paper concludes with recommendations, by which a blueprint is sketched out for the problems of deepfakes. Deepfakes express the many-sided nature of artificial intelligence. The broad application of AI across many industries promises to bring improvements, especially in the legal track where it will increase precision and speed up procedures while also increasing efficiency. Nonetheless, critical analysis of the effects and limits to social applications for AI leads us to consider its future prospects. There must be a balance between the advantages, disadvantages and impact on society by employing AI.

At this rate, the inherent drawbacks of artificial intelligence must be carefully considered in regulating deepfake technology. By increased vigilance and strict law enforcement, focused efforts can counter the misuse of deepfake technology. The fight against the ill effects of deepfake technology will necessitate multi-directional countermeasures that involve legal reforms, public opinion education, and a reflective review of social values. Through such actions, society can work towards realizing the goals of democracy and rule by law that are embodied in deepfake-abling illegal activity.

Keywords: *deepfake technology, deepfakes, victimization and exploitation of the innocent, legal issues involved in using them for blackmail or threats on people's lives*.

INTRODUCTION

In 2017, a revolutionary media manipulation algorithm, commonly referred to as 'Deepfake,' emerged, causing widespread concern and posing threats to the security and privacy of society. Deepfake is a kind of artificial intelligence that is used to generate considerable pictures, audio, voice and video hoaxes[254] This sophisticated technique utilizes deep learning to seamlessly substitute individuals in existing images or videos with the characteristics of someone else. Originating from an anonymous user using the pseudonym 'deepfake,' this technology gained notoriety by replacing actresses' faces with those of other celebrities in numerous pornographic

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[254] Title: Deepfakes and Beyond: A Survey of the Manipulation and Fake Detection Information Fusion (2020).

videos uploaded to Reddit. Deepfake, a subset of AI, is employed to fabricate undoubted images, pictures, audio, and video replications. Whereas Deepfakes offer various advantages in certain applications, they also introduce significant risks and challenges.

The impact of this technology extends across all facets of society and is particularly problematic in political contexts. Instances of transposing the faces of women, especially celebrities, into inappropriate contexts, such as pornography, are prevalent. In the contemporary world, people predominantly rely on social media platforms such as Google, WhatsApp, and Facebook for information. However, the proliferation of inaccurate information generated through Deepfake technology contributes to social unrest, fostering distrust, and, in some instances, inciting violence.

HOW DEEPFAKES ARE CREATED

Deepfake technology[255] relies on dual fundamental methods: first is deep learning and second is generative adversarial networks (GANs). Deep learning, which is a subdivision of machine learning, employs algorithms inspired by the functioning and design of human brain, specifically artificial neural networks. These networks analyze vast datasets, finding applications in natural language processing, computer vision, recognition of speech, and robotics. Generative adversarial networks (GANs) constitute a specific kind of deep learning architecture.

GANs apply dual neural networks— first is generator and the second is discriminator—to learn from a dataset and create synthetic data that closely bear a resemblance to the original. The generator produces fake samples, while the discriminator evaluates the authenticity of both the generated also real samples from the training dataset. In an adversarial training process, the generator aims to create samples convincing enough to deceive the discriminator, whereas the discriminator endeavors to accurately distinguish between generated and real samples.

This adversarial interplay continues until the generator achieves the capability to produce remarkably realistic synthetic data. Deepfakes are created through the innovative application of these technologies. In a generative adversarial network, the "generator" plays the role of a creative force, learning from a dataset that includes real examples, such as facial expressions and voice patterns. Its counterpart, the "discriminator," acts as a discerning judge, evaluating whether the generated content looks authentic by comparing it to examples from the training

[255] Jia Wen Seow, et al., "A Comprehensive Overview of Deepfake: Generation, Detection, Datasets and Opportunities," 513 Science Direct 351-371 (2022)..

data. Through an iterative training process, the generator strives to produce content which is progressively problematic for the discriminator to differentiate from the real data.

