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A RIGHT TO SAY NO: RAPE IN MARRIAGE

-***Rajat Kumar***

Introduction

In India, it is very common that crimes like sexual assault in marriage goes unreported.[1] Sexual assault inside the four walls of a marital household is not subject to public assessment by courts or other authorities, notwithstanding India's advances in practically every other field. As a consequence, in India, married women who have been sexually assaulted by their husbands are not protected by the legal system. Although there is no documented prevalence of marital rape in India, several studies have revealed that it is widespread, despite many authorities' reluctance to admit it, even if the actual percentage of rape is unknown. The subject of rape in marriage is not addressed by the current laws. There is a widespread misconception that courts lack the jurisdiction to interfere in a husband and wife's relationship. For those who have already been subjected to regular physical violence from their marriage, raping is just another way for the spouse to show their dominance.[2] The fact that crime rates are growing so quickly in India, the world's seventh-largest nation by geographical area, is both frightening and shameful.

In this sense, India's legislature has adopted a similar stance. India's legislature has been assigned the most difficult responsibility under the country's Constitution for the purpose of the country's safety, security, and progress. Legislators, on the other hand, are disinterested in doing anything to address this national problem. It is imperative that those who come into touch with rape survivors examine the widely held belief that rape by one's husband is inconsequential given the severe effects.[3] Similarly, the *J.S. Verma Committee study* proposed that the exclusion of marital rape should be deleted and that marriage should not be deemed an act of irrevocable consent. Because of this, while determining whether or not a sexual action was consented to, the relationship between the parties should not be used as an explanation.[4]

The Indian judiciary offers a ray of light, but its hands are tied since it is the legislature's job to create laws, not the courts. In India, domestic rape is legal, although it is not enforced. In

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[1] Easteal, Patricia & Plummer, *Louise Mc Ormond, Real rape, real pain: Help for women sexually assaulted by male partners*, Australia: Port Campbell Press (2006)
[2] Campbell, J. C., & Soeken, *Forced sex and intimate partner violence: Effects on women's risk and women's health*. Violence Against Women, 5, (1999)
[3] KAUR, MARITAL RAPE IN INDIA. CENTRE FOR FEMINIST POLICY, (2017)
[4] Justice J.S Verma, Justice Leila Seth, *Report of the Committee on Amendments to Criminal Law* (2013)

India, no matter how stringent the rules are, it is impossible to prevent rape in marriage. It is critical that India enacts strict regulations to prevent marital rape. Marital rape is not only a serious issue for women's rights, but it also violates numerous basic prohibitions. Indeed, the degree of respect and dignity afforded to women may be used to measure a country's growth. Around 70% of women in the globe have experienced sexual assault at some point in their lives, according to the United Nations Women's Organization ["UNW"]. In this regard, teenage females aged 15 to 19 have an increased risk of being targeted by criminals. Some 15 million young women who have been compelled to engage in sexual activity by their partners have sought mental health assistance. Even while marital rape is less severe than stranger rape in terms of the victims' physical, mental, and social well-being, the effects for those who are raped are far-reaching. Males in India forced their wives to have sex one out of every five times in 2011, according to a 2011 poll.[5]

Indian laws vis-a-vis marital rape

Laws against rape in marriage are ineffective and unenforced. According to the Indian Pena Code ["IPC"], a rape in a marriage is only a crime if the victim is under the age of 15. There is no legal safeguard against forced sexual intercourse for a wife beyond the age of 15, which is against human rights guidelines. Women have long been considered property of their significant other or guardian within the patriarchal structure of society. Our judicial system has long dismissed rape as an offence since it was reduced to a crime of snatching women from their "owners." As a consequence, sex between the bride and groom is now seen as a luxury or entitlement that the bride and groom have earned. When women's rights to equality and uniformity were neglected, they were reduced to just denouncing her husband's sexual pleasures. In criminal law, the distinction between consent and non-consent is crucial.[6] A threat of violence is not always present before a rape is committed in a violent manner. The only method to force a woman into sexual encounters against her will is in an emotional connection or marriage in particular. Judges now must take into account new aspects of marital rape in their rulings. Changing the burden of evidence in cases of marital rape leaves the question of whether to accept the wife's testimony or her husband's unanswered. Consequently, the court has raised issues on several occasions regarding whether or not a

[5] Sarthak Makkar, *Marital rape: a non-criminalized crime in India*, (2019)
[6] Aditya Shroff and Nicole Menzes, "*Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer*", Student Advocate, Vol. 6, 1994.

rape of an unmarried woman was performed with her permission. Courts commonly infer consent in situations of marital rape since the victim's sexual history with her husband is virtually always known to the prosecution. This premise was thoroughly examined in the case of ***Haryana v. Prem Chand***.[7]

The right to human dignity and the freedom to make one's own bodily choices are both violated by marital rape. Even though this right isn't directly mentioned in Article 21, it does exist as part of the overall framework. This privilege is based on the idea that a person is preeminent in things pertaining to his or her body or money. This right protects one's ability to control one's own body. In the case of ***State of Maharashtra v. Madhukar Narayan Mandikar***,[8] the Supreme Court acknowledged that a person has control over his or her own physical well-being. However, it is sad that the court hasn't included couples in this conversation. For the most part, women have no legal right to their own bodies unless they are raped by someone they don't know. If the victim is married to the offender, the rape does not become illegal. This has been bolstered by daily television shows and the movie industry, which depict strangers being raped and demonstrate that the victim enjoys it, meaning that it is not a crime.[9] The usual description of a rapist on a darkened street seldom includes rape perpetrated by one's own spouse. Many individuals assume that only rape done by strangers constitutes true rape because of a lack of knowledge and a cultural devaluation of the notion of marital rape represented in movies.

Forcible sexual intercourse affects women's emotions all throughout the globe, including fear, humiliation, and wrath, as well as having significant health repercussions. Forced pregnancies, HIV infection, bruises, wounds, and broken rectums are just some of the injuries that might occur. Some have expressed anxiety for their extended relatives, while others have expressed concern for their neighborhoods. Because of this, marital rape has been brought into the light. Response efforts by local governments and international organisations have stepped up in recent weeks. Expanded efforts in the areas of criminal justice and public health are required to combat sexual assault. Most of our progress will be made by better understanding the cultural circumstances and life experiences that women have. Despite the fact that the general public and academic community pays little attention to it, marital rape is one of the most devastating kinds of domestic violence. For women who are repeatedly

[7] 1990 AIR 538.
[8] AIR 1991 SC 207.
[9] Bufkin, J. & Eschholz, *Images of sex and rape: A content analysis of popular film. Violence Against Women*, 6(12) (2000).

abused and suffer long-term physical and mental effects by their husbands, recent research suggests that they are more likely to be raped again in the future.

Conclusion

In heterosexual relationships, the shift from reproduction to intimacy as the primary goal of marriage is a seismic shift.[10] In addition, the worldwide evolution of marriage as an institution is affecting people's perspectives of marital rape. Marrying for the sake of procreation is rapidly being replaced by companionate relationships focused on deep closeness, although unevenly and with some opposition. It's possible that this new way of looking at the issue may make it simpler for the public to learn about earlier cases of marital rape. In situations of marital rape, the burden of proof should be the same as in other rape cases. Our society must be restructured in order to deal with issues like the marital rape exemption and gender-specific rape laws. The patriarchal structure of India's society has been in place for millennia. Toxic masculinity has tied men to toxic masculinity and turned women to mere property because of patriarchy. By abolishing patriarchy as a social construct, rape and domestic violence may be lessened, and women's quality of life can be enhanced by removing societal restraints and expectations from their lives. It is possible for a man's life to be free from the constraints of society.

[10] Makkar, *Marital rape: A non-criminalized crime in India*, Harvard Human Rights Journal, (2019)

TOPIC: SHOOT YOUR SHOT! WAIVER OF VACCINE PATENTS DURING COVID-19

ABSTRACT

With the onset of an unexpected Pandemic and the resultant loss in life, major political and world leaders turned cited Intellectual Property Rights as a barrier to end the widespread virus. The debate on the fundamental policy design of IP Laws vis a vis the requirements of the pandemic contradict each other, leaving the question answered still, how does one overcome this apparent mis-match. This article aims to look into the claim and attempts to disprove it whilst offering an alternative solution, one of many available and yet unthought of.

Keywords: Vaccination, Covid-19, Patent, TRIPS Waiver.

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SHOOT YOUR SHOT! WAIVER OF VACCINE PATENTS DURING COVID-19

In early 2020, the Covid-19 pandemic raged throughout the world causing nearly everything to a stand-still. To top that, the Delta variant and other mutations of the virus still exist ruining the hopes to return to simpler times. To combat the virus, several vaccines have been rolled out in record breaking and unprecedented time, however, access to those vaccines particularly in developing nations have been difficult. Intellectual Property Rights (IPR) have been blamed as major roadblocks in ending the pandemic by media and politicians.

In October 2020, India, Brazil and South Africa led an initiative which called for a temporary waiver of IPR including patents, copyrights, industrial designs, and undisclosed information (trade secrets) in connection with the "prevention, containment or treatment of COVID-19 … until widespread vaccination is in place globally, and the majority of the world's population has developed immunity."[1] The ambit of this waiver comprises of "medical products including vaccines and medicines or to scaling-up of research, development, manufacturing and supply of medical products essential to combat COVID-19".[2]

However, progress in this respect has been close to negligible with developed countries such as Switzerland, EU countries, Norway etc., strongly opposing the waiver of rights. With the death count crossing the 5 million mark[3] and showing no signs of stopping any time soon, the need for greater access to vaccine becomes a key player to end the pandemic speedily. It is imperative to note that more outbreaks are likely to happen in the future. Hence, the issue in waiving IP rights vested in the vaccines would establish a salutary precedent that, in emergencies such as this one, which would fundamentally cross out the policy design of IPR. Additionally, it could also encourage the governments to employ other, more direct means to incentivize the development of new drugs.

Patent law essentially proposes and encourages the creation of useful new ideas for the long run by slowing the access to those useful novel creations and ideas in the short run and in doing so, it creates the negative rights restricting society and imposing costs on it by way of granting monopoly privileges, or temporary exclusive rights, to the patent rights holder. However, the

[1] Communication from India and South Africa, 'Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19' (WTO, Council for TRIPS, 2 October 2020), IP/C/W/669.
[2] Id, para 11-13
[3] Coronavirus world statistics *available at* https://www.worldometers.info/coronavirus/ (last visited 01.11.2021)

need for such vaccine should not subvert the reason for such a quick vaccine roll out i.e., the pharmaceutical companies and research institutes collaborated with governments of various countries at both national and international level to conduct trials and get approved after investing time and money and an assurance that their hard-work would be rewarded. The healthcare response to Covid-19 was historic with billions of doses being manufactured within the year was largely because of Patents which created commercial agreements, enhanced manufacturing capabilities, and bolstered supply chains to deliver vaccines to patients in record time.

