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Does the Hague Adoption Convention Protect Children in Intercountry Adoptions Cases Concerning the United States and India?

by

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Does the Hague Adoption Convention Protect Children in Intercountry Adoptions Cases Concerning the United States and India?

ABSTRACT

Intercountry adoptions are often connected to the sale of children, child trafficking, child abduction, and the fabrication of documents. Rich couples in western countries are eager to pay a great amount of money to adopt healthy babies in developing countries. As a result, adoption agencies often seek profits by using illegal means such as child trafficking. The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption was drafted on May 29, 1993, to solve this problem. The Hauge Adoption Convention includes articles to protect children, such as safeguards for children and cooperation between the Contracting States. However, it also has loopholes that could endanger children in cross-border adoption cases. For example, ambiguous terminologies regarding financial restrictions cannot prevent adoption agencies from receiving unreasonable fees, incentivizing those agencies to commit child trafficking. The Hauge Adoption Convention also does not protect children when the Contracting States receive children from non-Hague nations. The United States implemented the Hauge Adoption Convention well, and it even enacted the Intercountry Adoption Universal Accreditation Act of 2012, requiring adoption agencies in non-Hague adoption cases to satisfy the same accreditation requirements as those in Hague adoption cases. India also made good laws to comply with the Hauge Adoption Convention. India recently removed the loophole about financial restrictions in the Hauge Adoption Convention by fixing the amount of money that adoption agencies can receive. However, both countries need to improve their laws and practices in intercountry adoption. The United States did not close the loophole regarding the financial restrictions in the Hauge Adoption Convention. It needs to codify a detailed definition of professional fees or directly restrict the amount of money, as India has done. Also, the United States should not allow agencies to avoid responsibility through a waiver of liability. Meanwhile, India needs to increase efforts to solve rampant child trafficking and low adoption rates. It also needs to codify an automatic acquisition of citizenship system.

*KEYWORDS: Intercountry adoption, Hague adoption convention, child trafficking, implementation, loophole

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I. THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The number of intercountry adoptions started to increase after World War II.[1] After that, intercountry adoptions often caused serious issues[2] such as child trafficking.[3]

Many couples willing to pay a great amount of money in developed countries seek to adopt children, but there are not enough adoptable babies in those countries.[4] As a result, children in developing countries are adopted by citizens in developed countries.[5] This environment causes unethical adoption agencies to seek money in illegal ways.[6] Those agencies commit diverse offenses such as buying children,[7] kidnapping children,[8] and fabricating documents.[9] Furthermore, children in those developing countries usually do not have the means to protect themselves from these crimes.[10]

To solve these issues, the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (the Convention) was drafted on May 29, 1993.[11] As of October 26, 2020, 104 countries signed the Convention, including some countries where the Convention did not yet enter into force "for that country following the deposit of its instrument of ratification, accession, acceptance or approval."[12]

The Hague Adoption Convention has advanced principles to protect the rights of children under cross-border adoption. On the other hand, the Convention has limitations: many ambiguous terminologies and loopholes that would harm the best interests of the child.

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[1] *See* Notesong Srisopark Thompson, *NOTE AND COMMENT: HAGUE IS ENOUGH?: A CALL FOR MORE PROTECTIVE, UNIFORM LAW GUIDING INTERNATIONAL ADOPTIONS*, 22 WIS. INT'L L.J. 441, 444-45 (2004).

[2] *See* Karen Smith Rotabi & Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption dequately Protect Orphaned and Vulnerable Children and Their Families?*, 21 J. CHILD FAM. STUD. 106, 107 (2012).

[3] *See International Adoption's Trafficking Problem*, HARV. POL. REV. (Jun. 20, 2020), https://harvardpolitics.com/international-adoptions-trafficking-problem.

[4] *See Id*.

[5] *See Id*.

[6] *See Id*.

[7] *See* David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 404 (2005).

[8] *See Id*.

[9] *See* Karen Smith Rotabi & Judith L. Gibbons, *supra* note 2, at 107.

[10] *See Id*. at 106.

[11] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-5 [hereinafter Hague Adoption Convention].

[12] Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption: Status Table, HAGUE CONF. ON PRIV. INT'L L. (Mar. 3, 2011), https://www.hcch.net/en/instruments/conventions/status-table/?cid=69 [hereinafter Status Table].

A. PRINCIPLES OF THE HAGUE ADOPTION CONVENTION

1. *Contracting States Need to Protect the Best Interests of the Child.*

The primary objective of the Convention is to ensure the best interests of the child. The Convention states that the Contracting States need "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law."[13] Authorities of the State of origin must ensure that the child is adoptable[14] and information concerning "the identity of his or her parents" and "the medical history" are preserved.[15] Authorities of the receiving State must ensure the prospective adoptive parents are "eligible and suited to adopt."[16]

2. *Intercountry Adoption Is the Final Recourse.*

The Convention also incorporated the subsidiarity principle. It states that the Contracting States need to recognize that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."[17] Authorities of the State of origin first need to help a child to be raised by a suitable family such as "his or her birth family or extended family."[18] Also, the Authorities need to determine, "after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests."[19] The Authorities need to choose cross-border adoption only after considering all other available options.[20]

3. *Contracting States Need To Ensure Safeguards To Protect Children.*

Another objective of the Convention is to ensure safeguards for children. The Contracting States need "to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children."[21]

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[13] Hague Adoption Convention, *supra* note 11, at art. 1.
[14] *Id.* at art. 4.
[15] *See Id.* at art. 30.
[16] *Id*. at art. 15.
[17] *Id.* at pmbl.
[18] *Outline: Hague Intercountry Adoption Convention*, HAGUE CONF. ON PRIV. INT'L L. 1 (Jan. 2013), https://assets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf [hereinafter HCCH Outline].
[19] Hague Adoption Convention, *supra* note 11, at art. 4.
[20] *See* HCCH Outline, *supra* note 18, at 2.
[21] Hague Adoption Convention, *supra* note 11, at art. 1.

Contracting States also need to take the following measures: "ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards."[22]

4. *The Contracting States Need To Cooperate for the Best Interests of the Child.*

Protecting children under intercountry adoption requires cooperation between Contracting States. For this purpose, the Hague Adoption Convention states that "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention."[23] It also states, "[a] competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken."[24]

5. *Children Are Automatically Adopted in Both Countries.*

Pursuant to the Hague Convention, "[a]n adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States."[25] Under this system, children enjoy a firm legal status and do not need to take adoption steps in the receiving State. [26] Children in non-member countries do not enjoy this benefit. For example, Korean couples who want to adopt a foreign child need to adopt him or her twice, once in the country of origin and once in South Korea because Korea has not ratified the Hague Adoption Convention.

B. LIMITATIONS OF THE HAGUE ADOPTION CONVENTION AND RECOMMENDATIONS

Many ambiguous terminologies and loopholes allow individual Contracting States to fill the gaps based on their discretion.

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[22] HCCH Outline, *supra* note 18, at 2.
[23] Hague Adoption Convention, *supra* note 11, at art. 7.
[24] *Id.* at art. 33.
[25] *Id.* at art. 23.
[26] *See* HCCH Outline, *supra* note 18, at 2.

1. *Best Interests of the Child Is Too Broad.*

The primary limitation of the Convention is the ambiguous definition of best interests of the child.[27] The Convention fails to articulate the standards to decide whether or not the cross-border adoption ensures the best interests of the child.[28] A standard available in the Convention is the words in the preamble: "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."[29] Nevertheless, the words in the Convention are too broad, causing individual Contracting States to decide what the best interests of the child are.[30] The Convention needs to be amended to offer the minimum standard to determine the best interests of the child so that it at least ensures the uniformity of intercounty practices to protect children at the minimum level.

2. *Terminologies Regarding Financial Restrictions Are Ambiguous.*

The terminologies in Article 32 about financial restrictions on cross-border adoption are not clear.[31] Article 32 of the Convention states that (1) "improper financial or other gains from an activity related to an intercountry adoption" are forbidden, (2) "[o]nly costs and expenses, including reasonable professional fees of persons involved in the adoption" are allowable, and "[t]he directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered." The Convention prescribes no standards on how to decide "improper financial or other gains," "reasonable professional fees," and "remuneration which is unreasonably high." Individual Contracting States can define these terminologies.[32]

3. *The Convention Lacks the Way To Oversee the Implement of the Convention.*

The important loophole of the Convention is that it has no provisions about how to oversee whether individual Contracting States properly comply with the Convention.[33] The Convention

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[27] *See* Erica Briscoe, *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption: Are Its Benefits Overshadowed by Its Shortcomings*, 22 J. AM. ACAD. MATRIM. L. 437, 443 (2009).