This dynamic interplay continues until the generator becomes adept at creating synthetic content that is remarkably realistic. Subbarao Kambhampati, a lecturer specializing in computer science and engineering at University of Arizona and known for expertise in human-aware AI, underscored that extensive training data may not be imperative. He noted, "You do not need huge amounts of training data. Even just a ten-second clip can be enough." However, Kambhampati recommended that for optimal results, the model should be trained with longer clips, ideally sourced from videos containing at least 1000 high-quality frames. In the training process, contemporary algorithms are capable of mapping "landmarks" on an individual's head for each frame in a video. These algorithms go beyond basic features and encompass head pose, eye gaze, and the intricate details of facial features such as eyebrows, eye blinks, lids of eye , lower and upper lips, chin, cheeks, and dimples on face[256].

Using source videos with more frames enhances the meticulousness and quality of the generated final produce. In context of deepfake videos, this technology is harnessed to manipulate facial features, creating a visual illusion that someone is engaged in actions or expressions they never actually performed. Similarly, in the realm of deepfake voice technology, the nuances of a person's speech patterns can be replicated, generating artificial audio that convincingly mimics their voice. While the technological advances behind deepfakes are intriguing, there is a growing awareness of the ethical implications and potential misuse of this technology to create misleading or harmful content. Therefore, understanding the mechanics of deepfake creation is pivotal for developing strategies to detect, mitigate, and responsibly navigate the challenges presented by this innovative but potentially problematic technology.

KINDS OF DEEP FAKES

Various mediums utilize this advanced technology, encompassing videos, audio, photos, and more. The main purpose behind deploying this powerful mechanism is to tarnish someone's reputation, exploit individuals, sow instability in our society, etc. Different categories in which this technology is employed include:

[256] S. Agarwal, H. Farid, Y. Gu, M. He, K. Nagano, & H. Li, "Protecting World Leaders Against Deep Fakes," in Proceedings of the IEEE Conference on Computer Vision and Pattern Recognition Workshops (Long Beach, CA: IEEE, June 16–20, 2019), 38–45

Textual Deepfakes: In the initial periods of machine learning and natural language processing (NLP), there was skepticism regarding a machine's ability to undertake creative projects such as drawing or writing. Fast forward to 2023, when high-rated AI-generate writing software can nowadays create and make up human-looking pith and clearness for instance AI software like ChatGPT[257].

Video Deepfakes: This type is the most prevalent, utilizing visuals, including photos and videos, to convey impactful messages with greater clarity to the public. Video deepfakes are frequently misused, focusing on the creation of realistic-looking photographs and videos. This involves generating audio and facial features, often depicting celebrities, political leaders, or women, through algorithms and AI technology. Consequently, videos may exhibit a person's face and voice, yet the content spoken is entirely fabricated. These unauthentic audio, video, etc could include detrimental drive material that claims to originate from a political candidate when it does not[258].

While there are numerous other types of deepfakes, a few stand out as frequently employed, causing disturbances in societal stability. Myriad instances highlight the prevalent use and exploitation of this advance digital age technology, with a recent example involving the manipulation of ones face onto another person's body, There are a lots of occasions where it has been used and even is at its peak in its usage and misuse. One recent case was of Actress Rashmika Mandanna , where her face was manipulated onto another person's body

TRUST IN WHAT IS SEEN HAS LOST ITS RELIABILITY

Deepfakes pose a significant threat to the traditional notions of truth and trust in the contemporary times. As these synthetic media technologies continue to advance, the potential for misinformation and manipulation becomes more pronounced. What we See is to be believed , the old saw has it, but now the truth is that believing is seeing: Human beings look for information that supports what they need to believe and overlook the remaining[259]

These deepfakes have grew into a powerful and too disturbing technology that allows people to manage or fabricate audio as well as video information on the Internet to appear highly

[257] Chiradeep Basu Mallik, 'What Is Deepfake? Meaning, Types of Frauds, Examples, and Prevention Best Practices for 2022' (Spiceworks, 23 May 2023).

[258] For powerful work on the potential damage of deep-fake campaign speech, see Rebecca Green, Counterfeit Campaign Speech, 70 HASTINGS L.J. (forthcoming 2019)

[259] Porup, JM, How and why deepfake videos work — and what is at risk, CSO Online, (April 10, 2019), How and why deepfake videos work — and what is at risk | CSO Online

authentic. It has become an instrument of abuse. It is used just like the animation used in movies nevertheless this technology is a danger to every democratic nation, as in every field there are different cases where its misuse has been shown like celebrities, political leaders etc.

