Chanderprabhu Jain College of Higher Studies & School of Law

CPJ LAW JOURNAL

(LISTED IN UGC CARE)

Peer Reviewed / Refereed Journal

Volume - XIV, Issue No. 2, July-2023 ISSN 0976-3562

CPJ LAW JOURNAL

Volume XIV, Issue No. 2 JULY-2023

[Cite as: Volume XIV, Issue No. 2, CPJLJ (JULY-2023)]

A Journal of CPJ School of Law
(Listed in UGC CARE)

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Subscription: Rs. 400

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Published by:
Chanderprabhu Jain College of Higher Studies & School of Law
Plot No. OCF, Sector A-8,
Narela, Delhi - 110040
Website: www.cpj.edu.in

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CPJ LAW JOURNAL

Volume XIV, Issue No. 2 JULY-2023

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MESSAGE FROM CHAIRMAN'S DESK

We, at CPJ College, continuously strive to enhance our programs to stay at the forefront of higher educational trends. Our accreditations ensure that high academic standards are maintained. We inculcate amongst students a spirit to strive and achieve the desired goals and one of the way is providing a Law journal for legal fraternity.

At CPJ School of Law, we have provided a platform wherein they can flourish their caliber and potential to the maximum. This encouragement is provided to them by highly skilled and experienced faculty who play the role of a mentor and to guide them to their way to success.

I congratulate the Editorial Board for this issue of CPJ Law Journal and my sincere thanks to Advisory Board also for supporting and giving their valuable suggestions and insights.

This Vol. XIV, Issue No. 2 of CPJ Law Journal is a clear reflection of our years of sincere working for the Law students, Law Academicians and respected members of the legal fraternity.

Sh. Subhash Chand Jain

Chairman

CPJ College of Higher Studies
& School of Law

MESSAGE FROM GENERAL SECRETARY'S DESK

In today's competitive and globalized world, having a professional and specialized education becomes an imperative for future success. We, at the CPJ College of Higher Studies and School of Law, are committed to providing academic excellence in the fields of Management, Commerce, IT and Law. The research skill has been the most important part of legal field along with other intern disciplinary subjects. Keeping this in mind, we sought to create a platform which appreciates and accepts each and every idea and thoughts which are there in the form of treasure.

The initiative of the Chanderprabhu Jain College of Higher Studies & School of Law in regularly publishing CPJ Law Journal containing insightful research papers is an appreciable attempt by the Editorial Team in spreading legal awareness and knowledge. Quality legal research and standard publications constitute one of the important mandates of CPJ Law journal.

I am confident that readers will find the present issue of the Law Journal interesting and thought provoking. My highest regards to the Editorial Board to have meticulously worked and created this impeccable issue. We are also indebted to all our authors whose contributions in the form of article, legal studies etc. have made CPJ Law Journal listed with UGC CARE.

We hope that this July-2023, Volume XIV, Issue No. 2 of our prestigious Journal will make a strongmark in the legal research fraternity.

Dr. Abhishek Jain
General Secretary
CPJ College of Higher Studies
& School of Law

MESSAGE FROM EDITOR-IN-CHIEF

While welcoming you to the July-2023 (Vol. XIV, Issue No. 2) edition of **CPJ Law Journal**, it is, indeed, our honour to share that CPJ Law Journal, a **UGC Care** Listed Journal, has been recognized by the legal fraternity as a leading law Journal. It is a Peer reviewed Journal that aims to create a new and enhanced forum for exchange of ideas relating to all aspects of Legal Studies and assures to keep you updated with recent developments and reforms in the legal world in the form of Articles, Research Papers, Case Studies etc. Research studies have always been challenging with positive outcomes witnessed as a result of meticulous and persistent efforts. Researches in the field of Law have benefitted both the Industry and the Academia and it has always been our continuous endeavor to publish such scholarly Research Papers in this Bi-Annual National Journal of **CPJ School of Law**.