[28] *See Id*.

[29] Hague Adoption Convention, *supra* note 11, at pmbl. *See also* Erica Briscoe, *supra* note 27, at 443.

[30] *See* Erica Briscoe, *supra* note 27, at 443-44.

[31] *See Id.* at 446.

[32] *See Id*.

[33] *See Id.* at 448.

does not have "an international committee of participating member states" that would supervise the compliance or sanctions for the non-compliance without undue pressure from corrupted governments.[34] As a result, it provides no solution in a situation where Central Authorities acquiesce or pay no attention to illegal activities such as child trafficking, child abduction, and the fabrication of adoption documents.[35]

4. *Children Are Not Protected When the Contracting States Receive Them from Non-Member Countries.*

The Convention only applies to cross-border adoptions between the Contracting States, which means children in non-Hague adoption cases are not protected by the Convention.[36] This loophole exposes orphans in non-Convention adoption cases to the great risk of child trafficking.

5. *The Convention Does Not Mandate Signatory Nations To Ratify It.*

The Convention also does not mandate signatory nations to ratify it.[37] For example, South Korea signed the Convention on May 24, 2013, but has so far not ratified it.[38] There are no benefits for South Korea to ratify it soon because not ratifying it does not significantly affect its adoption practice. Requiring the Contracting States to conduct the adoption process with only other member countries is important because it would encourage other nations to join the Convention.[39]

6. *The Convention Does Not Have an Automatic Acquisition of Citizenship System.*

The Convention requires that the authorities of the receiving State determine that "the child is or will be authorised to enter and reside permanently in that State."[40] However, permanent residents can be deported in specific situations such as committing crimes in many countries such as the United States[41] and South Korea.[42] In 2020, around 15,000 to 18,000 foreign-born adoptees that lack the citizenship in the United were in an unstable status, and some of the adoptees realized

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[34] *See* Erica Briscoe, *supra* note 27, at 449.
[35] *See Id.*
[36] *See Id.*
[37] See *Id*.
[38] *See* Status Table, *supra* note 12.
[39] *See* Erica Briscoe, *supra* note 27, at 451.
[40] Hague Adoption Convention, *supra* note 11, at art. 5.
[41] *See* 8 U.S.C. § 1227 (2021).
[42] *See* Chulipgukgwanribeop [Immigration Act] art. 46 para. (2) (S.Kor.), translated in Korean Legislation Research Institute's online database, http://elaw.klri.re.kr /eng_service/main.do (search required).

that they did not have citizenship when they were deported.[43] The United States enacted the Child Citizenship Act of 2000 that automatically allows foreign adoptees to obtain citizenship.[44] However, countries like Korea still do not have this system. Foreign adoptees in South Korea must apply for the procedure to obtain citizenship.[45] Adoptive parents who abuse foreign adoptees could not help them to obtain citizenship. The Convention needs to be amended to include an automatic acquisition of citizenship system.

II. INTERCOUNTRY ADOPTION IN THE UNITED STATES AND INDIA

A. THE UNITED STATES

1. *Intercountry Adoptions in the United States*

The United States is the largest receiving country that internationally adopts a tremendous number of babies.[46] Between 2004 and 2008, the children who were internationally adopted to the United States composed around 50% of all internationally adopted children, and this percentage was around 40 % between 2009 and 2019.[47] Because of the magnitude of the adoptions, the United States possesses great power to influence the global cross-border adoption system.[48] Furthermore, the United States was deeply engaged in the drafts of the Convention on the Rights of the Child (CRC) and the Hague Adoption Convention, so those drafts incorporated the legal principles in the American legal system.[49]

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[43] *See* Marisa Kwiatkowski, *'You love this country, and it's taken from you': Adoption doesn't guarantee US citizenship*, USA TODAY, Dec. 16, 2020, https://www.usatoday.com/in-depth/news/investigations/2020/12/16/international-adoption-does-not-guarantee-adoptees-us-citizenship/6310358002.

[44] *See* Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000) (codified as amended at 8 U.S.C. § 1431).

[45] *See* Gukjeokbeop [National Act] art. 7 para. (1) (S.Kor.), translated in Korean Legislation Research Institute's online database, http://elaw.klri.re.kr /eng_service/main.do (search required).

[46] *See* Selman, P., Global Statistics for Intercountry Adoption: Receiving States and States of origin 2004-2019, NEWCASTLE UNIV., https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf (last visited Jun. 4, 2021).

[47] *See Id.*

[48] *See* David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 15 J. L. Fam. Stud. 81, 82 (2013).

[49] *See Id.*

2. *Implementation of the Hague Adoption Convention*

The United States signed the Convention on March 31, 1994, and the Convention entered into force for the United States on April 1, 2008.[50] The United States enacted the Intercountry Adoption Act of 2000 (IAA)[51] and promulgated the Code of Federal Regulations[52] to implement the provisions of the Convention.

Under the IAA, the Central Authority is the Department of State, where the Secretary is the head of the Central Authority, and the Secretary oversees the performance regarding Hague adoptions.[53] The Bureau of Consular Affairs, a bureau of the U.S. Department of State, plays the main role in the performance regarding Hague adoptions.[54]

The enactment of the Intercountry Adoption Universal Accreditation Act of 2012 (UAA)[55] was praiseworthy. The United States closed the loophole in the Convention by enacting the UAA. The UAA requires adoption agencies in non-Hague adoption cases to satisfy the same accreditation requirements as those in Hague adoption cases. The United States also introduced the automatic acquisition of citizenship system, which allows adoptees to obtain citizenship automatically through intercountry adoption, solving the unstable status of many foreign adoptees.[56]

3. *Weaknesses and Recommendations*

As noted above, the Convention Article 32 lacks standards to define unreasonable fees, remuneration, and gains.[57] Unfortunately, the United States did not set detailed standards to define professional fees when implementing the Convention.[58] As a result, persons involved in the adoption can receive an unreasonable amount of money. Acquiescing to this kind of practice can incentivize systematic child trafficking.[59] For example, in Guatemala, Guatemalan lawyers were

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[50] *See* Status Table, *supra* note 12.

[51] The Intercountry Adoption Act of 2000, Pub. L. 106-279, 114 Stat. 825 (2000) (codified at 42 U.S.C. § 14901 et seq.) [hereinafter IAA]. The IAA was signed into law on October 6, 2000.

[52] 22 C.F.R. pt. 96 (2021); Issuance of Adoption Certificates and Custody Declarations in Hague Convention Adoption Cases, 22 C.F.R. pt. 97 (2021); Intercountry Adoption-Convention Record Preservation, 22 C.F.R. pt. 98 (2021). See David M. Smolin, *supra* note 48, at n191.

[53] *See* IAA, *supra* note 51 at § 101; JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE, § 11.07 (2020).

[54] *See* JOAN H. HOLLINGER, *supra* note 53.

[55] Intercountry Adoption Universal Accreditation Act of 2012, Pub. L. No. 112-276, 126 Stat. 2466 (2013) (codified as added at 42 U.S.C. § 14925, 42 U.S.C. § 14925 note (Definitions), and amended at 42 U.S.C. §§ 14922 and 14943).

[56] *See* Child Citizenship Act of 2000, *supra* note 44.

[57] *See* Hague Adoption Convention, *supra* note 11, at art. 32.

[58] *See* David M. Smolin, *supra* note 48, at 121.

[59] *See Id.* at 116.

paid $15,000 to $20,000 per child of unaccounted finances.[60] Guatemalan attorneys sent approximately 30,000 healthy babies to the United States from 1998 to 2008,[61] and preventing the abduction, sale, or trafficking of children was practically impossible.[62] The United States needs to codify a detailed definition of professional fees or directly set a limit on how high the professional fees can be.[63]

The United States allows American agencies to avoid responsibility through a waiver of liability.[64] As a result, American agencies are not responsible when foreign agencies with whom they have a partnership conduct activities such as obtaining invalid consent of birth parents, child abduction, traffic in children, fabricating documents, and other illegal practices.[65] The United States needs to prevent this kind of waiver of liability so that American agencies conduct their best efforts to protect the best interests of the child.