Instances: A one-minute video featuring Barack Obama has garnered over 4.8 million views since its 2018 upload on YouTube. In the video, the former U.S. president is depicted seated against the backdrop of the American flag, addressing the viewer directly, and employing profanity to describe his successor, Donald Trump. However, the spoken words do not originate from Obama himself; rather, the video is categorized as a deepfake. Actor-director Jordan Peele is the creator of this deepfake, utilizing his impersonation skills to mimic Obama's voice.[260] while Obama's lips synchronize with the fabricated dialogue. This specific instance underscores concerns regarding the potential impact of deepfakes on media trust, political manipulation, and the imperative for increased awareness and countermeasures to address the issues associated with this technology.

In 2021, a woman allegedly used multiple images of girls on a school cheerleading squad to create Deepfake images of herself naked, drinking alcohol and vaping. At the same time, the suspect allegedly harassed these girls by texting them with a phone number obtained from the internet[261]

In 2023 a student allegedly uploaded Deepfake nude images of his teacher online and tried to sell them. Although the institution denied the student's guilt, the seriousness of the situation is obvious, no matter who did it[262]

Synthetic media, including deepfakes, holds potential in several fields such as entertainment industry and education, facilitating innovative also engaging content creation. In the film and entertainment industry, for instance, deepfake technology can be leveraged to breathe life into characters or convincingly recreate historical figures, enhancing the creative landscape. Despite these positive applications, the widespread use of deepfakes also introduces significant risks to society.

Misuse of this technology can lead to destructive consequences, including harming individuals' reputations, eroding trust in democratic institutions, and perpetrating public fraud. Deepfakes are mostly used to not only harm the person's status but also to weaken the trust and faith of democratic institutions, deceive the public, etc., and entirely this can be done simply with fewer

[260] BLOOMBERG How 'Deep Fakes' Became Easy — And Why That's So Scary | Fortune > accessed December 15, 2023

[261] BBC, "Mother 'Used Deepfake to Frame Cheerleading Rivals,'" BBC News (March 15, 2021), sec. Technology

[262] MaryAnn Martinez, "Texas Teacher Latest Victim of Deepfake Nude Pics," 2023

resources[263] . What exacerbates these risks is the relative ease with which such manipulations can be executed, requiring fewer resources than ever before.

One alarming trend in deepfake usage is the creation of explicit content, often targeting women and portraying them as sexual objects. This not only harms the targeted individuals' reputations but also inflicts emotional and psychological distress. Research indicates that a significant portion of deepfakes is directed towards generating pornographic material, highlighting a disturbing trend that contributes to the broader negative impact of synthetic media on society.

RISK TO THE FOUNDATIONS OF DEMOCRACY

Deepfakes are increasingly perceived as a significant threat to the very pillars of democracy. The apprehension stems from their potential impact on national security through the dissemination of misinformation for political purposes, manipulating opinions, and influencing elections, riots, and domestic stability.

Synthetic media, especially deepfakes, has emerged as a powerful tool for spreading disinformation, posing challenges not only to digital literacy but also to trust in authorities. The use of deepfake technology to propagate fake news raises concerns, as citizens may question the authenticity of information, eroding trust in governing bodies. This skepticism and mistrust can have profound implications for political and social stability, extending beyond India to pose global threats to international relations and national security.

As the prevalence of deepfake technology increases, the distinction between what is real and what is not becomes a critical and politicized issue. For example, an article titled "The people onscreen are fake; the disinformation is real" in The New York Times highlighted a viral video featuring a well-dressed actor discussing the U.S.'s actions against gun violence. Observers noted discrepancies in the voices and lip movements, leading to the realization of AI-generated video technology (deepfakes) and its intended motives — inciting violence and causing political and social instability. With this growing technology of deepfakes, the question of what is real and what is fake becomes more and more imperative and politized[264]

The circulation of deepfakes poses a tangible risk of inciting physical deployments underneath false pretences, precipitating public protection catastrophes and flickering outbreaks of

[263] Ashish Jaiman, 'The dangers of deepfakes' (The Hindu, 1 January 2023)

[264] Mike Westerlund, "The Emergence of Deepfake Technology: A Review" https://www.researchgate.net/publication/337644519_The_Emergence_of_Deepfake_Technology_A_Review

violence, as well articulated by Mr. Watts[265]. The increasing prevalence of deepfake capabilities is expected to escalate the occurrence and strength of such violent incidents. Legal expert Prof. Danielle Citron from Maryland University advocates for conditioning legal immunity based on reasonable content creation, warning against the likely troubles and perils that are associated with deepfake technology and software. Moreover, deepfakes can be exploited for fraudulent activities and may target financial institutions by creating fake identities.