One of the major reasons for pushback from developed nations such as the UK, the US, Australia, Japan, Canada, Norway, and the EU contending that IP Rights are not the issue leading to delays in vaccination roll-outs. Additionally, similar views have been shared by Rajinder Suri, the Chief Executive Officer of Developing Countries Vaccine Manufactures Network (DCVMN) and Sai Prasad, the President of Bharat Biotech, an Indian vaccine manufacturer assented that removing IP Rights will not solve challenges in vaccine manufacture as practical issues lie in non-IP factors including, inter alia, human resources, manufacturing capacity, know-how. Thereby, calling it naïve to believe that taking an antagonistic approach toward IP Rights will speed up vaccine production.[4]

Additionally, the R&D and time that gets invested into the creation of a successful drug and getting a patent is what encourages such a creation in the first place. Several studies have gone to show that without a patent 60% of medical inventions could not have been developed and 65% could not have been commercially introduced (Mansfield's study, 1986).[5] Further, one must absolutely acknowledge and appreciate the risk and reward mechanism that Patent offers since development of a vaccination is a highly risky, uncertain, and capital-intensive business. Averaging at a 94% chance of failure, leaving only 6% success rate and estimated cost per approved new vaccine varies between $1.2 billion and $8.4 billion.[6] Therefore, Patent as a means of reward cannot be overlooked.

Thus, dismantling the IP system would pose substantial risks in terms of counterfeit and unstable drugs especially when it is matched with inadequate infrastructure, raw materials and

[4] 'Virtual Press Briefing following the Global COVID-19 Vaccine Supply Chain & Manufacturing Summit' (IFPMA 9 March 2021) *available at* https://www.ifpma.org/resource-centre/virtual-pressbriefing-following-the-global-covid-19-vaccine-supply-chain-manufacturing-summit-video/ (accessed 1 November 2021).
[5] Edwin Mansfield, 'Patents and Innovation: An Empirical Study' (1986) 32 Management Science 174
[6] Dimitrios Gouglas et al., 'Estimating the cost of vaccine development against epidemic infectious diseases: a cost minimisation study' (2018)

know-how, skilled manpower and other essential resources. Apart from that, risks run deep when the very drugs and its components could be utilised in the creation of bio-weapons and with government mandates forcing the recipes, the precedent for the next cure for an unknown disease or even cancer, creates a serious de-incentive. The question still remains, "how does one facilitate a faster end to the Pandemic?"

The answer lies in Direct government support. In times of public health crises, direct support from the Government is the most effective tool by way of public funding of R&D, pre-determined purchase commitments by the government to buy huge quantities at fixed prices. It is essential to not be miser with the fixed prices and offer competitive prices to get the best possible quality and quantity of those vaccinations. A key example of slow paced roll-outs in the European Union owing to its tough approach in fixing prices[7] with the drug-making companies. In trying to bargain hard with the pharma firms, it ended up creating long queues for its citizens to stand and wait on. The idea during a public crisis is to end it as soon as possible but uncreative and saving a "quick-buck" would only allow its acceleration. When the government is focusing its efforts on the eradication of one particular disease, it ends up providing superior quality incentives than those offered through Patents. Since, the government backs the whole thing with not only public funding to cover the costs of drug development and trial but also provides it a safety net with assured profits by way of pre-determined purchase contracts and agreements.

In conclusion, the world still requires vaccines and the endeavour should not be to punish the drug makers by stripping them off their rights. Instead, creative solutions should be placed to reward their efforts and to encourage such incredible feats to be achieved for other diseases.

[7] Chris Bickerton, Europe Failed Miserably With Vaccines. Of Course It Did. *The New York Times,* May 17, 2021 *available at* https://www.nytimes.com/2021/05/17/opinion/europe-vaccines-commission.html?smid=tw-share

Regulation of private paramedical and nursing profession

By:Ancy Andrews

Abstract

There has been a general increase in health care demand because of the growth in population, growing urbanization and a general increase in income levels. Patient load and the clinical practice of spending time with each patient by private providers will have a significant bearing on the quality and cost of health care. Most private doctors work in their chambers in either the morning or evening, and some practice at multiple locations. This timing pattern of private practice primarily addresses the convenience and needs of clients. All these makes a need for private hospitals.

In India, the right to practice in allopathic, homoeopathic, Ayurvedic, Unani and other systems of medicine is regulated by central and state legislation. The enrolment of doctors and also regulate their professional conduct by formulating the Code of Medical Ethics.

This paper identifies the challenges to regulating the private health services in India. It argues that regulation has been fragmented and largely driven by the centre. Given the diversity of the private sector and health being a state subject, regulating this sector is fraught with the technical and socio-political factors.

The paper presents views on the prevalence of various undesirable practices in the private medical sector. It also discusses the awareness of providers about selected important regulations. The findings suggest that growing capital intensity due to cost of location, medical equipment and technology, and financial sources of capital investments are some unfavourable environmental factors experienced by private providers. The findings also indicate a high prevalence of various undesirable practices and low awareness of the objectives of important legislation among practising doctors. Lack of awareness of important and relevant legislation raises serious questions about the implementation of these laws.

The paper identifies the strong need for instituting and implementing an effective continuing medical education programme for practising doctors, and linking it with their registration and continuation of their license to practice. The paper also suggests that cost of health care, access and quality problems will worsen with the growth of the private sector. The public policy response to check some of the undesirable consequences of this growth is critical and should

focus on strengthening the existing institutional mechanisms to protect patients, developing and implementing an appropriate regulatory framework and strengthening the public health care delivery system. The study also discusses various other policy implications arising.

In the present times there is an increasing interest in the homeopathy. There are over hundred homeopathy journals worldwide and an International Congress meets yearly. India and Mexico are the only countries that maintain Homeopathic colleges. Supply factors, depicted by input market conditions and government regulations, and demand factors, depicted by financing mechanisms and utilization patterns, are likely to determine the shape and character of private medical practice. The interaction of this complex set of factors will have considerable implications for the cost access and quality of services offered by this sector.

Regulation of private paramedical and nursing profession

1.INTRODUCTION

The profession of medicine has been a concern of man since the beginning of time itself. Medical library has played an important role in the great advances of medical knowledge. This is the link between the past and the present. Indian medical library is the product of the scientific renaissance. In India, Portuguese, Dutch, Danes, French and English trading companies brought with them doctors and started imparting medical knowledge . India, however, had her own ancient indigenous system of medicine such as Ayurveda and Unani and finally Allopathy. The first is Ayurveda medicine which has been dated to be the oldest and is believed to have been initiated and practised between 2000 and <5000 BC. The allopathic system of medicine was first introduced in India in the 16 century with the arrival of European missionaries.

With the increase in the number of medical institutions, there arouse the problem of maintenance of standards. A study was undertaken by Norman Walker and Col Nudham and they submitted a report recommending the need to establish a central coordinating agency in India. It was mainly as a consequence of this report that in 1933, the Medical Council of India (MCI) came into existence. Since Independence in 1947 there has been a rapid expansion of educational institutions at all levels to a large number of institutions in the related disciplines of dentistry, nursing, pharmacy and paramedical sciences. In 1956 prestigious All India Institute of Medical Sciences (AIMS) was established. In addition to this, a number of other

institutes for medical research and higher education were established under the Indian Council of Medical Research.

Private hospitals and clinics are not governed by the same rules as their NHS counterparts, however they do still have a legal obligation to meet the minimum standards of quality and safety that their patients should reasonably expect. These paramedical workers perform routine diagnostic procedures, such as the taking of blood samples, and therapeutic procedures, such as administering injections or suturing wounds; they also relieve physicians of making routine health assessments and taking medical histories.

The Care Quality Commission inspects every private hospital and clinic in England at least every two years to assess how they measure up to the standards. They can also visit more often if prompted by complaints.

The Care Quality Commission publishes the results of every inspection online, in the public domain, so that the standards of care and safety are laid bare for all to see. The CQC also has powers to take action if these standards fall short of what is expected. These powers fall into two categories:

- Compliance actions – where the CQC will recommend a course of action to bring the hospital or clinic up to the required standard. These actions will be agreed with the facility and the CQC will monitor their implementation to ensure that the action is taken and that it achieves the desired results.

- Enforcement actions – under the Health and Social Care Act 2008, the CQC has the power to prosecute hospitals or clinics who continue to fail to meet the required standards, despite the intervention of compliance actions. This includes civil or criminal procedures in the courts.

The Care Quality Commission aims to work with private hospitals and clinics to help them to achieve the highest standards, rather than merely act as a regulator and punish offenders.

2. Healthcare Acts

There are various acts formed for the welfare and to strengthening the medical field sector in every need of times .This is to ensure the health and safety of all the people .This maintains a standard throughout whole world.

2.1 Healthcare Quality Improvement Act of 1986 (HCQIA)

The Healthcare Quality Improvement Act (HCQIA) provides immunity for medical professionals and institutions during conduct assessments. The law originated partially due to a Supreme Court ruling involving abuse of the physician peer review process. To date, HCQIA continues to evolve as the act arises in courtrooms and justices deliver new rulings. Legislators enacted the law to protect medical professionals from peer review-related lawsuits and to encourage physicians to file official complaints after encountering unprofessional and dangerous peer conduct.

2.2 Patient Safety and Quality Improvement Act (PSQIA) of 2005

The Patient Safety and Quality Improvement Act (PSQIA) protects health care workers who report unsafe conditions. Legislators created the law to encourage the reporting of medical errors, while maintaining patients confidentially rights. To ensure patient privacy, the HHS levies fines for confidentially breaches. The law also authorizes the Agency for Healthcare Research and Quality (AHRQ) to publish a list of patient safety organizations (PSOs) that record and analyse patient safety data. The Office for Civil Rights (OCR) enforces the law among national health care facilities.

2.3 Affordable Care Act of 2010

The Affordable Care Act offers health care professionals the opportunity to participate in shaping the delivery of patient services. The medical field can benefit from input that helps deliver better services to the growing patient population while reducing care expenses. As a current or future decision maker in the health care field, care providers must reflect on how to create these results at their respective workplace.

2.4 The Protection and Affordable Care Act

ACA is an act that brought about affordable and compulsory healthcare to America. The act which has the full name “The Protection and Affordable Care Act” is one of the key laws for regulating the healthcare industry.

With Congressional oversight, United States health agencies develop laws designed to protect public well-being. The Department of Health and Human Services (HHS) oversees the general health issues and concerns of all American citizens, spearheading initiatives that improve public health and further medical research. In 2016, the mission of the HHS entailed improving

patient outcomes and reducing medical costs. Throughout time, the HHS has worked toward such goals by supporting various new laws.

3. Technical Aspects of Regulation

Regulation is often seen as a technical and administrative problem that can be addressed with adequate "political will" However, if we employ the lens of power to study the private sector then one can delineate and analyse its complex architecture; the contradictions and alliance between its various actors; the nature of their influence and engagement with the political processes at the local, state, national and global level.

Given the complex structure of the private sector, with a range of institutions and actors, there is an intricate network of power relations that has emerged. One can clearly discern a hierarchy in the distribution of power among the different actors and their engagement with the political processes at the local, state, national and international levels.