B. INDIA

1. *Intercountry Adoptions in India*

India is one of the top source countries for incoming adoptions into developed countries.[66] It ranked second in 2017 and 2018, and it placed third in 2019.[67] India first commenced intercountry adoptions forty years ago.[68] Unfortunately, since then, illegal activities such as the sale of children, child trafficking, child abduction, and falsified documents have been committed during cross-border adoptions.[69] According to UNICEF's State of World's Children report 2016, India had 29.6 million orphans in 2016.[70] However, from April of 2016 to March of 2017, the number of adoptions was significantly lower at 3,210 for in-county adoptions and 578 for intercountry adoptions.[71]

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[60] *See* David M. Smolin, *supra* note 48, at 116.
[61] *See Id*.
[62] *See Id*. at 121.
[63] *See Id*. at 140.
[64] *See* 22 C.F.R. § 96.39(d) (2021); David M. Smolin, *supra* note 48, at 124.
[65] *See* David M. Smolin, *supra* note 48, at 124.
[66] *See* Selman, *supra* note 46.
[67] *See Id.*
[68] *See* Arun Dohle, *SYMPOSIUM: THE BABY MARKET: INSIDE STORY OF AN ADOPTION SCANDAL*, 39 CUMB. L. REV. 131, 131 (2009).
[69] *See Id*.
[70] *See* UNICEF, The State of the World's Children 2016 (2016).
[71] *See* Cent. Adoption Res. Auth., Ministry of Women & Child Dev., Adoption Statistics, http://cara.nic.in/resource/adoption_Stattistics.html [hereinafter Adoption Statistics].

2. *Implementation of the Hague Adoption Convention*

India signed the Convention on January 9, 2003, and the Convention entered into force for India on October 1, 2003.[72]

Indian legislation related to adoption includes the Hindu Adoptions and Maintenance Act (HAMA), 1956[73] and the Guardians and Wards Act (GWA), 1890.[74] The HAMA regulates adoption by Hindus, and the GWA allows people other than Hindus to become guardians of children instead of being adoptive parents.[75] Foreigners who were not Hindus needed to be guardians to adopt Indian children.[76] However, the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by the 2006 and 2011 Amendments Act) and the Guidelines Governing the Adoption of Children, 2011 enabled foreigners to adopt Indian children.[77] The Juvenile Justice (Care and Protection) of Children Act, 2015 entered into force on January 1, 2016, and replaced the JJ Act, 2000.[78]

In 2015, the Guidelines Governing Adoption of Children, 2015 entered into force, and, in 2017, the Adoption Regulations, 2017 replaced the Guidelines Governing Adoption of Children, 2015. Under the Adoption Regulations, 2017, the Central Authority is the Central Adoption Resource Authority (CARA), and the CARA is responsible for performance regarding Hague adoptions.[79]

Hague adoptions in India are well regulated. The CARA even fixed the intercountry adoption fee that a Specialised Adoption Agency (SSA) can receive in 2017.[80] The intercountry adoption fee that an SSA can receive is US $ 5,000.[81] "The legal fee is included in the above amount and the expenditure by SSA shall not exceed 5% of total adoption fees received."[82]

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[72] *See* Status Table, *supra* note 12.

[73] The Hindu Adoptions and Maintenance Act, 1956, available at https://www.indiacode.nic.in (search required).

[74] The Guardians and Wards Act, 1890, available at https://www.indiacode.nic.in (search required).

[75] *Id.* at §41.

[76] *See* ASHA BAJPAI, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE 54 (2017).

[77] *See* the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by the 2006 and 2011 Amendments Act) §41; Cent. Adoption Res. Auth., Ministry of Women & Child Dev., Guidelines Governing the Adoption of Children, 2011 §26.

[78] *See* ASHA BAJPAI, *supra* note 76, at 40.

[79] *See* Cent. Adoption Res. Auth., Ministry of Women & Child Dev., Adoption Regulations, 2017 §37.

[80] *See* Cent. Adoption Res. Auth., Ministry of Women & Child Dev., IP-3/20/2016/CARA (Issued on April 5, 2017).

[81] *See Id*.

[82] *Id*.

3. *Weaknesses and Recommendations*

However, since ratifying the Convention, India has continuously faced allegations about the sale of children, child trafficking, child abductions, and falsified documents. For example, in 2005, the Malaysia Social Service Centre in Chennai hired professional kidnappers who abducted Indian children from diverse places such as the streets and markets.[83] Then they sold the children to couples in developed countries.[84] In 2011, Preet Mandir, a managing trustee, abducted the children in Maharashtra and sold them overseas.[85] In 2016, an adoption agency stole children or did not receive valid consent from birth parents, and the agency then sent them to western countries.[86] India needs to strengthen the cooperation with the developed countries that receive Indian children to solve this issue. For India, solving this issue alone is quite challenging. Additionally, the CARA and Central Authorities in developed countries should actively share information about individuals engaged in child trafficking. Those individuals often change the agencies they work for.[87] Thus, India needs to create a procedure to share this kind of information with other countries.

Furthermore, as noted above, the adoption rates, including the rates of intercountry adoptions, are too low[88] despite the great number of orphans in India.[89] One of the reasons for this is that the Indian government faces difficulty ensuring that district-level officers are taking orphans from the street to childcare institutions.[90] As a result, "children on the street is the most common sight in India."[91] India needs to take steps to solve low adoption rates.

Additionally, unlike the United States, India does not have an automatic acquisition of citizenship system that automatically allows foreign adoptees to obtain Indian citizenship.[92] India needs to codify this system to ensure the best interests of the child.

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[83] *See* Gita Aravamudan, *Child trafficking, 'manufactured orphans': The dark underbelly of inter-country adoption in India*, FIRSTPOST (Oct. 30, 2018), https://www.firstpost.com/india/child-trafficking-manufactured-orphans-the-dark-underbelly-of-inter-country-adoption-in-india-4000837.html.

[84] *See Id.*

[85] *See Id.*

[86] *See Id.*

[87] *See* Karen Smith Rotabi & Judith L. Gibbons, *supra* note 2, at 111.

[88] *See* Adoption Statistics, *supra* note 71.

[89] *See* UNICEF, *supra* note 70.

[90] *See* Shreya Kalra, *Why India's adoption rate is abysmal despite its 30 million abandoned kids*, BUSINESS STANDARD (Oct. 30, 2018), https://www.business-standard.com/article/current-affairs/why-india-s-adoption-rate-is-abysmal-despite-its-30-million-abandoned-kids-118103000218_1.html.

[91] *Id.*

[92] *See* Tariq Ahmad, *Citizenship Through International Adoption: India*, LIBR. CONG., https://loc.gov/law/help/citizenship/international-adoption/india.php (last visited Jun. 4, 2021).

III. CONCLUSION

The Hague Adoption Convention was made to protect the best interests of the child. However, the Convention has several loopholes, such as the ambiguous terminologies regarding financial restrictions and the lack of means to oversee the implementation of the Convention.

In spite of these loopholes, the United States and India tried to fix them. The United States enacted the Intercountry Adoption Universal Accreditation Act of 2012, requiring adoption agencies in non-Hague adoption cases to satisfy the same accreditation requirements as those in Hague adoption cases, and India fixed the intercountry adoption fees that adoption agencies can receive.

However, these countries have problems regarding intercountry adoptions. The United States needs to codify reasonable fees that adoption agencies can receive. In addition, the United States should not allow agencies to avoid responsibility through a waiver of liability. Meanwhile, India should make stronger efforts to solve rampant child trafficking and low adoption rates. It also needs to codify an automatic acquisition of citizenship system that automatically allows foreign adoptees to obtain Indian citizenship.

RELIGIOUS RIGHTS: A CRITICAL COMPARISON BETWEEN SABARIMALA AND THE HAJI ALI DARGAH CASES

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RELIGIOUS RIGHTS: A CRITICAL COMPARISON BETWEEN SABARIMALA AND THE HAJI ALI DARGAH CASES

ABSTRACT:

Men have suppressed women since before the beginning of the British era. Until now, every woman has to deal with this problem. Patriarchy has been the reason for suppression women. Muslim women are locked in the hands of men and their custom, and they are unable to live their lives.They were always stuck under the hands of men. The leading tradition is that the practice of men dominating women. On account of, this prevailing practice, Muslim women were not given equal rights as men pose in society. Due to these practices, there was a problem for women to continue their education. Equal rights underpin the elimination of conventional gender roles, reform of Muslim rule, and a more prominent public presence for Muslim women. Men also reflected concerns for women's education. Even though nothing mentioned curtailing women's rights in Muslim law, Muslim men had made it a practice and downgraded women. Some rights have been curtailed, and women were limited to do the same. Not only Muslim Women, but most women are made limited to their work.

Some practices are being carried to this date in some particular places, and one of the practices that came to light in this respect, is women not being allowed to enter Haji Ali Dargah, which is located in Mumbai. This Dargah is a public trust that helps students' education and the people in need. The question that arises is whether this practice of not allowing women to enter the Dargah is an essential religious practice. The present paper examines how the judicial interpretation in respect of the same, was arrived it.