CPJ Law Journal is an open access Journal that aims at providing high-quality teaching and research material to Academicians, Research Scholars, Students & Law Professionals. This issue Includes papers from the Contemporary areas of Research in Juvenile Justice System, Custodial Violence, International Humanitarian Law, Surrogacy Law, Uniform Civil Code, Right to Abortion, Criminal Justice System, Biopiracy, Apathy of Prisoners, Human Rights Violation, Cross Border Insolvency, Live-in Relationship, Freedom of Speech, Cyber Crimes and Child Protection, Arbitration Proceedings, Critical Appraisal of Surrogacy, Competition Law, Dairy Industry, Business Laws, Rights to Sexual and Reproductive Health, Single Parenthood, Precautionary Principle, Participatory Governance, International Humanitarian Law, Artificial Intelligence, Mediation in Matrimonial Disputes, Dowry Laws etc.

We appreciate the tremendous response towards our **"Call for Papers"** and this compelled us to publish our CPJ Law Journal Bi-Annually (in January & July) from the year 2022. We once again welcome contributions in the form of unpublished original Articles, Case Studies or Legal Research Reviews for publication. We are obliged to our widespread readership for their continued support and encouragement in our endeavor to strengthen every issue of **CPJ Law Journal.** The credit to this achievement also goes to all Authors, Law Academicians, Editorial Board & Advisory Committee who have contributed to make CPJ Law Journal a quality journal. We highly solicit to have your continuous support and feedback for further growth of the Journal with quality learning for all the readers.

With this note, welcome once again to **CPJ Law Journal**, **July.-2023** edition!!

Mr. Yugank Chaturvedi
Director General
CPJ College of Higher Studies
& School of Law

MESSAGE FROM EDITOR

It is with pride and enthusiasm that I present Volume XIV, Issue No. 2, (July-2023) of the CPJ Law Journal (CPJLJ). It consists of words and complete analysis of the articles/research papers covered. This issue of the Journal touches upon a number of issues worthy to note in present scenario. A highly evolved and complex justice system makes enormous demands on the people who work in it. Therefore, academicians, law students and legal professionals need upto date information as well as professional analysis on land mark judgments. CPJLJ delivers this vital information to them.

It is pertinent to mention that CPJLJ is a blind two fold Peer Reviewed Annual Journal. Accordingly, it brings to the readers only selected articles/research papers of high standard and relevance. In a country governed by the rule of law, it is important that awareness about the research is created among those who are supposed to be concerned with these researches. Academicians can play a very important role in the development of the higher research, and there is need to encourage young minds to participate in development of research based on the needs of the changing society and technical advances. This Journal provides an excellent platform to all the Academicians and Research Scholars to contribute to the development of sound research for the country.

I would like to express our gratitude to the Editorial Advisory Board and the Panel of Referees for their constant guidance and support. Appreciation is due to our valued contributors for their scholarly contributions to the Journal. Finally, and perhaps most importantly, I wish to thank the entire Editorial team of the CPJ Law Journal for the hard work, positive attitudes and dedication that make this Journal excellent in so many ways.

I, therefore, hope that this issue of CPJLJ will prove to be of interest to all the readers. We have tried to put together all the articles/research papers coherently. We wish to encourage more contributions from academicians as well as research scholars to ensure a continued success of the journal.

Prof. (Dr.) Amit Kr. Jain

Director, CA

MESSAGE FROM CO-EDITOR

It is the supreme art of the teacher to awaken joy in creative expression and knowledge- Albert Einstein

Dear Readers,

We are presenting to you July-2023, Vol. XIV, Issue No. 1 of CPJ Law Journal. Our aim behind introducing this journal is to create a new forum for exchange of ideas on all aspects of legal studies and we assure to keep you updated with recent developments in the legal world. Future scope of journal is open to your suggestions. You are invited to contribute for the Journal and your submissions should include original research articles, criticism and commentaries on legal aspects.