The distribution and representation of power within the private sector can be captured through levels of interest. These could be broadly classified as dominant, challenging and repressed interests. We have classified the dominant interests as represented by pharmaceutical, medical equipment industry and the tertiary, corporate hospital industry, Indian and foreign. The challenging interests to include actors and institutions at the secondary level and the repressed interests would include the informal sector at the primary level.

The pharmaceutical, medical equipment and hospital industry have been privileged with public subsidies since these are seen as revenue earners for the economy. The Indian pharmaceutical sector is a major exporter of drugs to several developing countries in south Asia and Africa. They have received a great deal of support from the government for consolidation and expansion during this period. The engagement of corporate hospitals with the central government health services system, their promotion by state led insurance programs like Arogyasri in Andhra Pradesh and Chiranjeevi scheme in Gujarat are examples of such partnerships. There is a fairly large market that can be tapped with such tie ups. If the government chooses to leverage insurance as a means to universalizing health-care, the hospital, diagnostic and equipment industry would be willing partner

3.Paramedical and Nursing

Paramedical personnel, also called Paramedics, healthcare workers who provide clinical services to patients under the supervision of a physician. The term generally encompasses nurses, therapists, laboratory technicians, and other ancillary personnel involved in medical care but is frequently applied specifically to highly trained persons who share with physicians the direct responsibility for patient care. This category includes nurse practitioners, physician's assistants, and emergency medical technicians. These paramedical workers perform routine diagnostic procedures, such as the taking of blood samples, X-rays, ECG,CT scan dialysis and therapeutic procedures, such as administering injections or suturing wounds; they also relieve physicians of making routine health assessments and taking medical histories. Paramedical training generally prepares individuals to fill specific health-care roles and is considerably less comprehensive than the education required of physicians. Paramedical Sciences has served as a lateral aid to the medical science, in terms of diagnosis and treatment of diseases. Beside it that is not only difficult but quite impossible to diagnose a patient and test the diseases without technical assistance. So there is a great demand of medical technicians in various medical fields in India and abroad at present .In view of Public interest for root level need to Para Medics, the Para Medical council of India - Delhi (the Para Medical Division of PMS& EHRDO of India) was established.

3.1 Aims and Objectives of Paramedical Council of India

• To promote and develop the Para Medical Sciences all over India & abroad.

• To establish hospitals, research centres all over India & abroad. Promoting Paramedical Sciences for diffusal of useful literary and scientific knowledge.

• To conduct training programmes & camps on various aspects such as health education and social aspects.

• To enlist and accord registration on experience basis to deserving qualified persons; Students and those Possessing adequate experience in Para Medical courses of studies.

• To prepare Students in prescribed courses in Para Medical Science.

• To provide latest modem and advance knowledge, technologies to Paramedical Students. To open dispensaries, hospitals, medical pathologies; labs, diagnostic centres on charitable basis in rural & urban areas of India & abroad.

The Indian Nursing Council(INC) is a national regulatory body for nurses and nurse education in India. It is an autonomous body under the Government of India, Ministry of Health & Family Welfare, constituted by the Central Government under section 3(1) of the Indian Nursing Council Act, 1947 of Indian parliament.

3.2 The main functions of the Indian Nursing Council

• To establish and monitor a uniform standard of nursing education for nurses midwife, Midwives and health visitors by doing inspection of the institutions.

• To establish and monitor a uniform standard of nursing education for nurses midwife, and health visitors by doing inspection of the institutions.

• To recognize the qualifications for the purpose of registration and employment in India and abroad.

• To give approval for registration of Indian and Foreign Nurses possessing foreign qualification.

• To prescribe minimum standards of education and training in various nursing programmes and prescribe the syllabus & regulations for nursing programs. Power to withdraw the recognition of qualification in case the institution fails to maintain its standards that an institution recognised by a State Council for the training of nurses, midwives, Midwives or health visitors does not satisfy the requirements of the Council.

• To advise the State Nursing Councils, Examining Boards, State Governments and Central Government in various important items regarding Nursing Education in the Country.

• To regulate the training policies and programmes in the field of Nursing.

• To recognise Institutions/Organisations/Universities imparting Master's Degree/ Bachelor's Degree/PG. Diploma/ Diploma/Certificate Courses in the field of nursing.

• To Recognise Degree/Diploma/Certificate awarded by Foreign Universities/ Institutions on reciprocal basis.

• To promote research in Nursing.

• To maintain Indian Nurses Register for registration of Nursing Personnel.

• Prescribe code of ethics and professional conduct.

• To improve the quality of nursing education.

4.Results of private health sector

4.1 Growth in private practice and new entrants

There has been a general increase in health care demand because of the growth in population, growing urbanization and a general increase in income levels. In the survey, 84% of respondents have experienced growth in their practice .However, this growth is not uniformly spread across India .Experience is rated as the most important factor in practice growth. The second most important factor is the availability of specialized skills and technology .The general career plan of many prospective entrants in private practice is to acquire specialized skills during training, before starting their own practice. This is likely to enhance their opportunities to do well in their practice. Acquiring specialized skills generally goes hand in hand with technology and many providers feel that the growth of private practice is strongly influenced by these factors; factors which also contribute to private practice becoming more technology intensive. This in turn influences the decision of existing providers to refer their patients to high-tech diagnostic investigations to project the image of being a highly skilled and knowledgeable provider. This trend is increasing. Local competition and the existence of other medical facilities in the neighbourhood are considered least important in affecting the growth of the respondents' practices. This is surprising and contrary to the belief that competition among providers is a serious problem. Similarly, promotional efforts are not considered important by a large number of providers. Medical ethics also prevents medical practitioners from promoting their practice. A general increase in the demand for health care is considered the third most important factor influencing growth in private practice.

4.2 Patient load

Patient load and the clinical practice of spending time with each patient by private providers will have a significant bearing on the quality and cost of health care. Most private doctors work in their chambers in either the morning or evening, and some practice at multiple locations. This timing pattern of private practice primarily addresses the convenience and needs of clients.

Factors affecting cost of establishment Since the majority of providers follow a cost-based approach, it is important to look at what factors affect these costs. This is very closely followed by equipment and new technology, and their maintenance. Manpower, and costs associated with it, is ranked third. Most of the existing private clinics are located in commercial areas. The cost of setting up new establishments is very high. Therefore, there is a growing tendency on the part of private providers to set-up establishments in residential areas, away from commercial centres. For example, a large number of nursing homes in the private sector are in residential areas. About 91% of the respondents consider the location of private facilities in residential areas to be beneficial because of proximity and reduction in overall cost to patients (such as transportation and medical help received in case of emergency).

4.3Referrals in private medical practice

When referring to specialists, the doctor generally refers the patient to particular individuals. However, in the case of diagnostics, doctors do not generally ask the patient to go to a particular place. Providers do, however, give suggestions if patients seek information about where they should go for diagnostic tests. In 60% of cases, patients seek such information from their physicians. The survey indicates that recommendations by physicians are generally based on quality and proximity factors. The diagnostic facilities operate as separate entities, but are linked with providers through the existing referral system.

4.4Problems associated with nursing and paramedical staff

The employment of trained and qualified personnel to ensure good quality care is considered an important requirement for health care facilities. There is a general impression among private providers that the growth in paramedical staff and their training has not kept pace with the increase in the number of health facilities. A widespread shortage of para-medical staff is being experienced by private providers in India. Doctors, therefore, hire untrained people to man their health care facilities. Except for a few states (e.g. Delhi, Maharashtra, Tamil Nadu and West Bengal), there are no regulatory mechanisms in place to ensure that health facilities are manned by properly trained personnel. The providers in our survey have ranked ‘cost of hiring’ as the second most important problem associated with manpower.

4.5Prevalence of undesirable practices

With the growth of private practice and the interaction of a complex set of supply and demand factors, many undesirable practices have grown. In an attempt to understand the complex behaviour of private providers, Yesudian (1994),through an opinion-based study, observes that

medical malpractice and medical negligence seem to be rampant in the private sector. In the present survey, we prepared a list of various undesirable practices in the private medical sector . Over-prescription of drugs is ranked as the first major, prevalent medical practice by respondents. This is followed by fee-splitting practices and inadequate measures for disposal of waste, followed by over-prescription of diagnostics.

5.Private health sector regulations

The role of the state is critical in mitigating the undesirable effects of private sector growth. Regulation is one important intervention to address some of the issues arising. This section provides information on providers' perspectives on regulations. The central and state governments in India have promulgated several pieces of legislation to safeguard the health of the population. The existing set of regulations related to healthcare can be broadly divided into three categories. In general, respondents feel that regulations are an effective way of protecting the interests of patients and overall medical practice. Only 11% of the participants in this survey think these laws are not effective in protecting the interests of patients. About 76% of respondents believe the laws are moderate to highly effective in protecting patients' interests. COPRA indicates that it is an important piece of legislation affecting private practice in India. In comparison, a majority of respondents indicated low awareness about the purposes of various other legislative acts. The majority (more than 50% respondents) were familiar with only the Indian Medical Council Act, the Medical Council of India– Code of Medical Ethics, Drugs and Cosmetics Act and the Dangerous Drugs Act. In the case of the Drugs (Price) Control Act, Pharmacy Act, Nursing Home Acts and Bureau of Indian Standards, less than 50% of doctors indicated that they were aware of these acts' main objectives.

6.Conclusion

In India, the contemporary period has seen this private healthcare sector undergo corporatisation processes characterised by emergence of large private hospitals and the takeover of medium-sized and charitable hospitals by corporate entities. Private health care expenditure in India has grown at the rate of 12.5% per annum since 1960–61. For each 1% increase in per capita income, private health care expenditure has increased by 1.47% (Bharat 1996). About 57% of hospitals and 32% of hospital beds are in the private sector. Little is known about the operations of these private providers and the effects on healthcare professions as employment shifts from practitioner-owned small and medium hospitals to larger corporate settings. The substantial personal indebtedness, dwindling appeal of government employment,

reduced opportunities to work in smaller private facilities and the perceived benefits of work in larger providers describe a ‘re professionalisation’ of medicine encompassing changes in employment relations, performance targets and constraints placed on professional autonomy within the private healthcare sector that is accompanied by trends in cost inflation, medical malpractice, and distrust in doctor-patient relationships. The accompanying ‘re stratification’ within this part of the profession affords prestige and influence to ‘star doctors’ while eroding the status and opportunity for young and early career doctors. There causes doubt about the role that government and medical professionals’ bodies can, and should, play in contemporary transformation of private healthcare and the implications of these trends for health systems more broadly.

WRITS ASSEMBLE!

A Panoramic view of the Prerogative Writs enshrined in the Constitution of India

ABSTRACT

Since the genesis of the Constitution of India, the law of writ is a has remained a strong source of legal weapon giving hope to the citizens of India to reduce and cure the ills and inequality brought on by centuries of oppression. Through Articles 32 and 226, the Supreme Court and the High Courts are enamoured to protect the legal and the fundamental rights. Writ is the basic structure of the Constitution which cannot be amended. The ethos of a democracy is that everyone is equal in the eyes of law and no one shall be deprived of their rights and/or discriminated on the ground of race, caste, sex, place of birth, religion. This Research Article gives the reader an overview of the protection and rights available to them, using case laws and events to describe each writ as the article progress and concludes with a suggestion.