RESEARCH PROBLEM:

This research paper attempts to provide a critical overview of the debate between customs and fundamental rights, through two case studies, and how religion and equality affects women and their entry into these religious places.

INTRODUCTION:

The custom that was followed did not permit women to enter the Dargah, and this is because the trust members assumed that this ban was an amendment. The same thing happened in Sabarimala, where women are barred from entering the temple. In both the Haji Ali Dargah and Sabarimala cases, it was determined that those practices were a non-essential religious practice and not allowing women to enter the temple is violated under article 15, which deals with equality. In the case of Haji Ali Dargah, the trust said that it had used Sharia law to put a ban in place. The trust reasoned that the ban did not completely exclude female devotees from entering the shrine; only the inner sanctum, which housed the Sufi saint's tomb, was off-limits.[1] "They will read their prayers, perform namaz, and give shawls and flowers," Merchant said. They also say that the trust has a constitutional right to administer its affairs in matters of religion under Article 26 of the Indian Constitution. The limits were put in place to protect women's welfare and protection. Women were never allowed "to enter the proximity of the tomb" in the past, according to the trust." The Temple custodians in Sabarimala argue that women of menstrual age are not permitted to offer prayers because the deity there, Ayyappa, is a celibate. Women and girls aged 10 to 50, mostly menstruating women, were barred from entering the Ayyappa shrine in Kerala. Arguments made in both cases, was on the basis of gender equality. This paper examines and contrasts the cases of Haji Ali Dargah and Sabarimala, emphasizing the similarities and differences between the two. Just one aspect was impacted as a result of these activities, and it was gender equality. Women were not permitted to access the shrine due to these customs.

CONSTITUTIONAL PERSPECTIVE:

There are supporting articles in this paper which includes article 15, article 25, article 26, as these articles speak about the freedom of religion, freedom to manage religious affairs, respectively. Article 15 prohibits discrimination based on religion, ethnicity, caste, gender, or place of birth. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.[2]

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[1] *A grievous sin': Why women were banned in Haji Ali Dargah*, https://www.indiatoday.in/fyi/story/haji-ali-dargah-why-women-were-banned-from-entering-inner-sanctum-337379-2016-08-26

[2] Constitution of India, Article 15

Article 25 of the Indian Constitution of 1949 says about the freedom of conscience and free profession, practice, and propagation of religion.[3] This article is related because it discusses regarding public order, morality, and health and the other provisions of this Part, and also mentions that all the persons are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate religion. This article cannot prohibit the state from enacting law, nor does it affect the implementation of existing law. Nothing in this article may be used to restrict or limit any economic, educational, political, or other non-religious conduct. This article promotes social welfare and reform, including the establishment of public Hindu religious institutions for all groups and parts of Hindu. Explaining the wearing and holding off kirpans in the Sikh religion's occupation. Hindus shall also be construed as including a reference to people professing the Sikh, Jains, or Buddhist religions, and the reference to Hindu religious establishments shall be construed accordingly, according to sub-clause (b).[4]

Article 26 Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right[5] to establish and maintain institutions for religious and charitable purposes; to manage its affairs in matters of religion; to own and acquire movable and immovable property, and to administer such property in accordance with the law.[6]

Religion is a matter of belief or faith.[7] The right to freedom of worship is protected under Articles 25 to 28 of India's constitution, which acknowledges the importance of religion in the lives of Indians. The Constitution of India envisages a secular model and provides that every person has the right and freedom to choose and practice his or her religion.[8] The primary purpose of a secular state is to ensure that all the people who constitute the State will have freedom of conscience so that persons of different faiths will have the same rights and responsibilities and no discrimination between them[9] would exist. And since the introduction of secularism,

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[3] *Article 25: Freedom of Religion* | Fundamental Rights http://www.lawtycoon.com/article-25.html
[4] *Article 25: Freedom of Religion* | Fundamental Rights http://www.lawtycoon.com/article-25.html
[5] *Article 26 and Rights of Religious Denominations*. https://www.jatinverma.org/article-26-and-rights-of-religious-denominations/
[6] *Law and Religion* | Legal Yatch. https://legalyacht.in/articles-details.php?url=law-and-religion-
[7] *Right to Freedom of Religion: Articles 25-28 of the Indian*, https://blog.ipleaders.in/right-to-freedom-of-religion-articles-25-28/
[8] V.M. TARKUNDE, *Secularism and the Indian Constitution*
[9] Article 26 of Indian Constitution - Introduction https://legodesk.com/legopedia/article-26-of-indian-constitution/

limits are placed on women of the same religion, not on women of other religions. Then India cannot be considered a secular country. In secularism, every person must have the right to religion and no discrimination. But in this case, women are being discriminated against and have not been allowed to enter the temple.[10] It is clear from the constitutional scheme that it guarantees equality in[11] all individuals and groups irrespective of their emphasizing that there is no religion of the State itself.[12] The Preamble of the Constitution in Articles 25 to 28 emphasizes this aspect. It shows that the principle of secularism is expressed in the constitutional scheme in this way as a creed accepted by the Indian people, which must be considered when assessing the constitutional legitimacy of any legislation. The concept of secularism is one facet of the right to equality woven as the central golden thread in a fabric depicting the pattern of the scheme.

RELIGION V. EQUALITY:

The concern in the Sabarimala case is whether excluding women constitutes a "essential religious practice" under Article 25 of the Indian constitution. The supreme court of India laid down the "essential element of religion" doctrine. In the Commissioner, Hindu Religious Endowments, Madras vs. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Muttcase[13] it was laid down that religious opinions and the acts done in pursuance of those opinions, are religious practices. This implies that the supreme court has said that the rituals, modes of worship, and ceremonies all come under essential practices of religion. These have to be protected to the extent that they are within the limits of article 25 and 26 of the Constitution of India. Article 26 has been used as a defense in both cases because it discusses freedom of managing religious affairs. The trust has the authority to manage its religious affairs, according to Article 26. The trust can enforce a ban on women, and it has every right to do so. However, in the Sabarimala case it was contended that the ban on women was because Lord Ayyappa in Sabarimala is in a different form, who is unmarried. As a result, the Devaswom board argued that women and girls aged 10 to 50, as well as women in menstruation, should not enter the temple. It was said

[10] Md. Mahtab Alam Rizvi *SECULARISM IN INDIA: RETROSPECT AND PROSPECTS,*

[11] *The Concept of Secularism in India,* http://www.legalservicesindia.com/article/1589/The-Concept-of-Secularism-in-India.html

[12]*A Pseudo-Secular India? An analysis of the Citizenship regime*, https://www.barandbench.com/columns/a-pseudo-secular-india-an-analysis-of-the-citizenship-regime

[13] Commissioner, Hindu Religious Endowments, Madras vs. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Muttcase 1954 AIR 282, 1954 SCR 1005

in Haji Ali Dargah that menstruating women are unclean and impure in Islam and should not enter the Dargah or mosque. They also mentioned that women were not permitted because they wanted to be protected from any sexual abuse that could occur inside the Dargah. Article 15 of Indian constitution talks about the equality where every individual must be treated equally. The applicant in both cases put forth that this practice that they follow as custom violates article 15 of Indian constitution which amounts to discrimination on basis of sex as the psychological feature of menstruation is exclusive to females alone. In the case of Charu Khurana and others v. Union of India it was held that gender bias in any form is opposed to constitutional norms.

In general, there are two kinds of values in an argument and a research paper. These are persuasive and binding values. These are the source of law that helps the court to consult in deciding the cases. Lower courts, horizontal courts, foreign courts, and statements included in dicta, treatises, or law reviews will be used to determine persuasive value. Binding law implies that specific requirements must be fulfilled in order for it to be legally binding. These includes understanding the nature of the agreement and agreeing to do or not do certain things. When a High Court sites a Supreme Court case, an authority is said to be binding, as with the Supreme Court, it is said to be binding for the number of judges present in a particular case. If more judges, then it is said to be binding. The binding authority in this situation are laws, judgments, and customs that have been followed. Here the law itself says to give equal rights to both men and women. Article 21 talks about the equality of both the gender. Because the law has more authority over custom, custom cannot overrule the law. In these cases, the law cannot be avoided in the first place because of a custom. If the law states something about equity, the law must be followed. While men are permitted to enter the Dargah, women are also permitted to enter. In the case of Dr. Noorjehan Safia Niaz And 1 Anr vs State Of Maharashtra And Ors the court held that women are allowed to the sanctum and there is no ban imposed. The contention that was laid by the Dargah was there is no safety for women inside the sanctum and the court ordered that the trust has all the liberty to make safety precautions for the entry of women.