The CPJ Law Journal is a UGC Care Listed journal which is published Bi-annually. The journal publishes scholarly articles and commentaries on various aspects of law contributed by jurists, practitioners, law professors and students. The primary aim of this journal is to provide close insights into the various contemporary and current issues of law to the readers. Contributing to this journal provides an opportunity to authors to take an in-depth study in specific areas of the law and enhances their skills in Legal Research Writings and Analysis.

Talking about this Journal, it is great to be part of such a great initiative which provides all possible services to legal fraternity. Since it is not just confined to being a paper collection activity, rather it aims at providing services for all round development of law students, professionals and all others in this field. Also, being from law background, we feel that it is our prime duty to contribute for development of the society and we have taken many initiatives in this regard also by organizing various events of social relevance as well. Many exciting years for the journal have passed. Some notable developments might have been recognized by most of our readers but others probably have passed unnoticed to the majority. Therefore, this CPJ Law Journal is not only a retrospective on the previous years but also a good opportunity to summarize recent developments.

I hope you find this issue of Journal informative and interesting. The success of this enterprise depends upon your response. We would appreciate your feedback. You are also requested to submit your articles for the next issue July-2023 of CPJ Law Journal.

Dr. Shalini Tyagi
Dean
CPJ School of Law

MESSAGE FROM HON'BLE JUSTICE RAJESH TANDON

Any democratic country with rule of Law as its core value principle must guarantee Freedom of Speech and Expression. It is considered the mother of all freedoms. At times, the right to ask is more important than the right of life. Unless we express, we cannot live. It is, therefore, the social responsibility of any Educational Institution to further the understanding of Democratic Governance. It is in this context that a journal like CPJ Law Journal adds importance and relevance.

The CPJLJ is being launched with the aim of remedying the lack of authoritative academic writing devoted to the critical analysis of Law and Legal Institutions. It is intended to serve as a platform where Students, Academicians, Lawyers, Policymakers and Scholars can contribute to the ongoing Legal, Political Disciplinary research in the field. The Faculty of Law at CPJ aims at excelling in interdisciplinary research in the field of Law and other disciplines like Sociology, Political Science, Public Policy and Economics etc. As one of the first academic journals, it will have to look at the inter-disciplinary aspects between Law, Development and Society, which are three value-loaded terms in themselves.

I believe that it is the obligations of the academia to initiate discussion, analyze the various issues that are being faced by India and the world at large and offer solution for the same. The CPJLJ provides a forum for interdisciplinary legal studies and offers intellectual space for ground–breaking critical research. It is not committed to any particular theory, ideology or methodology and invites papers from a variety of standpoints, ideologies, perspectives and methods. The journal aim to explore and expand the boundaries of law and legal studies.

I wish the CPJLJ and the Editorial Board success in all their endeavours and hope that they will keep up their academic work, which may provide some guidelines for the betterment of Socio-legal scenario in India in particular, and across the world in general.

Justice Rajesh Tandon

Former Judge

High Court of Uttarakhand

MESSAGE FROM SH. R.S. GOSWAMI

Dear Readers,

CPJ Law Journal is in its 14th year of continuous publication with a diverse, professional, highly engaged and expert global readership. This Law Journal is a box filled with original research-based papers, articles etc., which is an attempt to cover almost all the subjects relating to legal field.

Getting published is something all Law professionals strive to achieve, and it feels great to me that Chanderprabhu Jain College of Higher Studies & School of Law is providing that platform by bringing out the 12th Volume of the CPJ Law Journal with eagerness and enthusiasm.

The CPJ Law Journal Team deserves very high appreciation for this endeavor. I cherish my association with this journal since its inception and wish it all success and endurance. Such a journal for the practitioners, Law professors and Law students is the need of hour.

Adv. R.S. Goswami
Ex-Chairman
Bar Council of Delhi

MESSAGE FROM SH. MURARI TIWARI

I feel extremely exhilarated to be a part of CPJ Law Journal which aims to create all aspects of Legal Studies and also gives a highly readable and valuable addition to the recent developments and reforms in the legal world. It also helps to provide a different outlook to various legal issues that are prevalent in the contemporary society and also to extract exact solutions for the same. As Nelson Mandela said and I quote, "Education is the most powerful weapon which you can use to change the world."