DEEPFAKES : OFFENCES COMMITTED BY USING DEEPFAKES

AI, especially deepfake technology, has pervasive effects across multiple sectors, giving rise to significant legal implications due to the emergence of various offenses associated with its use. The potential for committing crimes using deepfake technology is vast, as the technology that we can employ as a tool for criminal activities counter to both individuals as well as society. The utilization of deepfakes opens up endless possibilities for committing various offenses[266], and the following crimes can be facilitated through the manipulation of deepfake technology.

Identity theft and virtual forgery. —Deepfakes pose a serious threat to individuals' identities by enabling malicious actors to create highly realistic impersonations. This can result in identity theft, where perpetrators use manipulated content to assume someone else's identity for illicit activities. Deepfakes contribute to virtual forgery, allowing the creation of fabricated content that appears genuine. This raises concerns about the forging of virtual documents, videos, or images that can be exploited for fraudulent purposes.

Misinformation targeted at Governments. — This technology, which can convincingly manipulate audio and visual content, allows malicious actors to create deceptive narratives or fabricate statements attributed to political figures. The potential consequences of misinformation against governments are far-reaching, encompassing damage to public trust, undermining the legitimacy of institutions, and potentially inciting unrest.

Online defamation and Hate Speech. —This Deepfake can be weaponized to propagate hate speech by manipulating content to make it appear as if individuals are expressing

[265] Bart van der Sloot and Yvette Wagensveld, 'Deepfakes: regulatory challenge to synthetic society' (2022) 46 Computer Law & Security Review <https://www.sciencedirect.com/science/article/pii/S0267364922000632 >accessed 23 September 2023

[266] Shubham Pandey and Gaurav Jadhav, " Emerging Technology and Law : Legal Status Of tackling Crimes Relating To Deepfakes in India" (SCC Blogs, 17 March 2023) Emerging Technologies and Law: Legal Status of Tackling Crimes Relating to Deepfakes in India | SCC Blog (scconline.com)

discriminatory or harmful views. This malicious use can amplify the impact of hate speech, contributing to the spread of false narratives and fostering a hostile online environment

Violation of privacy/obscenity and pornography. — Deepfakes have been notably misused in the creation of nonconsensual and often explicit content. Malicious actors can generate fake pornography featuring the likeness of unsuspecting individuals, contributive towards the spread of false and damaging material which leads to the violation of individual privacy.

In India, there is at present no specific legislation which explicitly prohibits deepfakes. However, within existing legal framework, Sections 67[267] and 67A[268] of The IT Act, 2000 address the dissemination of sexually explicit material in electronic form and prescribe penalties for such offenses. Additionally, Section 500[269] of the IPC, 1860, deals with defamation and imposes penalties for making defamatory statements.

Nevertheless, these existing legal provisions may prove inadequate in addressing the diverse manifestations of deepfake technology. The absence of explicit regulations targeting deepfakes underscores the need for comprehensive legislation to effectively combat the various forms in which deepfakes can manifest[270].

INTERNATIONAL OUTLOOK AND REGULATORY APPROACHES TO DEEPFAKES

In the realm of global legislative responses to the challenges posed by deepfake technology, several countries have taken noteworthy initiatives. Notably, the United States has introduced targeted legislation to address different facets of the issue. The Malicious Deep Fake Prohibition Act of 2018 is designed to penalize individuals engaged in creating deepfakes with the intent to defraud, extort, harass, or damage reputation, imposing fines or imprisonment[271]. The Deepfakes Accountability Act of 2019 focuses on the necessity of labeling manipulated media to enhance transparency[272]. Certain U.S. states, such as Virginia and California, have enacted specific prohibitions against nonconsensual deepfake pornography[273]. The