Keywords: Writs, Fundamental Rights, Constitutional Law, Constitution of India

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Introduction:

"If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify." - Alexander Hamilton, The Federalist Papers #33

The framers of the Indian Constitution have borrowed much from various sources without blindly incorporating only one system. They have endeavoured to evolve a system suited to the genius of the Indian people and have, and for the purpose of removing some evils peculiar to our country, hand-picked certain key features from particular constitutions across the globe and strategically included the same in the Constitution of India, to give its people the finest from what the world has to offer.

Thus, On the 26th of January, I950, India joined and greeted the family of free nations as a sovereign democratic republic. It was a day memorable in the annals of mankind, because on that day an ancient country, which from the very dawn of history has been in the vanguard of civilization, re-entered the world stage after a temporary eclipse and resumed her onward march towards her fated greatness.

I. What is a writ?

Definition: A writ is a written official order issued by the court. A "writ," was originally a short-written command issued by a person in authority, and "tested" or sealed by him in proof of its genuineness.

Origins: The origin of writs can be drawn from the English Judicial System and were created with the development of English folk courts to the common law courts. The law of writs has its origin from the orders passed by the King's Bench in England. Writs were issued on a petition presented to the king in council and were considered as a royal order. Writs were a written order issued in the name of the name of the king. However, with different segments writs took various forms and names. The writs were issued by the crown and initially only for the interest of the crown later on it became available for ordinary citizens also. A prescribed fee was charged for it and the filling of these writs were known as Purchase of a Writ.

- **Introduction in India:**

The origin of writs in India goes back to the Regulating Act, 1773 under which Supreme Court was established at Calcutta. The charter also established other High Courts and also gave them power to issue writs as successor to Supreme Court. The writ jurisdiction of these courts was limited to their original civil jurisdiction which they enjoyed under Section 45 of the Specific Relief Act, 1877.

- **Post-Independence and Present-day scenario:**

The formal order may be in form of warrant, direction, command, order etc. Writs can only be issued by the High Court Under Article 226 of Indian Constitution, 1950 and by The Supreme Court under Article 32 of Indian Constitution,1950. Indian constitution has adopted the concept of prerogative writs from English common law. Writs was first used to describe a written command of the King. Whereas, these writs are now available to a person aggrieved by the decision of the inferior courts or administrative body in England.

- **Is there a need for Writs?**

Yes, A writ petition is generally filed in case of violation of the fundamental rights or injustice served to any individual/aggrieved. It is basically a remedial measure that is provided by the constitution against the law and order regulating authority in the country for the reasons mentioned below:

1. To help citizens protect their fundamental against court orders.

2. To offer an alternative to the aggrieved in case of impugnment is not objected by the appeals made to the authorized higher authorities in the legal system.

3. To make sure that justice is served and not denied.

II. Types of Writs

There are five types of writs in the Indian Constitution stated in Article 32 for Supreme Court and Article 226 for High Court. They are as follows:

1. Habeas Corpus

2. Quo Warranto

3. Mandamus

4. Prohibition

5. Certiorari

III. Writ of Habeas Corpus

- Habeas Corpus first originated in 1215, in 39th clause of Magna Carta, signed by King John. Habeas Corpus derived from Latin term which means “that you have the body”. It is used to secure a person who has been detained unlawfully or illegally.
- According to Article 21, "no person shall be deprived of his life or personal liberty except according to the procedure established by law". The writ of Habeas corpus is in the nature of an order directing a person who has detained another, to produce the latter before the court in order to examine the legality of the detention and to set him free if there is no legal justification for the detention. It is a process by which an individual who has been deprived of his personal liberty can test the validity of the act before a higher court.
- The objective of the writ of habeas corpus is to provide for a speedy judicial review of alleged unlawful restraint on liberty. It aims not at the punishment of the wrongdoer but to resume the release of the retinue. The writ of habeas corpus enables the immediate determination of the right of the appellant's freedom. In the writs of habeas corpus, the merits of the case or the moral justification for the imprisonment or detention are irrelevant.

CASE LAW:

Perhaps the most famous case attributed with this writ is ***A.D.M. Jabalpur v. Shivakant Shukla***[1], which was set in the motion after the emergency of 1975 by the then Prime Minister of India.

Facts: It all started when Smt. Indira Gandhi’s election to the Lok Sabha was challenged before the Allahabad High Court. Justice Sinha convicted her of indulging in wrong practices and declared her election void, which in turn meant she was barred from contesting any election or holding her office for the following six years. Gandhi appealed to the apex court but was only granted a conditional stay. Therefore, to reclaim the power that was restrained by the aforesaid judgements, she decided to invoke the Constitution and impose an emergency on 26th June 1975. On the very next day, the power under Article 359(1) was invoked and the right to approach the Supreme Court to enforce Article14 (Right of equality), Article 21 (Right to life and personal liberty), and Article 22 (Protection against detention in certain cases) was taken

[1] 1976 AIR 1207

away. As soon as the above-mentioned provisions of the Constitution were invoked, the process of taking into custody persons who were considered either as political opponents or critics started. These persons, including A.B. Vajpayee, Jay Prakash Narayan, and Morarji Desai, were arrested under the draconian Maintenance of Internal Security Act (MISA) which provided for custody without any trial. Many people arrested under MISA approached various High Courts to challenge their detention and some of them even got favourable orders. The government became concerned with these High Court orders and approached the Supreme Court in the case of ADM Jabalpur v Shivkant Shukla

Held: The single dissenting opinion of Justice H. R. Khanna, who was the only one who supported the superiority of fundamental rights, is also common in this case. The majority of the judges held that as long as the emergency continues, constitutional rights must remain suspended. Some claim that it was simply a selective reading of the statute, some say that it was the Centre's apprehension of an exceedingly strong government but the truth remains that this decision is a stain on the Indian judiciary.

It was observed that "the writ of Habeas Corpus is a process for securing the liberty of the subject by affording an effective means of immediate relief from unlawful or unjustifiable detention whether in prison or private custody. If there is no legal justification for that detention, then the party is ordered to be released."

- **Thus, the detention is unlawful if:**

  o It is not according to law.

  o Not strictly following the procedure established by law.

  o The invalid law is followed (Because the law infringes Fundamental Law).

  o It exceeds the law enacted by legislature.

- **Limitation for Habeas Corpus:**

  Though a writ of right, it is not a writ of course means it provides only procedural remedy (Guarantees against any detention that is forbidden by law), But it does not provide any other remedy (does not protect any other rights such as fair trial etc.)

IV. Writ of Quo Warranto

- Quo Warranto is originated in the Latin in the medieval period, which means by what authority. It is issued to the person who holds the public office and on what authority it is entitled to him. The concerned person is responsible to the court to explain his authority on which he holds the authority. The person who files this writ is need not to be personally suffered. This writ is filed to test the validity of a election of a person in a university syndicate, Mayor in municipal corporation, Nomination of members to a Legislative Council by Governor, appointment of Chief Minister, Chief Justice, Advocate and Attorney General, University Teachers etc.

  CASE LAW:

  a) ***Purushottam Lal vs State of Rajasthan***[2]

  Facts: The writ of Quo warranto was filed against the CM of Rajasthan stating that CM was not elected validly to the house. The court rejects the petition stating that if the CM holds office without authority, then it is breach of constitutional provision. The office of Chief Minister is created by constitution, so member of assembly is not a purpose of office. Raising the questions on the Election of Chief Minister in this writ is not a proper form it must be raised through an election petition.

  Held: If a person who had no qualification was appointed as CM by the Governor under the Article 164 of the Constitution which is unconstitutional, the governor cannot be challenged. Because he had the discretionary power under Article 361 and the appointment will be deserted by the High Court.

  b) In the case ***Y.S.Raja Sekar Reddy vs Nara Chandra Babu Naidu***[3] a quo warranto cannot be issued for dismissing the Chief Minister of a state on the reason of non-performance of his constitutional duty.

- **Thus, for the issue of Quo Warranto:**

  o The office must be a public one and it must be created by the constitution.

  o It must be a substantive one.

  o There must be a contravention in constitution in appointing the person for that office.

[2] AIR 1979 Raj 18
[3] 1999 (6) ALD 623

- **Limitations of Quo Warranto:**

  The fundamental basis of the proceeding of Quo Warranto is that the public has an interest to see that an unlawful claimant does not usurp a public office. It is, however, a discretionary remedy which the Court may grant or refuse according to the facts and circumstances of each case. Thus, it may be refused when it is vexatious or where it would be futile in its result or where the petitioner is guilty of laches or where there is an alternative remedy for ousting the usurper.

V. Writ of Mandamus

- Mandamus is developed from Latin word which means We command. It is an order from the Supreme or High Court to:
  a) Lower or Subordinate courts.
  b) Tribunal.
  c) Public Authority.
  To perform the public or statutory duty. Mostly this writ of command will be issued to any government, court, corporation or public authority fails to do their work.

- Issuing such writs is a part of the discretionary powers of a court. The primary purpose is to regulate the Government Machinery and make sure it works properly. An order mandamus can be understood as a command directed to a person, corporation, or a lower tribunal, asking them to do abide by a particular thing regarding their office and which is associated with a public duty. The public servants are answerable to the public for their public duties as directed by the laws. Failure of compiling their duties a writ of mandamus may be issued in the name of that official or the authority warning him about his unfulfilled public duties and ordering him to fulfil the same.

CASE LAW:

a) In the case of ***Vijaya Mehta v. State of Rajasthan***[4], a petition was filed in the High Court for compelling the State to perform its duty of appointing a commission to look into the climate change and floods in the State. It was held by the Court that the State Government would have to appoint a commission only when a resolution was passed by the Legislature,

[4] AIR 1980 Raj 207

moreover, it was a discretionary duty and not a mandatory duty, so the Writ of Mandamus was not issued in this case.

b) In the case of ***Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal***[5], the Income Tax Appellate Tribunal had given clear directions to the respondent Income Tax Officer by its final order. The Income Tax Officer had still refused to carry out the directions given by the Tribunal. It was held by the Supreme Court that the Income Tax officer had a mandatory duty to fulfil the directions given by the Tribunal and non-performance of which amounted to grave injustice. Thus, the Writ of Mandamus was issued to direct the officer to carry out the directions of the Tribunal.

- **Limitations for Mandamus:**

  1. Supreme Court cannot issue Writs to:

  a. President or State Governors

  b. Chief Justice of High Courts

  c. Against any private individual

  d. Duties on voluntary interest

  2. Mandamus cannot be issued against

  a. state government to appoint a commission for any enquiry in the state

  b. delegated legislative to make further rules in statutory provisions

  c. directing the government to make reservations (Article 16[4])

  d. the complete right of a private person

  e. to enforce the payment of money of a person in a civil liability.

VI. Writ of Certiorari

- Certiorari is issued by a Superior Court to the inferior or subordinate courts, tribunal and other public authorities to submit the record of a proceeding for review. Generally, the writ of certiorari was issued by the Supreme or High Court for quashing the order passed by inferior courts or subordinate courts, tribunals or other quasi-judicial authorities.