In the Durgah Committee, Ajmer v. Syed Hussain Ali case, Gajendragadkar, J. explained that article 21 (b) (c) and (d) thereby violates right to freedom of religion and to manage denominational institutions guaranteed by the said article.[14] This case is binding authority; however, in religious matters, it is found that the same is not sacrosanct since there may be many ill-

[14] The Durgah Committee, Ajmer vs Syed Hussain Ali And Others, 1961 AIR 1402, 1962 SCR (1) 383

practices such as superstitions that, in time, may become mere accretions to the basic theme of that religious denomination. In Sri Venkatramana Devaru v. State of Mysore and others, it is said that all that a religious denomination may do is to restrict the entry of a particular class or section in certain rituals. In Indian Young Lawyers Association vs. The State of Kerala, the court with a five-judge bench is binding authority, and it was held that women are allowed to enter into the temple of Sabarimala as they have the right to equality.

In National Legal Service Authority v. Union of India and (2008) 3 SCC 1 (2015) 1 SCC 192 others and Justice K.S Puttaswamy and another v. Union of India and others, it has averred that the exclusionary practice pertaining to women is violative of Article 21of the Constitution as it impacts the ovulating and menstruating women to have a typical social day to day rendezvous with the society including their family members and, thus, undermines their dignity by violating Article 21 of the Constitution.[15]

Here the law is contradictory to the custom that is followed. If Article 14 speaks about the right to equality, then Article 21 speaks about the right to personal liberty. If a person has a right to personal liberty, then the Constitution as it impacts the ovulating and menstruating women to have a normal social day to day rendezvous with the society, including their family members, and, thus, undermines their dignity by violating Article 21 of the Constitution.[16]

CONCLUSION:

Every law is applicable to every person in this country. No person shall be deprived from using the law. Every single citizen has right to equality in our country, and he or she must be allowed to exercise that right. Being a woman should not be a reason for not entering into any religious places. Majority of people supported the entry of women into religious places without any bar. Not only women, even men are not allowed in certain temples and religious places. The custom practiced may have been inferred, but a custom cannot overrule a law. Any individual must be granted equal rights, and no one should be barred from entering one place.

[15] *Sabrimala Temple Judgement: A Critical Analysis*, https://journal.indianlegalsolution.com/2019/07/15/sabrimala-temple-judgement-a-critical-analysis%ef%bb%bf/

[16] Id.

Topic: Criminalization of Marital Rape in India

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Abstract:

Any sexual offense abuses a ladies' protection and trustworthiness against her. After the Nirbhaya case in 2013, assault laws were revised on the proposal of the equity J.S. Verma board of trustee's report. Nonetheless, in India, marital rape is not yet condemned, as it is assumed that there is inferred assent by the two accomplices in a marriage. Since individuals do not know and because it is anything but an offense under the Indian penal code, 1860. However, the fact of the matter is not so. Assault is assault regardless of whether it is among a couple. Marital rape is sex without assent where the culprit is the casualty's life partner. Most of the created nations have condemned marital rape as it is an infringement of central rights. In any case, in India, it is not yet condemned even though it was suggested by the law commission and the equity Verma panel too.

Research Problem

Rape is a shameful offense whether it occurs within or outside of the boundaries of a marriage, but there is no legal penalty in India for marital rape. As a result, a model of criminalization of marital rape is needed to secure women's rights. – Should marital rape be criminalized? What are the Punishments for the Act of Sexual Intercourse amounting to Marital Rape?

Introduction:

In Indian culture, marriage is considered a religious organization as a base stone for a steady family and an edified society, yet sadly it covers sexual pitilessness and another type of ruthlessness. Marital rape can be characterized as undesirable intercourse or infiltration (butt-centric, vaginal, or oral) acquired forcibly, danger, or power, or when the spouse cannot assent. Marital rape is sex without assent where the culprit is the casualty's life partner. Marital rape is the most widely recognized wrongdoing against wedded ladies in India and the most under-announced wrongdoing in the nation. The exploitation of ladies and intimate assault being a typical marvel in India. To comprehend the significance of marital rape, it is essential to explore the importance of the term assault. Etymologically, the word assault gets from the Latin action word rapere, which intends to seize or take forcibly. As per the Cambridge Dictionary, the term assault intends to constrain somebody to have intercourse when they are reluctant, utilizing viciousness or undermining conduct. Rape is a direct breach of civil rights, and under no circumstances can the victim's association with the rapist be seen as a shield in rape cases. The Honourable Court's point is that criminalizing marital rape will destabilize the institution of

marriage; this demonstrates the existence of innate societal sexism in our culture, which has resulted in the exploitation of women. The exception clause of Sec. 375 is very evidently giving an upper hand to the husband and constant consent to sexual intercourse to which the wife has no option but to submit.

As a result, the question remains: why do some states continue to grant marital exemptions for rape while others make it a full-fledged crime? To answer this question, we use a conflict model embedded within a diffusion context. Our strategy acknowledges that confrontation and diffusion are not antagonistic mechanisms but rather operate together to influence legal reform. In this way, we use a conflict perspective to guide our modelling of the diffusion process. We construct hypotheses in line with the relevant literature but focus on three central arguments:

1. We argue that women's power is positively related to the elimination of spousal exemptions. We use a conflict perspective to direct our diffusion process modelling in this way. We construct theories based on the literature, but we concentrate on three main points.
2. We suggest that the abolition of spousal exemptions has a positive impact on women's influence.
3. We expect that when states completely criminalize marital infidelity, there will be a detrimental impact on spatial diffusion. It reduces the probability of similar laws being passed in nearby jurisdictions.
4. We argue that minor reforms in rape statutes harm the implementation of more comprehensive reform legislation.

Marital rape in Child Marriage:

This ancient accommodation is still in our reformatory resolution, Indian penal code 1860. That is, sex by a man with his own significant other not younger than 15 years is not assaulted. The exemption proviso gives total freedom and insusceptibility to the legitimately married spouse to violate the wife to any expand. However, it may influence her respect and life in general. Also, state changes like Manipur subbed the age of fifteen to the age of thirteen. The highlight is considered is, this exemption is silly and in opposition to a similar section 375 of IPC s sixth

depiction if a man submits assault on a lady with or without her assent when she is beneath the age of eighteen years is an assault. Also, this case empowers child marriage.
As per Indian law, an individual beneath the age of 18 years is a child. Over the age of fifteen years in the uncommon condition implies and incorporates a youngster (underneath the age of eighteen years). Thirdly without wanting to and without her assent is unconsidered in assault in marriage.

Subsequently, marital rape is seen as assault just if the life partner is under 15 years of age, and the earnestness of discipline is mild. There is no legal security consented to the life partner after 15, which is against standard freedoms bearings. A similar law that obliges the legal time of the arrangement for union with 18 shields from sexual misuses only those up to the age of 15. As indicated by the Indian Penal Code, the cases wherein the companion can be criminally summoned for an offense of marital rape are as under: When the spouse is between 12 – 15 years old, an offense culpable with detainment is two years or fine, or both.[1] At the point when the mate is underneath 12 years of age, offense blameable with the confinement of one or the other depiction for a term which probably won't be under seven years yet instead which may contact life or for a term loosening up if ten years and should in like manner be liable to OK rape of a judicially detached life partner. Offense chargeable with confinement if two years and acceptable rape of spouse of over 15 years in age are not culpable. The part of the Indian Judiciary on account of Marital assault is quiet. While the Parliament is to make law and the legal executive is to decipher. The legal activism by the legal executive is quiet in the matter of the actual demonstration over the wedded ladies - The marital rape, even the legal executive is of the view that a spouse can have constrained sex with his significant other.