[267] The information Technology act, 2000.
[268] The Information Technology Act, 2000.
[269] The Indian Penal Code,1860.
[270] Jain, Piyush and Jha, Simran, Deepfakes in India: Regulation and Privacy, South Asia @ LSE (May 21, 2020), https://blogs.lse.ac.uk/southasia/2020/05/21/deepfakes-in-india-regulation-and-privacy/
[271] The Malicious Deep Fake Prohibition Act of 2018
[272] The Deepfakes Accountability Act of 2019
[273] Narayanan, Nilesh, How US states are tackling deepfakes, Analytics India (July 20, 2020), https://analyticsindiamag.com/how-us-states-are-tackling-deepfakes/

DEEPFAKES Act of 2019 places responsibility on companies to remove harmful deepfakes, holding them accountable for non-removal[274]

In the European Union, while there is currently no dedicated legislation for deepfakes, existing frameworks related to protection of DATA and AI accountability are utilized. The General Data Protection Regulation provides directives for consent-based data processing along with legal remedies. The European Union's ethical guidelines for trustworthy Artificial Intelligence stress the importance of transparency and oversight, particularly concerning systems like deepfakes[275].

In the UK, 1 in 14 adults are at risk of having inappropriate images of themselves spread online. From 2015 to 2021, there were 28,000 complaints of non-consensual sexual content recorded in police reports[276]. To tackle this issue, the UK is working towards implementing the Online Safety Bill. This legislation is designed to cover a broad range of content, including topics from pornography to political discussions.

China has implemented regulations requiring deepfake creators to declare and tag their creations and product as artificial, with a focus on incorporating principles of truthfulness and consent into their governance framework. However, the effectiveness of these regulations is hampered by the absence of penalties for violations[277].

Singapore has taken a significant step by enacting of the Protection from Online Falsehoods and Manipulation Act in 2019. This legislation empowers legal action countering inauthentic content which includes deepfake videos and pictures, with penalties such as fines and imprisonment for offenders[278].

WHATS THE WAY FORWARD?

When looking at deepfakes in the realm of artificial intelligence, not only is our way forward quite clear, but there are also much deeper problems involved that have implications on an international scale. Therefore, legislative strengthening is even more necessary-in order to keep up with changing society and the diverse changes within it. Humanizing the law The First, in recognition that society is ever changing and must adapt to new circumstances when necessary.

[274] DEEPFAKES Accountability Act, 2019

[275] Regulation (EU) 2016/679 (General Data Protection Regulation).

[276] GOV UK, "New Laws to Better Protect Victims from Abuse of Intimate Images," GOV.UK (2022).

[277] European Commission, Ethics guidelines for trustworthy AI (Apr 8, 2019), https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai

[278] Liu, Min and Zhang, Xijin, Deepfake Technology and Current Legal Status of It, AHFE 2022 (July 2022), https://doi.org/10.2991/ahfe.2022.194

Beyond strengthening legislation, the introduction of other measures (like anti fake technology) is also complementary. These technologies can be seen as a powerful ally in raising public consciousness, encouraging citizens to develop an increased sensitivity and mindfulness to prevent fraud.

However, by stressing the absolute necessity of a discerning public and attacking blind adherence to online information he showed that there is an urgent need for this. It is also important to create the habit of warning people against blindly accepting information, encouraging them to assess whether or not what they read on digital platforms really exists. Along with laws, strengthening security mechanisms and promoting data privacy efforts are essential elements of a larger plan. What is important is the development of an integrated approach that brings together legal and non-legal responses to resolve the problems caused by Deepfakes.

Dealing with the thorny issues that arise from Deepfakes, as society seeks to build a defense agais deceptive and malicious content on all sides, it appears evident that many different approaches will be required. The combination of legislative achievements, technological developments and popular consciousness together forms a formidable barrier against the damage wrought by Deepfakes on modern society.

CONCLUSION

In today's society, deepfake technology has become widespread and is seen as one of the nightmarish aspects linked with the mass acceptance of AI in the 21st century. It is true that in many different fields, AI has helped reduce burdens and increase efficiency--but the rise of deepfakes also shows a darker side. However, it is the speed and time-saving abilities of artificial intelligence that have made such breakthroughs possible.