CASE LAW

[5] 1961 AIR 182

a) In ***A.K. Kripak Vs Union of India***[6], the Supreme Court issued the writ of certiorari to quash the selection list of the Indian Forest Service on the ground that one of the selected candidates was the ex-officio member of the selection committee.

b) ***Rafiq Khan v State of U.P.***[7]

- **Facts** - S. 85 of Uttar Pradesh Panchayat Raj Act, 1947 a sub-divisional Magistrate does not have power to modify the order or sentence of Panchayati Adalat. Whereas, he can either quash the order or cancel the jurisdiction panchayati Adalat. In this case sub-Division Magistrate has modified the order by maintaining the conviction of the accused in one of the offences and quashed his conviction in respect of the other offences, in this manner the order passed by the Panchayati Adalat has been modified by sub- Division Magistrate.

- **Held-** Allahabad High Court held that order of sub- Divisional Magistrate is contrary with the provision of section 85 and quashed the same order by issuing a writ of certiorari.

  Therefore, by reviewing this case it is clear that want of jurisdiction may arise from the nature of the subject matter of the proceeding and court can't decide some of its parts and let the other be untouched. Enquiry of the whole case should be conducted together.

- Thus, for the Issue of Writ of Certiorari:
  a. There must be a court, tribunal or an authorised person having a legal right to act judicially.
  b. Such court, tribunal or officer must act or have passed an order without jurisdiction or in excess of judicial authority.
  c. If the order was against the principle of Natural Justice.
  d. If the order contains an error of judgement.
  e. If it is against the constitution or contravention to the fundamental rights.

VII. Writ of Prohibition

[6] AIR 1970 SC 150
[7] AIR 1954 All 3

- The writ of prohibition is issued by Supreme or High Court to an inferior court to forbid or to stop the order passed by them. The writ of prohibition is a judicial order issued to a constitutional, statutory or non-statutory body or person if it exceeds its jurisdiction or it tries to exercise a jurisdiction not vested upon them. It is a general remedy for the control of judicial, quasi-judicial and administrative decisions affecting the rights of persons.
- The writ of certiorari and prohibition are issued mostly on similar grounds. The main difference between these two writs is:
  o Certiorari issued to quash a decision after completion of proceedings.
  o Prohibition issued before the completion of proceedings.
- The grounds for issuing the writs of certiorari and prohibition are generally the same. They have many common features too.

CASE LAW:

a) ***S. Govinda Menon v Union of India***[8]

Facts: In this case the Supreme Court has explained the jurisdiction of the court for grant of a writ of prohibition. It says that power to issue writ of prohibition is primarilysupervisory and the main object for behind the writ of prohibition is to restrain inferior courts or tribunals from exceeding their jurisdictional limits. It is well settled law derived from decided cases that writ of prohibition lies not only in case of excess of jurisdiction or for abuse of judicial power but writ lies also in cases of where the actions are taken in contravention to the rules of Natural Justice.

Held: This writ does not lie to correct the course, practice or procedure of inferior courts or tribunal, also to correct the wrong decision of inferior court on the merits because issue can be issued only when the subject matter of the plea is a question of law. Writ of prohibition can't be issued when there is an error of law unless such error makes it go outside its jurisdiction. Therefore, it is clear from this case that if there is want of jurisdiction then the matter is coram non judice and a writ of prohibition is lie otherwise on any other ground other than on point of jurisdiction writ of prohibition can't be issued.

b) ***East India Commercial Co. Ltd v. Collector of Customs***[9]

[8] 1967 AIR 1274
[9] 1962 AIR 1893

In East India Commercial Co. Ltd v. Collector of Customs, a writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise.

The writ of Prohibition is issued by the court exercising the power and authorities from continuing the proceedings as basically such authority has no power or jurisdiction to decide the case. Prohibition is an extra ordinary prerogative writ of a preventive nature. The underlying principle is that 'prevention is better than cure.'

IX. SUMMARY

The Constitution of India has provided the power to issue Writs to the Supreme Court under Article 32 and to High Courts under Article 226. These Writs are a command which is given by the Courts for the performance of an act to the public authority which has a duty to perform it.

There are five types of Writs which are Habeas Corpus, Mandamus, Certiorari, Quo Warranto and Prohibition and all these writs are an effective method of enforcing the rights of the people and to compel the authorities to fulfil the duties which are bound to perform under the law.

X. SUGGESTION

For effective working of these principles and goals in real life and to prevent misuse of these rights and liberties the judiciary was constituted in the Constitution.It is a trite saying and a latin maxim *ubi jus ibi remedium* which means that wherever there is wrong committed law provides remedy for the same. Therefore, judiciary was constituted to satisfy this principle well and when a remedy is given for infringement of any right then that will make the right more effective.

The writs are initiated to maintain the proper functioning of the persons in the public authority and also for the proper functioning of the government. It must be followed strictly and to ensure that there is a proper function is maintained without any malfunctions in the respective fields. Judiciary must play a major and strict role in this.

XI. CONCLUSION

Indeed, it could well be argued that "*the writ jurisdiction in India today is in a better position than in England*"[10]. With the ability to enforce fundamental rights and not just legal ones, the Indian system is more flexible than the English counterpart. For example, *"in India, a writ or order in the nature of mandamus is available to restrain the State or a public official from enforcing an Act*[11] *on the ground that it is unconstitutional, crucial protection afforded only occur due to the interpretation of Art. 13"*[12]. Even more so, the activism of the Indian Judges in relation to the interpretation and application of the Articles has meant an even wider protection of rights than may be even the drafters conceived.[13]

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[10] Durga Das Basu & A.K. Nandi, Constitutional Remedies And Writs 18 (2nd Edn., 1999).
[11] Himmatlal v. State of M.P., AIR 1954 SC 403
[12] *Supra* note 10, at 17
[13] See, commentary at M.R. MALLICK, WRITS LAW AND PRACTICE 85 (1st edn., 2ooo) and cases such as Bagaram Tuloule v. State of Bihar, AIR 1950 Pat 387 (Patna High Court).

MARITAL RAPE

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1. INTRODUCTION

Marital rape is one of the most heinous crimes in India. Marital rape is not a lesser crime than rape; rather, it is a different species of rape. Married women are the most common victims of marital rape. It is one of the most serious dangers to gender equality in India. It is an example of a societal evil that has been in India from ancient times and continues to wreak devastation on the nation. Marital rape has never been considered an issue in Indian culture. For a multitude of reasons, it is seldom challenged by anybody in Indian culture. In this way, the Indian legislature is no different.[1] The Indian Constitution has charged the Indian legislature with the most difficult responsibility of enacting laws for the country's safety, security, and growth. However, the legislature appears uninterested in eradicating the scourge of marital rape in the nation. The Indian court offers some optimism in this area, but its powers are constrained since writing laws is the province of the legislature, not the judiciary. In India, there are no effective laws against marital rape. Whatever rules exist in India, they are insufficient to prevent

[1] S. Pande, *The Issue of Marital Rape in India* 1, JUS CORPUS LJ 80 (2020).

something as heinous as marital rape. There is a need to enact tough legislation to put a stop to marital rape in India.

Since time immemorial, several societal ills have existed in India. Sati Pratha, child marriage, forced marriage, the Devdasi and Purdah systems, and so on are examples of societal ills. While many of these societal ills have been eradicated from India through time, others are still very much alive and wreaking havoc in the country. Marital rape is one such societal evil that has been in India from ancient times and is still common in contemporary India. It is one of those vexing societal ills that has not vanished from India's map with the passage of time and remains a pervasive occurrence in the country. Indian culture and the Indian law are likewise mostly apathetic to the threat of marital rape. However, the Indian court is not oblivious to the evil of marital rape; rather, as seen by its several landmark judgements, the Indian judiciary is generally in favour of eliminating the demon of marital rape from the country. While marital rape is outlawed and criminal in the majority of the globe, it is not in India. There are no effective regulations in India to combat the scourge of marital rape.

2. INDIAN SCENARIO

From the very beginning, Indian civilization has been a patriarchal or male-dominated society, which has continued to this day. It is precisely for this reason why marital rape is often not seen as a morally terrible act in Indian culture, since the majority of victims of marital rape are women rather than males. The practise of marital rape would have been prohibited in India long ago if males had been the victims of such crimes in the past. Those who advocate the ban and punishment of marital rape in India are a minority among the country's population.[2] The removal of any social evil is most effective when the whole community works together. Only when the whole society rejects the social evil will it be completely removed from the society. Marriage rape has not been condemned by Indian society, and as a result, it has continued to flourish in the country of India. The Indian legislative has the potential to make a significant contribution to the eradication of marital rape in the nation. However, there is significant

[2] Mathew, Rajesh. *Marital Rape in India: Judicially Sanctioned Human Rights Violations and the Dehumanization of Women in the Biggest Democracy of the World* 7, BAKU ST. UL REV. 48 (2021).

hesitation on the side of the Indian legislative when it comes to criminalising marital rape in the country.

Various attempts to make marital rape a criminal offence in India have been defeated time and time again. Several bills to outlaw marital rape in India have been proposed in the Indian Parliament, but none of them has been passed into law. The Indian legislature is the only body that has the authority to prosecute marital rape, yet the legislature has shown little initiative in this respect. The Indian legislative is primarily of the opinion that criminalising marital rape in the nation would have a negative impact on the country's treasured notion of marriage and would result in an increase in the number of instances of divorce in the country, according to the legislature.

The reaction of the Indian court to the evil of marital rape is not as hesitant and guarded as the response of the Indian legislative branch to the same crime. The Indian court has taken a considerably more aggressive approach to combating the threat of marital rape. There have been many significant Supreme Court of India rulings in which the court has shown strong opposition to the practise of marital rape in India and has urged for its prosecution on several occasions. Many of India's high courts have, in their many judgements, urged for the criminalization of marital rape in the nation, and the Supreme Court has agreed. However, the Indian court has a very limited role to play in this area. It is the responsibility of the Indian legislature, not the Indian court, to make marital rape illegal across the nation. In India, laws have been enacted to penalise those who commit rape on another person.[3]

Rape is punishable under Section 376 of the Indian Penal Code (in English). However, there are no special laws in place to deal with the evil of marital rape, which is a problem in and of itself. Only Section 375, Exception 2 of the Indian Penal Code (IPC) affords some kind of protection to victims of marital rape in the country. Specifically, it stipulates that when a husband engages in sexual relations with his wife who is under the age of 15 years, he may be subject to rape prosecution. However, the Supreme Court of India, in its judgement in the case of *Independent Thought v. Union of India*, has increased the age of consent from 15 years to 18 years, effective immediately. As a result, at the moment, the law in India provides that if a husband engages in sexual relations with his minor wife, he may be prosecuted for rape, but a major wife does not have the same recourse. As a result, victims of marital rape are only

[3] *Id.*

afforded a limited level of protection under Indian law. In India, there is no comprehensive protection against the heinous crime of marital rape.