THEORETICAL EXPLANATIONS FOR CHANGES IN MARITAL RAPE LAWS

According to Catherine MacKinnon (1989), rules, especially those concerning rape and sexual assault, manifest male superiority. Men construct laws representing a social structure in which women are structurally inferior to men and stripped of authority, thereby perpetuating women's subordination (MacKinnon 1989). However, as groups gain economic and political power, laws are modified to reflect their interests (Vold, Bernard, and Snipes 2002). For example, in

[1] sangamithra logananthan Marital Rape legalservicesindia.com
http://www.legalservicesindia.com/article/2369/Marital-Rape.html

response to conflicts and contradictions by expanding women's rights following suffrage, lawmakers began to alter some laws governing women. While most research on law creation focuses on the impact of the social and political climate on the criminalization process, especially power differentials between opposing parties, other research suggests interstate diffusion can help understand the likelihood. Timing of legislation (Grattet, Jenness, and Curry 1998; Rogers 1962; Soule and Earl 2001 Strang and Earl 2001 Strang and Earl 2001 Strang and Earl 2001 Strang and Earl 2001 Strang and Earl 2001 Strang. Earl 2001 Strang and Earl 2001 Strang and Earl 2001 Strang and Diffusion theorists model a heterogeneous diffusion mechanism, which means that politicians, when unsure of the best strategy to pursue, often turn to neighbouring states' policies for guidance in drafting and deciding on specific policies (Soule and Earl 2001). As a result, social and political scholars would have a greater understanding of the probability and pace of legislation. Although also considering propensity, susceptibility, infectiousness, and similarity to previous adopters, as is typical in diffusion studies (e.g., Myers 2000; Soule and Earl 2001).[2]

Concept of Consent

The most intimate marital arrangement between a man and a woman should be ruled by agreement. There is a need to ensure express consent at any moment, from the time a woman decides to marry a man to the time she agrees to have sexual intercourse with him. Consent is the moral line that separates rape from sexual intercourse, although it is unfortunate to note that if a woman is married, she loses her right to consent., her consent is implicitly assumed, and she cannot revoke it. Since India has always regarded men as superior to women, she has always been known by the man's name in her life and has never had her own identity.She is considered as her father's property before marriage and as her husband's property[3] after marriage, and she is required to always give her permission to her husband on all matters. Even where a woman expresses overt non-consent, it is regarded as superfluous or a mild annoyance that can be converted and reinterpreted as consent.[4]

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[2] Jennifer McMahon-Howard, Jody Clay-Warner and Linda Renzulli, Criminalizing Spousal Rape: The Diffusion of Legal Reforms Vol. 52, No. 4, 5

[3] Amit Varma, Misogyny is the oldest Indian tradition, The Hindu Business online, (August 04, 2017), https://www.thehindubusinessline.com/blink/talk/misogyny-is-the-oldest-indiantradition/article9800756.ece

[4] Prof. Kshitij Naikade & Dr. Garima Pal, Issues and Challenges Related to Marital Rape in India, "7 IJHSSI 58-69 (2018)

Deaths and Reports:

The man makes a condition to the wedded lady that they reserve no option to deny their better half because the conviction is that spouse has suggested agree to engage in sexual relations with the husband it was viewed as irrelevant whether the demonstration is made with or without her assent and will. Which is embarrassed and against the viewpoint of fundamental liberties. Today various countries have either settled marital rape laws, denied marital rape uncommon cases, or have laws that don't perceive marital rape and common assault. This exhibits that marital rape is presently seen as an encroachment of common liberties. In 2006, it was surveyed that marital rape is an offense repelled under the criminal law in no under 100 countries, and India isn't one of them. Even though many establishments and foundations have gone in India as to brutalities against women in her own home, like laws against female youngster murder and oppressive conduct at home, marital rape has failed to get affirmation as bad behaviour as per system makers. Marital rape, in India, is squatted behind the consecrated window hangings of marriage.

Marital rape and Laws in India

Marital rape is not an offense in India. Institutions concerning marital rape in India are either non-existent or obscure and dependent on the comprehension by Courts. **Section 375**, the arrangement of assault in the Indian Penal Code (IPC), specifies as its exemption provision that Sexual intercourse by a man with his own better half, the spouse not being under 15 years old, isn't assault. According to Section 376 of the IPC, the perpetrator should be punished by being imprisoned in one or both depictions for a period that could most likely not be less than seven years but may extend to life or a term of up to ten years, and should also face a fine, because the woman attacked is his real mate and is not in danger of being fined. Moreover, he is not under the age of 12, in which case he may be punished by being imprisoned in one or both portrayals for up to two years, with or without a sentence.

In the **Francis Coralie Mullin v. Union Territory of Delhi** case, the idea of the right to life under Article 21 of the Constitution was highlighted. As per this case, **Article 21** incorporates the right to live with human dignity and all that accompanies it, to be specific, the minimum essentials of life, for example, adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and

mixing and mingling with fellow human beings. The right to live with human integrity is one of the essential components of liberty since it determines a person's freedom.[5]

The Supreme Court has held in a catena of cases that the offense of rape abuses the right to life and the right to live with the human dignity of the victim of the crime of rape. One of the examples is **The Chairman, Railway Board v. Chandrima Das.**[6] The Supreme Court has observed that rape is not merely an offense under the Indian Penal Code but is a crime against society. In **Bodhisattwa Gautam v. Subhra Chakraborty** court held that rape is a lesser degree a sexual offense than a demonstration of hostility gone for corrupting and mortifying the ladies. In this manner, the marital exception principle is violative of the spouse's entitlement to live with human dignity. Any law which damages women's entitlement to live with dignity and gives a spouse appropriate to drive the wife to have sexual intercourse without her will is along these lines unlawful.[7]

The Delhi High Court in February 2015 and The Kerala High Court in October 2015 wouldn't engage a PIL testing an arrangement section 375 uncommon statement as illegal. Even though there have been huge fights against assault everywhere in the nation. Exceptional Fast Track Court in New Delhi has decided that intercourse among a couple, regardless of whether coercive, isn't assaulted. Further, the judgment came from Additional Sessions Judge, Virender Bhat, in October a year ago expressed a dubious articulation that young ladies are ethically and socially bound not to enjoy sex before an appropriate marriage, and on the off chance that they do as such, it would be to their hazard, and they can't be heard crying later that it was assault. In 2005, the Protection of Women from Domestic Violence Act 2005 was passed, which thinks about marital rape as a neighbourhood viciousness. Under this Act, a woman can go to court and[8] get a lawful section from her significant other for marital rape. Marital rape is preposterous: is a woman's body assaulted, just as her warmth and trust are harmed in this way tossing her it very well may be said of precariousness and fear. Her fundamental freedoms are surrendered at the sacred spot of marriage. Be that as it may, the laws to make sure about the interests of the losses of marital rape are missing and inadequate, and the methods taken are unsuitable. The crucial start of these "laws" is that consent to a wedding remembers consent to

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[5] sangamithra logananthan Marital Rape legalservicesindia.com http://www.legalservicesindia.com/article/2369/Marital-Rape.html

[6] Id at 3

[7] Riddhi daga Criminalizing Marital Rape: A Constitutional Outloook https://www.lawcolumn.in/criminalizing-marital-rape-a-constitutional-outloook/

[8] WAKE UP BEFORE IT'S TOO LATE: MARITAL RAPE AND CRIMINAL LAW. https://www.lawaudience.com/wake-up-before-its-too-late-marital-rape-and-criminal-law/

draw for into sexual activity. In any case, does agree to partake in sexual activity intend to consent to be demanded with sexual violence? Ruthlessness makes a sentiment of fear and precariousness, causing the woman to submit to sex. It isn't equivalent to consenting to sex.

The refinement among consent and non-consent in contradistinction is fundamental to criminal law. It is startling that a woman can guarantee her privilege to life and opportunity, not her body inside her marriage. The importance of assault (Section 375 of IPC) ought to be changed. The top resort for women so far is section 498-An of the IPC, overseeing callousness, to protect themselves against "preposterous sexual direct by the companion". Regardless, there is no norm of measure or interpretation for the courts, of 'corruption' or 'unnatural' inside suggest marital relations.

Although the Constitution doesn't expressly recall it, such a right exists in the more significant arrangement of the privilege to life and individual freedom.[9] The possibility of confidence relies upon the conviction that the individual is a complete boss in issues eagerly associated with her/his body or flourishing. The more private the choice, the more overwhelming is the advantage of the individual. They will be the primary makers of his predetermination, which chooses his existence. Sexual relationship is a champion among the most individual choice that a woman holds for herself. Choices related to sex are a sort of self-articulation and confidence. If the law attempts to remove the advantage of imparting and renouncing such consent keeps a woman her shielded right from getting genuine confidence. Along these lines, it is introduced that the conjugal avoidance guideline effectively denies a married woman her qualification to considerable confidence and interferes in her most individual dynamic. The Supreme Court, in **the State of Maharashtra V. M.** The archaic belief of considering women as property must end. Violence within marriage and that too rape destroy the whole concept of the sanctity of marriage, and hence the perpetrators of such crimes must be punished.[10]

[9] Remedy of Compensation under Article 32. http://www.legalservicesindia.com/article/2570/Remedy-of-Compensation-under-Article-32.html

[10] Marital Rape in India:A Sleazy Truth. http://www.legalserviceindia.com/legal/article-3241-marital-rape-in-india-a-sleazy-truth-.html

Conclusion:

The changing society is empowering women worldwide. Just because the woman is married, it does not mean that she lost her dignity and chastity. In her husband's hands, she is neither a home nor a personal property. Rape a heinous crime against the women to unmarried women, but it is also the same for the women in matrimonial relations. It should be held immaterial whether the women who are sexually assaulted are married or unmarried and who committed is a husband or a stranger. The absurdity in law is that a woman can protect her right to life and personal liberty, but not her own body within the marriage should be focused, that it is violative of our constitutional guarantee. The exception clause should be removed from the Indian Penal Code 1860in light of the recommendation of the Justice Verma Committee report. Also, the penalty for rape under section 376 of the Indian Penal Code should be expanded to include marital rape. A new provision for marital rape should be created. There should be a judicial awakening too. As UNITED NATION rightly pointed out, we require the generation of awareness by educating boys and men to view women as a valuable partner in life.