But with the rapid increase in artificial intelligence, on the other side of which lies deepfake technology, some have been alarmed over its potential for abuse. Although they have their uses and may be helpful in situations where there is no other available choice, its intrinsic dangers are enormous. This alone makes dangerous things for our society as a whole unacceptable. The surge in deepfake technology, a subset of AI, has raised alarms due to its potential for misuse. Despite its usefulness in certain applications, the intrinsic risks and dangers it poses not only to our society but also to individual are highly substantial. Mainly when it comes to tarnishing an individual's self-esteem or reputation, the consequences are just so severe. Thus, it can be rightly said that Deepfakes are a threat to democracy, national security, and overall well-being.

So the people fear that the threat of deepfakes will pose a challenge to democracy, national security and social welfare is not misplaced. In terms of deepfake technology, dealing with its place in society is an essential legal problem and they have to be resolved at the earliest. In India our existing legislation--experimental laws like the IT Act and certain clauses of IPC need to be changed in order to deal with these problems that are brought about by this advance digital age technology, and which are being faced by modern people a lot. There should be a strong push to ensure that people's privacy is protected, plan elections are honored and concern for cybersecurity efforts. Improvement of the legal frameworks can help to ensure that people have a safe space in which private information is less risks losing its control and being put into wrong hands.

LIBERTY IN THE SHADOWS: UNRAVELLING THE COMPLEX NEXUS OF HUMAN TRAFFICKING, CHILD LABOR, AND PRIVATE PROSTITUTION

- PALLAVI YADAV

Abstract

In my presented Research paper cum Project empirical work the reader will be made aware of the difficulties with our preamble. I'll discuss how child labour and private prostitution have clearly benefited from an increase in human trafficking in this section. Unaware of their origins, people are bought and sold between nations, forced into tasks they never imagined would become their only source of income and food for their family, and eventually abandoned. This research article summarises a brief empirical study I conducted in my hometown of Jabalpur, Madhya Pradesh. You will gradually begin to understand how an individual is bid in a market and how his price is determined for the purchasers; why are they being purchased like commodities? What are they going to do next? To what destination will they travel? At what point are they all brought together? What are they going to work on? Is their freedom true, as ours is?

Introduction

At Bennett University in Greater Noida, I'm Pallavi Yadav, a first-year law student. Ever since my birth, I have resided in Jabalpur. The task set to us for our sociology project was to defend the Indian constitution by identifying a social problem, outlining the ways in which it is being contested, and providing recommendations to strengthen the constitution. I decided to focus my research on how human trafficking paves the door for traffickers to sell people to private prostitution and child labour, therefore I chose liberty as my theme and gave it greater weight.

Private prostitution: A phase of the nexus

Every year, a large number of women, children, and sporadically young men are trafficked and forced into the abhorrent industry of prostitution, and labor, or are auctioned off to specific sectors as bondage laborers. Human trafficking makes way for private prostitution market whose size exceeds then that of the labour market. Numerous young boys, girls, and children are compelled to work as bondage labor in hazardous sectors, which could have a disastrous impact on their health. Certain statistics attempt to manipulate the numbers in order to portray a higher number of individuals involved in the sex trade. For instance, in Thailand, a significant

portion of the male population is left out of the figures because males are not considered victims of human trafficking under the country's national law. Although I did imply in my earlier statement that men are also victims of labor trafficking and, in the case of young boys, sexual exploitation, I am not arguing that men are trafficked in Thailand more often than women. Numerous people who are easily swayed and in need of low-cost employment are there as a result of the awful criminality. Based on statistics, the sex on the other side, the police discovered 1,200 female victims between 2019 and 2022 compared to about 1,440 male victims. What about the other crowd? This is only a written record of individuals whom the police were able to save. It's impossible to estimate how many people are battling to escape unimaginably difficult circumstances.