3. JUDICIAL TRENDS IN INDIA

Since the creation of the IPC in 1860, changes in rape legislation have occurred; this thesis sheds light on three of them. Three judgments delivered by Indian courts have had an impact on their establishment, which is the common denominator for all three of them. The Indian Supreme Court's (Supreme Court) decision in *Thukaram vs State of Maharashtra*[4] (Mathura case) sparked public outrage and prompted amendments to Indian rape legislation, which culminated in the Criminal Law (Amendment) Act 1983. (Amendment Act 1983). The Amendment Act 1983 was the tipping point for modifying Sections 375 and 376 IPC, the latter of which stipulates the sentence for rape. Thus, it was this Amendment that sparked a wave of reform in rape legislation.

A modification brought about by Amendment Act 1983 is that if officials in duty use their official position to conduct rape and sexual intercourse, it is regarded an aggravated form of rape, and a set minimum punishment for the offence was adopted. Due to the fact that the prosecutor's/evidence victims were disregarded in the Matura case, Section 114A of the Indian Evidence Act, 1872 (IEA) was created, which transfers the burden of proof on the accused. A marital rape clause established with the Amendment Act 1983 states that it is a criminal for a man to compel his wife to have sexual intercourse when the couples live apart owing to tradition or a judicial ruling. In this respect, it should be noted that when forced sexual intercourse occurs that is not related to a legal separation between the spouses, i.e. marital rape, it is not considered a crime. Although India elected not to recognise marital rape as a crime, the Amendment Act 1983 ushered in a wave of broader and enhanced protection for raped women.

The public outcry after *State by Reference vs Ram Signh & Ors*.[5] (Delhi gangrape case) influenced the subsequent wave of reform in Indian rape legislation, culminating in the passing of the Criminal Law (Amendment) Act 2013. (Amendment Act 2013). The 2013 Amendment Act made many modifications to Indian rape legislation. Rape was redefined under Section 375

[4] AIR 1979 SC 185.
[5] (2014) App. No. 6/2013.

IPC to include different types of penetration into any bodily area of a woman/girl. Rape was formerly defined as the vaginal penetration of a man's penis. A seventh addendum states that if the woman is unable to consent, this also establishes a basis for rape. While the Amendment Act 2013 resulted in modifications to the IPC, the Verma Committee's suggestion to eliminate the marital rape exemption was not implemented. Thus, unless there is a formal separation or the woman is under the age of 15, a male cannot be prosecuted for rape inside the marriage.

The most recent wave of reform in Indian rape legislation occurred with the passage of the Criminal Law (Amendment) Act 2018 (Amendment Act 2018), which was influenced by the Supreme Court's 2017 decision in *Independent Thought versus Union of India*[6]. The Supreme Court determined that this provision establishes a disparity between unmarried and married female children, which was both discriminatory and arbitrary. As a result, the Supreme Court argued in this decision that the age restriction for the marital rape exemption should be expanded from 15 to 18 years. Additionally, the Supreme Court noted discrepancies in the fact that married males cannot be punished for major rape offences but may be tried for less serious sexual offences. Stalking; sexual harassment; purpose to affront her modesty; assault or use of criminal force against a woman with the aim to disrobe; and voyeurism are all less severe offences for which a male might be charged. There are no exceptions to these less severe offences, regardless of whether they occur inside marriage or not. Unlike rape, which has an exemption for marital rape despite the fact that it is a more severe sexual offence.

Thus, it may be claimed that the Amendment Act 2018 made modifications to, for example, Section 376 IPC. The Supreme Court's remark, however, that the marital rape exemption creates a discriminatory disparity between married and unmarried female children and that rape is a more severe sexual violation, did not result in any adjustment to the marital rape exception. Thus, this indicates that India has opted not to amend the statute, i.e., the exemption remains in place. *Independent Thought versus Union of India* is a historic judgement that demonstrates the Supreme Court's desire to safeguard married female children between the ages of 15 and 17 from marital rape, as demonstrated in the above paragraph. One possible concern is if this will result in the judicial system evaluating whether all married women, regardless of age, may be protected against marital rape.

[6] (2017) 382 SCC.

4. ANALYSING THE EXCEPTION

One argument for maintaining the non-criminalization of marital rape is that the world's view of marriage is incompatible with the Indian view of marriage, which means that the concept of marital rape is inapplicable in India due to the stark cultural differences between India and the rest of the world.[7] The argument is that marriage is a sacrament, and that values, social norms, and religious beliefs, when combined with a lack of education, illiteracy, and a rising share of poverty in India, create an atmosphere unsuitable for criminalising marital rape. Those who advocate for criminalising marital rape argue that doing so violates the private essence of the marriage rite. The prevalent belief is that family issues can be resolved inside the family, and that criminalising marital rape has a detrimental effect on the whole family structure.

The Supreme Court has rejected the notion that marriage should be seen as a sacrament and hence that criminalising marital rape destroys the institution of marriage as an acceptable rationale. The Supreme Court said in Independent Thought versus Union of India that since marriage is intrinsically personal, criminalising marital rape cannot undermine the institution of marriage. Additionally, the Supreme Court noted that since neither divorce nor legal separation are seen as destroying the institution of marriage, there is no chance that the notion of marital rape accomplishes the same. Additionally, the Gujarat High Court in *Nimeshbhai Bharatbhai Desai vs State of Gujarat*[8] reasoned that the non-consensual act of sexual intercourse in a marriage damages confidence and trust and highlighted that it is exactly the incidence of marital rape that ruins the institution of marriage. As a result, it may be concluded that the Courts in these two depicted instances do not concur with the idea that criminalising marital rape destroys the institution of marriage.

Proponents of keeping the marital rape exemption say that the loophole caused by the marital rape exception is addressed by other national legal instruments. It may be argued that India aspires to promote and guarantee women's rights through enacting national legislation and becoming a State Party to international human rights treaties (both specific and general). However, when it comes to married women's rights inside marriage, there is a loophole in rape legislation that has evolved as a result of the marital rape exemption. The marital rape

[7] Tripathi, Shruti, *Marital Rape in India and How Interpretation of Statutes Can Be Applied to Laws Governing It* 1, JUS CORPUS LJ 298 (2020).
[8] (2017) No. 26957.

exemption occurs because patriarchal societal norms hold that a husband owns a woman's sexuality, owing to the woman's implied agreement to sexual intercourse when she enters into a marriage.[9]

The argument for keeping the marital rape exemption is because marriage, as an institution, has a special status that the Indian state wishes to protect and exclude from outside influence. By analysing, for example, ministerial declarations, it is clear that rape inside the marriage cannot occur and, even if it could, it is impossible to legislate against it owing to variables such as illiteracy, poverty, and the possibility of married women abusing the law.

The prospect of altering something so deeply ingrained necessitates a hierarchical dialogue inside the Indian legal system in which government officials take a stance and the legislator is willing to open up to a new viewpoint, i.e., to designate marital rape as a crime. Marriage as an institution has a higher status in respect to the human rights of married women, which implies that married women are denied the right to enjoy the same human rights as unmarried women. Categorizing women based on marital status is artificial and cannot be used to determine whether rape should be considered a crime or not. Rape legislation should be in place to define the crime and decide the penalty, protecting women regardless of marital status.

It is impossible to escape the topic of why an Indian marriage, when compared to any other marriage in the world, is so unique that it may be justifiable to put the marriage in a lawless zone by granting a man legal protection while raping his wife. The idea that a married woman has access to other laws to achieve justice when she is subjected to rape by her husband is questionable, since neither the IPC, the HMA, nor the PWDVA allow a raped married woman to file a rape complaint against her husband with the police. Because marital rape is not a crime, the only option for the raped married lady is to establish that another less severe sexual crime was committed against her or to seek a civil law settlement.[10]

Despite the legislature's reluctance to classify it as a crime, marital rape is clearly a prevalent issue in India. The evidence for this may be seen in *Nimeshbhai Bharatbhai Desai vs State of Gujarat*, where the High Court said that the burden of non-criminalization of marital rape falls disproportionately on the female married population. Thus, the unwillingness to punish marital rape emerges as an infected political problem contained by a patriarchal paradigm in which the

[9] *Supra Note* 2.
[10] P. Chatterjee, *Jurisprudence Aspect of Penal Law Relating to Rape in India: Special Reference to Marital Rape* 1, FIAT LUSTITIA (2018).

woman inside the marriage is subservient to the husband. Despite the waves of changes in rape legislation, as shown by violent rape cases, and the Verma Committee's proposal to eliminate the marital rape exemption, conservative sectors of society maintain that the provision cannot be repealed.[11]

5. CONCLUSION

Finally, it may be asserted that legal action is necessary by India to acknowledge that married women are provided the entire spectrum of their human rights; nevertheless, given that India, as an example, has the legal tools to press for change, it can be argued that it is not impossible. What India has to do to solve this problem can't be determined at the time of writing since it's clearly a multi-faceted issue, but repealing the marital rape exemption and categorising marital rape as a crime may be a good start.One cannot deny that marital rape exists in our culture, and that many people suffer in silence since there are insufficient legal measures and strong support for such a serious crime. The patriarchal ideology that runs through the country's blood has caused the court system to turn a blind eye to the country's women' dreadful pain. The culture of "*tolerance*," "*adjustment*," and "*compromise*" has persisted in the streets until this day. The thin boundary between violence and sex has progressively worn away, or it may never have been at all. People fail to see that rape, especially marital rape, is not a criminal perpetrated by a psychopath or a disordered individual, but rather by people who profess to be "exemplars" of patriarchal societal standards. This crime is not a blunder, an accident, or an outlier; it is a flagrant violation of the male chauvinistic mentality.[12]

The reasons presented here do not call for a whole new special provision since there are currently a myriad of them. All that has been highlighted here is the removal of the unique label given to some of the perpetrators because of a 'sacred connection' they have with the victim. Rape is rape, and there should be no distinction made depending on the connection between the perpetrator and the victim. Exceptions like this not only protect them from the consequences of a crime like this, but they also help them perpetrate a crime of this magnitude in certain ways. As a result, it can be said that the solution here does not lay in not enacting the

[11] Ghosh, Adrija, *Debunking the Validity of Culture-Based Justifications for the Retention of the Marital Rape Exemption in India*, IN THE ASIAN YEARBOOK OF HUMAN RIGHTS AND HUMANITARIAN LAW, 77-106. Brill Nijhoff (2020).
[12] *Id*.

long-awaited amendment owing to fear of its abuse by society, but rather in making effective use of the legislation. Our society's most serious stumbling block is its execution, and laws must be executed for the purpose of protecting victims of domestic violence and misery, not just as a tool for harassment.[13] The true test lies in precisely realising the intent and rationale of declaring marital rape a crime and not a mockery of jurisprudence by its abuse, as the true test lies in precisely realising the intent and rationale of declaring marital rape a crime and not a mockery of jurisprudence by its abuse.

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[13] *Supra Note* 10.