Furthermore, now India has adopted 17 goals of the UN and looked ahead to achieve UNITED NATION DEVELOPMENT PROGRAMMES SUSTAINABLE DEVELOPMENT GOALs with the agenda of transforming our world by 2030. This goal will be successful only if the crime against women -marital rape is held criminalized. Since he is her lawfully married husband, marital rape cannot be decriminalized. Marital rape is rape. The love should not hurt.

Abrogation of Article 370: A Decision Which Transformed the State of J&K

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CONTENTS

ABSTRACT

This research essay tries to analyse that whether the whole process of revoking the article was conducted keeping in mind the legal framework and the obligations which needs to be adhered with, to address the above issue, there is a need to carry out research on the topic such as the legal history of J&K, The role of the legal institutions and the sharing of powers between the Central and the State government in place, in addition to the question that whether the process of Revoking Article 370 was performed in a lawful manner?. At the end of the essay, we conclude that this decision of revoking Article 370 by the parliament and the government was a sheer misuse of its powers as it lacked legal obligations and rules.

KEYWORDS

Article 370, Jammu and Kashmir, Central Government, Legal Institutions, Political Instability

INTRODUCTION

Article 370 of the **Indian Constitution** is mentioned in part XXI of the constitution which talks about the temporary provisions with respect to the state of Jammu and Kashmir. This article contains 3 clauses. Under this article the State of Jammu and Kashmir were provided with some special provisions which were different from the rest of the states in the country. As stated in clause (1) sub clause (c) of Article 370, "That the provisions of article 1 and of this article shall apply in relation to that state".[1] The various laws made by the parliament were not applicable to this state and it contained its own rules and bylaws. Jammu and Kashmir being the only state in India which had its own Constitution, National Flag, and anthem. On 5th August 2019, the government of India took a massive decision by **Revoking the Article 370** and thus removing the special provisions for the state of J&K.

A. LEGAL HISTORY OF J&K

Talking about the legal history of how Article 370 came into force, there were certain important events which took place between 1946 to 1954. In the year 1946 the Cabinet mission decided on the policy for the Britishers to withdraw from the country and an act named **Indian Independence Act, 1947** came into force which divided the British India into two dominions of India and Pakistan.

Jammu and Kashmir being in the border of both the countries had to come up with a decision. The then king of Jammu and Kashmir Maharaja Hari Singh decided to stay independent until October 20, 1947 when the state was attacked by some of the Tribesman, Maharaja Hari Singh left with no choice had to sign an "**Instrument of Accession"** seeking to be a part of the dominion of India.[2]

Maharaja Hari Singh was in distress because the state was attacked and he required immediate help to get rid of this situation, On 26th October 1947 Maharaja Hari Singh looked for Military

[1]INDIA CONST. art. 370, cl. 1(c).

[2]Agarwala Jaishankar, *Article 370 of the constitution,* EPW., 18 Apr. 2015.

assistance from India, so he signed a document of Assistance and Instrument of Accession which was sent to the then governor General of India, **Lord Mountbatten**[3]. On 27th October 1947, Lord Mountbatten wrote back to Maharaja in which he accepted Maharaja's request of including Kashmir in the dominion of India. This Instrument of Accession was a legal document between the state of J&K and the Central Government. Since then, it has become an important document for all the matters relating to the State of J&K and the Centre. In the year 1949, king Yuvraj Karan Singh issued a proclamation demanding a separate constituent assembly for the state and the relation between the Centre and the State of J&K was to be decided on the basis of Instrument of Accession. On 15th February 1954, the constituent assembly of the state formally consented to be a part of India. Though Jammu and Kashmir had been a part of Indian dominion still the state had its own separate constitution. The constitution makers of our society had to accommodate Kashmir by providing with certain special provisions, thus it was included in Article 306A of the constitution when the constitution was drafted, later being changed to Article 370.[4]

B. (1) POWER SHARING BETWEEN THE CENTRE AND THE STATE

After the state of Jammu and Kashmir were given special Provisions, it was crucial for both the central and the state governments to exercise their power in a balanced manner to ensure peace and harmony in the state.

Under the Instrument of Accession, which was a legal document, the Centre had the control over only 3 subjects, they were: Defence, External Affairs and Communication the rest of the powers were vested in the hands of the state government. The Central government did not have a say on various issues which created difficulty to govern the state.

After Article 370 was revoked on 5th August 2019 the state of J&K were converted into two Union territories J&K and Ladakh. The major change which took place were the powers shifted from the hands of the state government to the central government as it was directly administered by the Centre. The Centre had the complete power to take decisions regarding J&K and the parliament had the authority to amend laws under the Indian Constitution.

[3] Hussain, Ijaz. *Kashmir Dispute and the Instrument of Accession.* 18, JSTOR. 13, 14 (1995). https://www.jstor.org/stable/4518220. Accessed 1 Dec. 2020.

[4] Sathe S.P*, Article 370: Constitutional Obligations and Compulsions*, 25 EPW. 932, 932-33 (1990). www.jstor.org/stable/4396216 . Accessed 16 Nov. 2020.

B. (2) POLITICAL INSTABILITIES IN THE STATE

The primary reason for the Revocation of Article 370 had been the long political instabilities which existed in the state from the period of 1947- 2008. There were various problems between the Central and the state government and the reason was that the "state government was more proactive in imposing its own ideologies in the state through the virtue of power and patronage which led to central government withdrawing their support economically." They believed investing in the state would be risky due to uncertain future. It was in the year 1953 when the powerful leader and then prime minister of Jammu and Kashmir Sheikh Abdullah was arrested and dismissed, his successor Bakhshi Gulam Mohammad tried to regain support of the central government, but his efforts did not bring out promising results.[5] During this period when Sheikh Abdullah was arrested a lot of revolts and violent disturbances took place in the state. The intention of Jawaharlal Nehru was to merge Jammu and Kashmir to the Indian union like the other states, but Sheikh Abdullah wanted the state to remain independent as it was decided and written in the constitution.

Bakshi Gulam Mohammad stayed in power for over 10 years (1953-1962) but in the year 1962 his political regime came to an end because of his devious act which led to disqualification of the opposing Candidates.[6] In the year 1964 Ghulam Mohammad Sadiq was elected as the head of the government and due to his efforts Abdullah was released in the year 1964.

During the period of (1964-1970) the Central government felt that Sadiq was gaining power and authority, so they decided to destabilize Sadiq government and appointed Mir Qasim. There were long negotiations between Delhi and Abdullah which finally resulted into Abdullah replacing Congress chief minister Qasim in the year 1975. During the era of 1975-83 there was no political instability as Abdullah tried to maintain peace and harmony in the state but it was again after Abdullah's death in the year 1983 that the whole political system in the state was dismantled.

The main problem in the state was the differences between Delhi and the state, the central government had the motive to establish their political party in the state, but the state political parties were against this decision by the centre and all these successive events of political

[5] WANI AZIZ ASHRAF, *What Happened to Governance in kashmir* 7-32 (2018).

[6] Mohan, Surinder. *Democracy in Jammu and Kashmir 1947-2008.* 16, The Journal of International Issues. 88,99 (2012). https://www.jstor.org/stable/48504940. Accessed 2 Dec. 2020.

instability remained from the period of 1985-2008 after Abdullah's death. The reason for such political instabilities was that the Central and the State government not working together

C. THE ROLE OF LEGAL INSTITUTIONS

The legal institutions in any democratic country has got a lot of work and responsibilities, be it the parliament or the courts all play a major role in the decision- making process related to the subject of Law. Let us consider Article 370 of our Indian Constitution, The Constitution makers while drafting the constitution had to consider various issues while drafting the constitution for the whole country. India being a federal country, the powers are divided between the Union and the State government. The entire country had to abide by the constitution except Jammu and Kashmir because it was the only state in the country which had its own constitution, and all the laws were framed by the constituent assembly of the state. Though Jammu and Kashmir had its own constituent assembly still it did not have the power and the authority to abrogate the Instrument which was signed between the Union and the state government.[7] The state Constituent assembly did not have the authority to unilaterally take the power away from the Indian Union, therefore it is evident that the laws framed by the legal institutions or the Law-making body are to be followed duly and diligently.