Now let's discuss the situation in our own nation. On Wednesday, November 15, 2023, I went to a red light neighborhood in Jabalpur, Hira Nagar, along with a male buddy, to do fieldwork for this study paper. When I saw the red light district, I always associated it with brothels because of its elaborate decorations, extravagant lighting, and decorative architecture. Sitting in the middle of the halls, a Naayaka (the head prostitute) receives clients who approach her. She sets the price and selects a prostitute based on the amount the client is willing to pay, sending her into a room with him. When they are through, she returns and sits back in the same seat. This assumption of mine was terribly wrong, before going to an actual red light area, which left me feeling miserable and terrified for days to come. I could see women standing outside small kutcha houses, and very very hideous, they would cover their faces and just stand and not do anything, and men would come and go inside those small kutcha houses, I got to hear screams that were so not of pleasure but of pain and suffering, screams that made me terrified and wanting to just get out of there. I went to a woman's house whose anonymity I'd like to maintain and can name her Anamika for this research paper. She was a wonderful woman, who greeted me with a wide smile on her face beside me being a girl and not cursing me for not being one of her customers, We talked quite for a long and I appreciated her for being this helpful to my research that would not benefit her in any way. She was in Delhi's most infamous red light area, G.B. Road before, where she was used brutally 24/7, and how many kids she had to abort because of her profession. She then goes on and tells me about how she, a little girl from Lucknow, was thrown into begging was fed biscuits and the next thing she remembers is she was in Delhi in brothel number 32. Jabalpur was an upgrade for her she said. She could come out of Delhi only when there was a raid on her brothel, or else she could never even think of running from that brothel under her naayaka. I asked if she was that scary and if all the prostitutes were afraid of her. Anamika started to chuckle and said, "She used to

beat us with a whip and hockey sticks if any of us ever tried to run". The head of these prostitutes used to collect all the money they got from the day's sex work, She also told me that the prostitutes with babies, naayaka used to keep them with her and used to say "Earn this amount of money and only then, you'd b able to feed your baby", this use to keep them from not running away and working tirelessly all day. Again, we the people of India are free in terms of expression, faith, and worship and not work? She a citizen of India is not free to even step out of that area without her head mistress's permission for which she will say no.

Anamika told me about several other women who raised their kids in G.B Road, who were born and brought up in the red-light area. A good majority of them end up being pick pocketers, or daily wage laborers or end up doing nothing and providing nothing to the household, so it's just the woman who is providing for the household. The prostitutes with school-going kids had to struggle more as compared to any other prostitute, had to hide their official documents or get some fake documents so they could get work elsewhere and earn more in order to send their kids to school. The kids were nonetheless discriminated against on the basis of what area they come from, and what their mother does to feed them, "please don't be friends with them they might end up doing the same work as their parents, and they are not a good influence". What I see is a kid and a human being who has all the rights of being free and enjoying all RIGHTS as the other citizens of this nation. They are not free, they can not run away and flee from their reality and it's their idea of normal, the conditions to which I was wanting to leave my fieldwork and run back a few hours ago, it was their livelihood and the sole source to earn money and feed their families.

Another phase: Labor market

Poor families that are easily tricked and have no way to survive are another group of people trafficked by these criminals. They are transported to work in the oil industry in the Middle East, where they are treated like slaves for the rest of their lives and are unable to escape. In 2020, the government could identify around 5,156 victims of labor trafficking including 2,837 victims of bonded labor and 1,466 victims of sex trafficking but the government, unfortunately, could not report the type of trafficking for the 694 potential victims in the year 2020 (the new Indian express, march 2023). The condition worsens in 2022 with 6,622 victims being reported and an additional 694 being potential victims. Poor families, with little more than a bowl in their hands, who stand outside a railway station begging for small change to put food in their mouths, are the principal victims of these traffickers. Traffickers take advantage of the

weakness of both genders, seeing how readily a person might fall victim to their schemes and agree to work for them under any circumstances.

For this phase, I did not have to do much work as I could see an abnormal amount of kids working at one or the other construction site, some were helping their parents, and some were working all alone to gather some money to buy cigarettes or eat tobacco so they don't have to buy food. This was told to me by a 9-year-old boy who can be called Tony for this research paper. He did know where he was from, he tried telling me by telling me about the people there and then said "*Orsa"* he kept on repeating it, It took me some time to realize he was from Orissa, he learned to say these words from sitting in the station looking at the board which said 'Orissa station' and used to ask people what it is or how do we say it. A very playful kid told me he and his 5-year-old sister were told by an uncle to go and ask people for money at the station. He did not know his parents he just knew his uncle who later sold him and his sister for a mere sum of 500 rupees and sent them off to a place they had no idea about. Here, they were working as bonded laborers, had to pick up heavy bricks on their small heads, with their small hands just for a wage of around 100 rupees. He told me he is quite happy here as he is working because back in Orissa he had to beg and he did not want to do that, at least he can save up some money and send his sister to a local government school he said. A very aspirational kid you see there, he then came to me close and said in my ear and pleaded politely, "Please don't call the orphanage, they won't let me be free". His idea of personal liberty was totally different than any other average Indian, He was alright working in conditions that he himself has no idea about was hazardous to his health. These conditions he was working in are exploiting him and his rights, and how adversely his mental and physical development is being affected. He has no idea about the rights he is entitled to as a citizen of this so-called great democratic country, which doesn't even ensure that the country's own citizens are aware of their basic fundamental rights or not.