CASE COMMENT ON THE SUPREME COURT JUDGEMENT OF ASIKALI AKBARALI GILANI ETC VS NASIHUSAIN MAHEBUBBHAI CHAUHAN

Aakansha Mewar*

INTRODUCTION

Articles 32 and 226[1] 226 gives rights to the Supreme Court as well as the High Courts to issue writs which are legal documents issued by these courts to order a person or an entity to perform or cease performing a specific action or deed. Consequently, Article 12[2] defines 'State' and bring under its purview all those bodies and entities that help govern India under its territory. Writ Petitions fall under Part III of the Constitution and includes rights to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies. Merely stating these rights under the constitution and providing them to the citizens of India is not sufficient. It is required that these rights should be protected. It is for this reason that Writ Petitions are provided.

Articles 32 and 226 provide for 5 types of Writs to the citizens of India, which are:

a. **Habeas Corpus:** Which is a kind of a writ which can be filed when one is being illegally detained. [Sunil Batra v Delhi Administration, 1980[3]]
b. **Mandamus:** Which is a type of writ that is usually issued by the court to a public servant asking him to perform his duty. [Hari Krishna Mandir Trust v. State of Maharashtra, 2020[4]]
c. **Certiorari:** which is a kind of writ that is issued by a higher court to a lower court to either transfer the case or quash the judgement passed. [Hari Vishnu v Ahmed Ishaque, 1995[5]]
d. **Prohibition:** this is the kind of writ that can be issued against judicial and quasi-judicial authorities. These writs are usually issued against a lower court or by a superior court to forbid the act which is being performed outside its jurisdiction at any stage of the proceedings. [S. Govind Menon v Union of India, 1967[6]]
e. **Quo-Warranto:** Is a type of writ that is generally issued by a court to enquire the legality or under what authority he is holding that office. It prevents the illegal holding of a public office by any person. [Jamalpur Arya Samaj Sabha v Dr. D. Ram, 1954[7]]

Public Interest Litigation however is the power that is given to the public by the courts through judicial activism. These cases occur when the victim does not have the necessary means to

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[1] Article 32 and 226 of the Indian Constitution
[2] Article 12 of the Indian Constitution
[3] Sunil Batra v Delhi Administration, 1980 AIR 1579
[4] Hari Krishna Mandir Trust v. State of Maharashtra, (2020) 445 SC
[5] Hari Vishnu vs Ahmad Ishaque, 1955 AIR 233
[6] S. Govind Menon v Union of India, AIR 1967 SC 1274
[7] Jamalpur Arya Samaj Sabha v Dr. D. Ram, AIR 1954 Pat 297

commence litigation or his freedom to move court has been supressed or encroached upon. As a result, the court takes cognizance of the matter and proceeds suo moto or cases can commence on the petition for any public-spirited individual. The first reported case of PIL was noticed in Hussainara Khatoon v. State of Bihar[8] in 1979 to bring attention to the inhuman conditions of prisons and under trial prisoners. Public Interest Litigations are mainly filed for reasons like:

a. Violation of basic human rights of the poor
b. To compel Municipal Authorities to perform their duty
c. Violation of religious rights or other basic fundamental rights
d. Content or Conduct of Government Policy

[8] Hussainara Khatoon v. State of Bihar, 1979 AIR 1369

FACTS AND ISSUES OF THE CASE

As per the facts of the case, a Writ Petition as PIL was filed in the Gujarat High Court for the issuance of direction against State Authorities to remove the illegal encroachment and structure erected by the appellant on a Municipal Land, and on the public roads and surrounding areas. The High Court further noticed the issuance of 869 leases given by the Municipality to different persons without the authority of law and on which constructions have been put up without any formal lease executed in favour of concerned persons/occupants nor the approval of the State Government in terms of Section 65 of Gujarat Municipality Act, 1963 was obtained. The Division Bench after analyzing Sections 65, 80 and 146 of the Act and the decisions in Parasram Manjimal & Ors. V. The Kalol Municipality, Kalol[9], Dipak Kumar Mukherjee v. Kolkata Municipal Corporation & Ors.[10], Sri K.Ramadas Shenoy v. The Chief Officers, Town Municipal Council, Udipi & Ors.[11] and Friends Colony Development Committee v. State of Orissa & Ors.[12] held that ordinarily public streets must be used by the Municipality as public streets for the public right of way and cannot be let out or allowed to be used for any other purpose.

The main issue presented before the Hon'able Supreme Court were as follows:

1. Whether These appeals challenge the judgment and final order passed by the Division Bench of the High Court of Gujarat at Ahmedabad dated 11th July 2013 in Writ Petition (PIL) No.144 of 2011 and Writ Petition (PIL) No.13 of 2013?

[9] Parasram Manjimal & Ors. V. The Kalol Municipality, Kalol, AIR 1972 Guj. 54
[10] Dipak Kumar Mukherjee v. Kolkata Municipal Corporation & Ors. (2013) 5 SCC 336
[11] Sri K.Ramadas Shenoy v. The Chief Officers, Town Municipal Council, Udipi & Ors. (1974) 2 SCC 506
[12] Friends Colony Development Committee v. State of Orissa & Ors. (2004) 8 SCC 733

PETITIONER'S ARGUMENT

- The Petitioner contended that the Writ Petition had been filed out of Political Vendetta and the Municipality had allotted a plot to the appellant pursuant to the resolution passed by the Executive Committee of the Municipality on 19th March 1988 allotting 50 x 50 land on the basis of rent at Rs.50/- on specified terms.
- It was also contended by the High Court that as per the direction to the Collector, transcends beyond the mandate of S. 258 of the Act.[13]
- It further contended that persons affected by the directions given by the High Court, therefore, have approached the High Court by way of civil applications.

RESPONDENT'S ARGUMENT

- The respondent, that is, the Municipality and the State Authorities supported the views put forward by the High Court and purported that no previous permission of the State Government had been taken by the Municipality before granting 869 leases as previously stated had not been according to S. 65(2) of the Gujarat Municipality Act, 1963.
- It also contended that the mere passing of a resolution by the Executive Committee of the Municipality is not enough; and in any case no structure can be permitted on public streets in terms of Section 146 of the Act.

[13] Section 258 of the Gujarat Municipality Act, 1963

JUDGEMENT

On October 7th, 2016, the Supreme Court case of Asikali Akbarali Gilani Etc. v. Nasirhusain Mahebubbhai Chauhan was closed and the court came to the following judgement:

1. The State Government would be free to consider the request of the occupants of unauthorized structures on the subject public property including to ratify the resolution passed in their favour by the Executive Committee of the Municipality; under the condition that it was to follow the expounded policy. If the request is accepted, then the Government will be free to provide for such terms and conditions, as may be permissible by law.
2. The Collector may examine the claim of the occupants of the concerned unauthorized structure(s) standing on the subject public property on case-to-case basis and take suitable action as may be permissible in law.
3. If the occupation of the subject public property is not in conformity with the policy of the State Government and the structure cannot be tolerated thereunder, the Collector must then proceed to take action against such structure(s) within two months in accordance with law, for complying the directions given by the High Court.
4. The appeals were disposed in the above terms with no order as to cost.

JUDGEMENT ANALYSIS

The judgement which was decided upon by the two-judge bench came to the conclusion that the Municipality ensured the bench that they would accept the argument of the State Authorities "that no right can enure in favour of the allottees/occupants of the structure on a public property, in respect of which no formal lease deed has been executed and that too when no prior approval of the State Government for such allotment and grant of lease has been obtained by the Municipality. Understood thus, the direction issued by the High Court in paragraphs 14 and 15 of the impugned judgment, does not merit any interference."

Further, it has been made clear on the part of the Municipality that the Collector has the right to restore the public property as it had previously existed. as per the directions given by the High Court, the court was to take possession of all concerned property and remove its illegal occupants and demolish all such properties. But this was to be done by the Collector by following due process.

Further, it was made clear that the Collector was to take action on a case-to-case basis in relation to all 869 leases or unauthorized occupation of the concerned public property and structures put up thereon without a sanctioned plan. Since some structures date back to the year 1956, and those around the said properties have become accustomed to the property may not be required to be demolished. Due to this reason, the State Government was to come up with a more comprehensive policy, if there had not been one in existence already. The Collector was to thereafter take action in respect of such unauthorized occupation and encroachment of the public property. The Collector may already follow the policies if already in existence, and if not, then, it was to be formulated in accordance to the previously mentioned facets. The new policy may provide for rehabilitation of the unauthorized occupants to alternative location, if the unauthorized structure in occupation of a given person has been tolerated for quite some time or has been erected before the cutoff date to be specified in that regard. If the structure has been erected after the cutoff date, no right of rehabilitation would enure to the occupant(s) of the unauthorized structure(s) on the public property; and such structure(s), in any case will have to be removed in terms of the direction given by the High Court. The State Government may formulate an appropriate policy within six months from the day of the passed judgement, if already not in existence.

CONCLUSION

The Asikali Akbarali Gilani Etc v. Nasirhusain Mahebubbhai Chauhan case puts into perspective the leniency of the Municipality as well as the negligence of the State Authorities in keeping check. The judgement passed by the court not only results in people being displaced by no fault of their own. 869 such leases granted, and properties built will face the same fate because of the dereliction of duty of the concerned authority. It truly is a matter of shame that such a vast number of leases could go unnoticed by the State Authorities. As personal opinion, I believe the court should have also ruled to remove all those belonging to these authorities and have more competent members take their place.

TRIPARTISM IN INDIAN INDUSTRIAL RELATIONS

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TRIPARITISM IN INDIAN INDUSTRIL RELATIONS

ABSTRACT

The International Labour Organization came into being along with the League of Nations with India being one of its founding members. The International Labour Organization promotes the idea of Tripartism which is a contract among the workers, employers and the government. Apart from the Industrial Disputes Act, 1947, there are several other areas that aim at practicing and promoting Tripartism. It is the working of the government, the employers and the workers to come together to be able to for a lucrative, safe and healthy among a few other policies work environment.

KEY WORDS

1. Tripartism
2. Labour Laws
3. International Labour Organization
4. International Labour Standards
5. The Industrial Disputes Act, 1947
6. The Ministry of Labour and Employment

INTRODUCTION

Labour laws arose due to the demands of workers for better conditions, the right to organise, and simultaneously the demands of the employers to keep costs low.[1] Tripartism came into being during the First World War when the allied countries invited trade unions and employers to sit in governmental bodies in Great Britain, the United States and elsewhere. The trade unions were asked to forgo their union with the promise of restoring their rights after the war. Drafts of the labour proposals were made for peace conferences with regards to forming a labour commission where the representatives and employers could come together, giving them voting rights, forming a labour legislation. Its main strife would be to negotiate and discuss more dignified and humane working conditions of work.

Tripartism originates from the word 'tripartite' with means divided into or composed of three parties.[2] It is a contract between the employers' organizations, trade unions and the government of the country. It can be understood as a policy of decision-making wherein all parties play a fair and equal role in matters relating to industrial relations.

Tripartism aims at redressal of disputes with regards to economic policies through cooperation, consultation, compromise and negotiation. An example of a tripartite agreement is 'novation'[3]. In novation, rights and obligations under the original contract are transferred from the original party, to a new third party. All parties must consent to novation.[4]

The tripartite structure aims at giving equal voice to workers, employers and governments so as to maintain labour standards and shaping policies and programmes.