Talking about the courts and the supreme authority of Constitution of India there is a case law associated known as **SBI v Santosh Gupta (2017),[8]** it was a case related to SARFAESI Act (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest) Act, 2002. A case was filed in the Jammu and Kashmir high court that the SARFAESI Act is not applicable in Jammu and Kashmir because it was outside the legislative competence of the parliament under the provisions of Article 370. The proceedings took place, and the decision of the high court was overruled by the Supreme court and it came up with a judgement that the "Constitution of India is superior to the Constitution of Jammu and Kashmir and the provisions of SARFAESI Act is applicable to J&K". There were two important cases regarding the applicability of Article 370 of the Indian Constitution, they were **Prem Nath Kaul v State of J&K (1959)[9]** and **Sampat Prakash v State of J&K (1969).[10]** In the Prem Nath Case the matter

[7] Diwan Paras, *Kashmir and the Indian Union: The Legal Position,* 2(3), The International and Comparative Law Quarterly, 333, 344-47 (1953). www.jstor.org/stable/755438. Accessed 17 Nov. 2020.

[8] SBI v Santosh Gupta, (2017) 2 SCC 538 (India).
[9] Prem Nath Kaul v. State of J&K, AIR 1959 SC 749 (India).
[10] Sampat Prakash v. State of J&K, (1969) 2 SCR 365 (India).

was regarding the unconstitutional passing of an Act (Big land estates Abolition Act, 1950) by Maharaja Hari Singh's Son Yuvraj Karan Singh. The Court held the power of the king was not limited under Article 370. The Case of Sampat Prakash was an important case regarding the cessation of Article 370. The petitioner claimed that Article 370 ceased to exist after the Constitutional assembly was dissolved and the power to of the president under the Article 370(1) to amend the laws cannot be applied. It was held in the judgement that Article 370 will only be dissolved upon the recommendation of the Constituent assembly under Article 370(3) of the Indian Constitution.

In the process to abrogate the Article 370, the President of India Issued an order under the power of Article 370 declaring all the provisions of the state to be void, to which a resolution was passed in the Rajya Sabha for the revocation of the Article and a bill was passed for the State's Reorganisation, which ultimately became an act and was effective from 31st October 2019. This act was known as Jammu and Kashmir Reorganization Act 2019. The parliament and the legal bodies played an important part in this process. In a democratic country like India, it is expected out of these legal institutions to abide by the laws and carry out the process in a systematic and a lawful manner without disturbing the integrity of the nation.

D. WAS THE REVOCATION PERFORMED IN A LAWFUL MANNER?

A historic move was taken on 5th August 2019 by revoking the Article 370 from the state of Jammu and Kashmir. It was done through amending the Article 367 of the Indian Constitution which allowed the government to revoke the parts of Article 370.[11]

A lot of questions were raised from various perspectives like Social, political, International Repercussions but the question of utmost importance was from the legal perspective that, Was the process of Revoking Article 370 performed in a Lawful Manner? There were many different opinions on this matter, but before considering the opinion, the most important step was to know the process through which it should be performed. Article 370 of the Constitution deals with the temporary provisions that were provided to the state of Jammu and Kashmir and other important provision here is of Article 35(A) which gave special rights and privileges to the permanent residents of J&K. Though the word temporary provisions are used but the Supreme Court in a response to appeal in the year 2018 had ruled that it was not a temporary provision.

[11] Gupta, Anubhav. "Kashmir and India's Climb Up the Ladder of Chaos." *Horizons: Journal of International Relations and Sustainable Development*, no. 15, 2020, pp. 250–265. *JSTOR*, www.jstor.org/stable/48573651 . Accessed 16 Nov. 2020.

On 5th August 2019, the president ordered a constitution (Application to Jammu and Kashmir) Order, 2019 which superseded the (Application to Jammu and Kashmir) order, 1954 resulting into the removal of special status of Jammu and Kashmir.[12] Under Article 370 Clause (3) "The president by public notification declare this article shall cease to be operative provided that the recommendation of the constituent assembly of the state is necessary before the president issues such a notification".[13] But the constituent assembly in the state of J&K was dissolved on 26th January 1957 after drafting the constitution for J&K. According to this law the president had to consult the state constituent assembly but instead the president through the provisions of Article 370 clause (1) which grants the president to make modifications to the Indian Constitution on the issues related to J&K.[14]

In the order issued it replaced the word '**Constituent assembly of the state**' with '**Legislative assembly of the state**', and at that time the legislative assembly had been suspended in the state which resulted into governor's rule in the state. All these changes resulted into the parliament taking over the state legislative assembly and thus revoking the Article 370.

Taking an opinion of a Constitutional expert A.G Noorani on this matter he believed that the whole process was completely unconstitutional and after "The dissolution of the constituent assembly in 1957 the power of abrogation of Article 370 was Vanished".

A lot of believed it to be politically motivated and a pre- planned strategy, the reason being both the former chief ministers of the State of Jammu and Kashmir were detained on the previous night and all the communication services in the state were put on hold.[15] Talking from a larger perspective it can be interpreted that somewhere the Law was not followed appropriately and the manner in which the whole process took was somehow unlawful and lacked morality if we see it from the perspectives of the Residents who lived in the state of J&K.

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[12] Kaushik Deka, *Kashmir: Now for the Legal Battle.* Post: India Today Insight (Aug. 19, 2019), https://www.indiatoday.in/india-today-insight/story/kashmir-s-new-normal-1582167-2019-08-19. Accessed 18 Nov. 2020.

[13] INDIA CONST. art. 370, cl. 3.

[14] INDIA CONST. art. 370, cl. 1.

[15] Verma Mansi, Diminishing the Role of Parliament: *The Case of the Jammu and Kashmir Reorganisation Bill,* 54, EPW, 1, 1-6, (2019).

This step of Revoking the Article 370 and 35A from the Indian Constitution led to a lot of complications which were observed in the state of J&K. The main motive behind the revocation of Article 370 was the fact that it encouraged Separatism, Corruption, and Underdevelopment in the state. Though the Motive behind this move was taken with a bona-fide intention, but the manner or the process through which it was done was incorrect. Some of the repercussions observed after the revocation was that there was complete blackout of the communication system, there were mass curfew in the state, many state political figures were detained under the Public Safety Act.[16] People of J&K were not satisfied with this move as they believed that this action taken by the government encroached their social identity which included religion, customs etc. They also felt that it resulted into lack of employment opportunities as people did not get jobs.

[16] Lalwani, Sameer P., and Gillian Gayner. *India's Kashmir Conundrum: Before and After the Abrogation of Article 370*. US Institute of Peace, 2020, www.jstor.org/stable/resrep25405 . Accessed 16 Nov. 2020.

CONCLUSION

This essay in the end shows that the Procedures which were taken to remove the Article 370 from the Indian Constitution was not appropriate. The reason being that the president misused his power and the whole process was termed Unconstitutional. Emergency provisions (Article 356) was applied in the state from 19th December 2018 and the legislative assembly had dissolved. Under Article 356 clause 1(c) "The President can suspend any provisions of the Constitution in whole or in parts".[17] This decision of the President was unlawful because the Article 370 was not suspended but instead it was completely revoked.

The president nor the governor had informed about such a decision and it was wrong on their part to take such a huge decision in an arbitrary manner. A Senior advocate of the Supreme Court Raju Ramachandran was of the opinion that, neither the President nor the governor had any discussion with the public at large and thus it was a violation of Article 14 of the Indian Constitution as the affected people of J&K were not heard and there was no deliberation on the relevant factors.[18] Thus, according to him it was unconstitutional and unlawful on the part of the authorities to make such decisions. In the end according to my opinion though the motive to revoke the Article 370 can be considered legitimate but the whole process or the methodology which was adopted in the whole process was completely unlawful and unethical on the part of the government. This decision of Revoking the Article 370 transformed the state of J&K and many people held a strong view against this decision calling it to be 'Unconstitutional'.

[17] INDIA CONST. art. 367, cl. 1(c).
[18] Abrogation of Article 370 unconstitutional, people of J&K bypassed: Petitioners to SC, (Dec. 10, 2019, 9:37PM). https://economictimes.indiatimes.com/news/politics-and-nation/sc-commences-hearing-on-pleas-challenging-abrogation-of-article-370/articleshow/72454345.cms.