His idea of liberty is to work and save up to send his little sister to school. Tony is an exception to this failure system of ours. He is just being employed because he is cheap, he can be easily manipulated, everyone does it, and is normal so I can employ him as well.

The profound, dark stain of child labor is what unites our diamond rings, silk saris, embroidered carpets, and celebrations. Wonderful, gorgeous carpets for the rest of India are made in Mirzapur, perhaps the largest carpet-making city in India. If these handcrafted carpets were offered by a major capitalist company under their well-known brand, they would cost a whopping lakh.

To sew those carpets, you need very tiny, little fingers to fit the tread into the needle and utilize it to sew that luxurious, expensive carpet that looks stunning. Once more, they hire children and pay them a meager 100 to 200 rupees each day. A vast majority of working children consist of girls, as opposed to Sivakasi, where most of the workers are boys and they operate barehanded in fireworks factories without any safety or security procedures. In the last ten years, there have been about 145 incidents involving the fireworks business in Sivakasi alone. Since the majority of child laborers work in the unorganized sector, whether or not in rural and urban areas, within families, or in tiny household businesses, almost 85% of them are difficult to reach, invisible, and excluded.

Speaking about places with a million colourful stacks of glass bangles, let's talk about Firozabad. Making glass bracelets is a generational profession for many families, and each member of the family puts their heart, mind, and body into it. Because they are impoverished, the children who play a role in the family business usually find themselves forced to work in the same capacity and have no choice but to create bracelets in order to support themselves. They are always forced to assist their parents in their dangerous jobs; they are never given a choice. Glasses are melted in a furnace to give them the proper size and shape. Exposure to this intense light damages the eyes of laborers, which is one of the main reasons these workers become blind after a certain age and are unable to support their families; as a result, their children are now the ones who earn money for the family. Besides going to school they are working in hazardous conditions to provide for their family single-handedly.

Conclusion

Liberty is being challenged, heavily challenged here in India, the sovereign state, the tier 2 country having its own idea of development, and not talking about the flipside of this overused idea. is facing serious challenges to liberty. However, the negative aspects of this overused concept are hardly discussed. The two most fundamental rights that every individual has are protected under Article 21.

- Right to personal liberty
- Right to life

Another set of rules being violated in these instances are:

- Section 373 of IPC prohibits buying minors for the purpose of prostitution.

- Section 370 of IPC under which, buying any person as a slave or importing, exporting, removing, disposing of any person as a slave, or accepting, receiving, or detaining them against their will as a slave, shall be a punishable offense with imprisonment of up to seven years.
- Any work done by a child of age 15 or under the age of 15 and dangerous work done by any child under the age of 18 is totally illegal. Article 32 of the Constitution of India Prohibits child labor and ensures the protection of young people at work.

When we hear of these laws we think of how effective our system actually is, or how certain crimes even take place when we have a great system backup and a good justice system? What we need is actual work to be put toward these areas, and not a lousy system, which just appreciates and celebrates the good side and keeps the citizens doomed about the downfall and failure and loopholes in the working of the system. I would like to add a small suggestion at the end that the government because of their red tapism, so-called workload can't do the job right, Why not nationalize certain NGOs and give them the work and fund them and administer them, and help them with their networking so they grow bigger and better and can help these children and women get back their **identity**, their own, **personal liberty** and not live a life of shame or under the veil of embarrassment?

Moreover, I want the people of our nation, to not treat them any differently than any other citizen of India. What I want them to have is empathy and a change of mindset and treating them equally. They are not different, They are not objects, They have rights just like us, They are Free. Not always a mere law or an act will be going to help us to change the system and the conditions, It's us, The people of India who are going to do it.

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