[1] Labour Laws In India, https://ncib.in/pdf/ncib_pdf/Labour%20Act.pdf (Visited on July 29, 2021)
[2] Merriam-Webster, "Tripartite" *Merriam-Webster* (Visited on July 29, 2021).
[3] Novation: the substitution of a new contract in place of an old one
[4] Drew Donnelly, *What are Tripartite Agreements?* New Horizons Global Partners, (2020).

TRIPARTISM WITH REGARDS TO THE INTERNATIONAL LABOUR ORGANIZATION

The International Labour Organization or the ILO came into being in 1919, under the League of Nations and is the first specialised unit of the United Nations. India happens to be one of the founding members of the International Labour Organization. It currently has 186 members and its main objective is to ensure that Tripartism grows and flourishes. The three groups consisting of the workers, employers and the government are represented in almost all the organs of the International Labour Organisation. The three organs are the International Labour Conferences which is the General Assembly of the ILO, the Governing Body which happens to be the executive organ of the ILO, and the International Labour Office that is the Permanent Secretariat.

THE INTERNATIONAL LABOUR CONFERENCES:

The International Labour Conferences is one of the most integral parts of the International Labour Organization. The conference is assisted by the Governing Body which aims at adopting a Biennial[5] Programme and Budget keeping true to the International Labour Standards in the form of Conventions and Recommendations and provides a forum for discussing social, economic and labour related issues.

The Conference has so far had 4 Indian Presidents viz., Sir. Atul Chatterjee (1927), Shri Jagjivan Ram, Minister for Labour (1950), Dr. Nagendra Singh, President, International Court of Justice (1970) and Shri Ravindra Verma, Minister of Labour and Parliamentary Affairs (1979). There have also been 8 Indian Vice Presidents of the International Labour Conference, 2 from the Government group, 3 from the Employers and 3 from the Workers' Group. Indians have chaired the important Committees of the Conferences like Committee on Application of Standards, Selection Committee and Resolutions Committee.[6]

THE GOVERNING BODY:

The main function of the Governing Body or the Secretariat is to decide the agenda of the International Labour Conference, take decisions on the International Labour Organization's

[5] Biennial: lasting for two years or occurring every two years

[6] *श्रम एवं रोजगार मंत्रालय,* Ministry of Labour & Employment (July 30, 2021) https://labour.gov.in/lcandilasdivision/india-ilo.

policy, adopting the draft Programme and Budget for submission to the Conference as well as electing the Director General. It meets three times a year, in March, June and November.

It is composed of 56 titular members (28 Governments, 14 Employers and 14 Workers) and 66 deputy members (28 Governments, 19 Employers and 19 Workers). Ten of the titular government seats are permanently held by States of chief industrial importance (Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States). The other Government members are elected by the Conference every three years (the last elections were held in June 2014). The Employer and Worker members are elected in their individual capacity.[7]

THE INTERNATIONAL LABOUR OFFICE:

India has held office of prominence several times in the International Labour Office. The office is situated in Geneva and its main function is to provide the Secretariat for all Conferences and other meetings. It is also responsible for the implementation of decisions taken by the Conference, The Governing Body, etc.

[7] *About the Governing Body (Governing Body)*, International Labour Organization (July 30, 2021) https://www.ilo.org/gb/about-governing-body/lang--en/index.htm.

INTERNATIONAL LABOUR STANDARDS

The International Labour standards fall under the International Labour Organization and are a bar at which the standards are set for the basic principles and rights of wok. These standards are legal instruments that are decided upon by the members of the International Labour Organization keeping in mind all their constituents, i.e., The Government, The Employers, and The Workers. These standards are set either in Conventions which are legally binding International Treaties or in the form of Recommendations which serve as a basic guideline.

The International Labour Standards are usually adopted at the International Labour Conference wherein competent authorities of the member states submit their proposal for consideration. These considerations are submitted in hopes of being ratified and then later being adopted and implied. The International Labour organization serves as a supervisory system making sure that all the standards are being met by their member states. In the case of a violation however, a complain procedure is initiated against the country or countries that have breached a convention that has been ratified.

By the end of June 2018, the ILO had adopted 189 Conventions, 205 Recommendations and 6 Protocols covering a broad range of work issues.[8] Basic Human Rights, Wages, Working Time, Occupational Safety and Health, Development, Employment Policy and Promotion, Maternity Protection and Social Security, etc. are a few areas that are covered by the International Labour standards.

The governing Body of the International Labour Organization has held the following eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)

[8] *International Labour Standards*, International Organisation of Employers: A powerful and balanced voice for business (July 31, 2021) https://www.ioe-emp.org/policy-priorities/international-labour-standards.

- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

The principles of these conventions are covered in the International Labour Organization Declaration on Fundamental Principles and Rights of Work (1998).[9]

VITALITY OF THE ROLE OF THE INTERATIONAL LABOUR STANDARDS IN INDIA

India has always had a positive approach towards the standards set by the International Labour Organization. They have provided a guideline and a framework for India to follow and evolve legislative and administrative measures to protect and advance the interests of labour to the extent that the International Labour Organization Conventions are held as a standard of reference for labour legislations and practices. Since ratifying conventions is legally binding, India chooses very carefully to ratify only those that they are fully satisfied with making sure that our laws and practices are in conformity with the relevant International Labour Organization Convention.

It is now considered that a better course of action is to proceed with progressive implementation of the standards, leave the formal ratification for consideration at a later stage when it becomes practicable. India so far has ratified 41 Conventions of the ILO, which is much better than the position existing in many other countries. Even where for special reasons, India may not be in a position to ratify a Convention, India has generally voted in favour of the Conventions reserving its position as far as its future ratification is concerned.[10]

There are 47 ILO conventions and 1 protocol ratified by India. Out of 47 Conventions and 1 protocol ratified by India, of which 39 are in force; 5 Conventions and 0 Protocol have been denounced; 4 instruments abrogated.[11]

[9] Ibid at 8
[10] Ibid at 6
[11] Ibid at 6

TRIPARTISM AND THE INDUSTRIAL DISPUTES ACT, 1947

The Industrial Disputes Act of 1947 is the primary statute dealing with industrial relations in India. Under various provisions of the Act, the concept of Tripartism has been adhered to, especially in cases relating to dispute redressal.

The Industrial Disputes Act, 1947 provides for a three-stage mechanism, for industrial dispute resolution which are:

1. Conciliation: Conciliation refers to when there is an amicable settlement of disputes between the management and the workers. It can also include a third party to come to an agreement. This third party can either be the government but can also be a private entity thereby sticking by its tripartite status. In the case of Bansilal Kishorilal Sahu v. Akola Mazdoor Sangh[12], the trade union was seeking a 5% deduction towards their activities. The trade union was seeking to have their settlement be held among the trade union, the employers and the government. The Bombay High Court upheld the sanctity of tripartite settlement arrived in conciliation proceedings and emphasised on the binding nature of these settlements towards the employers as well as present and future employees. [13]
2. Arbitration: In this form of redressal, matters are usually settled outside the court so as to avoid lengthy legal proceedings. This is a completely voluntary process and is usually solved among two or more members. It is legally binding on both sides and enforceable in court.
3. Adjudication: Adjudication is the last remedy for industrial dispute redressal. In this, the dispute is usually solved by a third party that is appointed by the government. Adjudication becomes mandatory when the government makes a reference of the dispute without the consent of either or both the parties to the dispute.

Industrial Dispute Act provides for a three-tier adjudication system consisting of:

1. Labour Courts
2. Industrial Tribunals
3. National Tribunals

[12] Bansilal Kishorilal Sahu v. Akola Mazdoor Sangh, (2005) IILLJ 761 Bom
[13] Sirgapoor Sahil Reddy, *Tripartism in Indian Industrial Relations & Covid-19*, Legal Maxim (July 31, 2021) https://www.legalmaxim.in/tripartism-in-indian-industrial-relations-covid-19/.

The appropriate governments are empowered to constitute and refer the disputes to these tribunals as and when they deem necessary as per the conditions given under Section 7,7A, 7B of the Industrial Disputes Act, 1947.[14]

Section 18(3) of the Act states that the settlement arrived at the tripartite level through the forms mentioned above are legally binding and that it also binds all parties not only to the agreement but also the dispute including the minority trade unions and the future employees of the establishment.

Section 3 of the Industrial Disputes Act also states that if a hundred workmen or above a hundred workmen have been employed, the government may order the employer to constitute a work committee consisting of equal representatives of workmen as well as employers.

The above-mentioned provisions of the Industrial Disputes Act, 1947 can be seen having elements of Tripartism.

[14] Ibid at 13

TRIPARTISM IN INDIAN INDUSTRIAL RELATIONS

Apart from the Industrial Disputes Act, 1947, there are several other forms of Indian industrial relations which display elements of Tripartism. The Ministry of Labour and Employment, which is the primary governmental body responsible for all policy and executive decisions with respect to labour welfare, makes sure to implement Tripartism. The Government is a committed body to the functioning of Tripartism and shows their dedication by attending the International Labour Conference and trying their level best to come up with new policies to imbibe into the current scenario.

The Ministry makes sure to take consensus from the employers and employees while enacting new laws or policies related to industrial relations. The objective of the Ministry is to take into account the views of all the social partners while framing policies for the working classes. Following the procedure adopted by the ILO, the Government of India set up various Industrial Tripartite committees for different industries. The main task of these committees is to look into the problems of labour specific to the industry concerned, with the view to bring about better understanding between the employers and the employees and to formulate a workable formula agreeable to the parties concerned. At present, the following Industrial Tripartite Committees are constituted as: –

- Industrial Tripartite Committee on Plantation Industry.
- Industrial Tripartite Committee on Road Transport Industry.
- Industrial Tripartite Committee on Cotton Textile Industry.
- Industrial Tripartite Committee on Jute Industry.
- Industrial Tripartite Committee on Electricity Generation and Distribution Industry.
- Industrial Tripartite Committee on Engineering Industry.
- Industrial Tripartite Committee for sales promotion employees

A part from the Labour Ministry, several other government bodies like the Central Advisory Contract Labour Board (CACLB) are based on the principle of Tripartism. The CACLB is constituted under Section 3 of the Contract Labour (Regulation and Abolition) Act 1970, by the Government of India, with its main purpose to advise the Central Government on such matters arising out of the administration of the Act[15]

[15] Ibid at 13

CONCLUSION

Tripartism brings together two sides of the economy that is the workers and employers who have conflict and makes sure that both of them contribute to the dispute resolution process usually at the presence of a third party, i.e., The government. It helps formulate laws and policies that are beneficial to all social constituencies, the workers and the employers, striving to make the workplace like a well-oiled machine trying to make sure all parties are content and satisfied.

In conclusion, it can be said that Tripartism does play an important role in today's date and time. It weighs into the lives of people although in small ways but most definitely does work at bettering their lives. The International Labour Organization has done a very good job at making work environment not only safe but also healthy in ways not only physically but also mentally for workers and employers. The government too gets to weigh in on certain matters making it more involved with the economy. Tripartism seems to be the way to go when it comes to matters of trying to advance the economy and India does a good job at adopting only those conventions and recommendations that suits its economy the best.

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