The journal is a great way to invite one's thoughts for a fruitful experience in Legal Research and Drafting and especially for Academicians, Lawyers and the Law students as it has become a demanding area for the highly complex legal system. The relation between the Bar Council of India and Law Colleges/University of Delhi is exceptional and the Bar Council of India also promotes Legal Research such as conducting Seminars, Workshops, Conferences etc.

In my entire career as an Advocate, I have always affirmed with the idea that Journals and Research Work have quintessential means for advocating Societal Issues and thereby, changing the entire horizon of the Indian Legal system and for the betterment of Legal Fraternity.

I honor CPJ School of Law for giving me an opportunity to be a part of the Law Journal Advisory Board.

Adv. Murari Tiwari
Chairman
Bar Council of Delhi

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A Study on the Interplay Between Intellectual Property, Climate Change and Environmental Law

Mr. K.C. Mittal & Mrs. Anchal Mittal Aggarwal***

ABSTRACT

The law relating to intellectual property promotes innovation and other human creations. Concomitantly, environmental law aims to protect the environment. Even though intellectual property rights are temporary grants given to the owner, IP has made a noteworthy contribution to addressing environmental issues. Erstwhile, the awareness of the environmental harm caused by a lot of the technology used in manufacturing, agriculture, and transportation has gained impetus, especially in the last twenty years. Other forms of technology, however, can lessen resource waste and reduce pollution. Therefore, the fundamental motto of intellectual property becomes extremely significant in attaining sustainable development. Sustainable development (SD) has environmental sustainability among the four of its pillar, which can be synergized through intellectual property. The relationship between the TRIPS agreement pertaining to intellectual property and environmental law is complex, but there are still deliberations over it. Simultaneously, the relationship among the WTO's IP agreement and the (CBD) Convention on Biological Diversity has its focal point of in the Committee on Trade and Environment (CTE).

One fundamental principle of our economic system is that technological advancement is required to uphold and raise our standard of living, which involves the role of intellectual property and environmental law. Utilizing intellectual property to combat climate change is an area which needs to be promoted to achieve sustainable development. In this patents contribution is quintessential because more innovation will lead to saving resources and reduce pollution, though the issue of increased pollution levels due to innovation can't be denied.

Use of intellectual property to enhance environmental protection, necessitates study into the connections between these two legal disciplines. This paper intends to identify the linkages, relationships, and lacunabetween intellectual property and environmental law by adopting normative method of study.

* Advocate, Delhi High Court.

** Associate Professor, SGT University, Gurugram, MBA, LL.M, Ph.D (Law).

I. INTRODUCTION

Modernization's scope is all-encompassing. It has evolved from a personal experience to a society-wide and national phenomenon that affects all aspects of life on a daily basis. Humanity's expanding needs put a great deal of strain on the planet. Consumption has consumed humanity, as if there were another planet to colonise. Hence, legal guidelines are in place in the form of environmental law which not only intends to protect our environment but preserve it from *inter alia*, pollution and abuse by human race. To achieve and maintain this objective contribution from intellectual property law cannot be omitted.

The intellectual property system is intended to promote and spread emerging technologies that might lessen damage to environment. Particularly important in the development of climate solutions, patent protection is frequently subject to more scrutiny than other Intellectual rights. However, in order to be properly commercialised, technologies often attract a web of various IP protections and ask for a variety of licence agreements.

The patenting system is effectively crafted to promote the advancement of cutting-edge technologies. Innovative works must be unique, involve a technological advancement in their field, and have an industrial application in order to qualify for patent protection. The applicant should be in a position to explain the use of the invention in practise by knowledgeable reader and must agree to publicly disclose their work as part of the application. As a result, after the exclusive rights time has passed, society will be exposed to the information, and technology will be more generally available.

The private interests of those who are funding and developing new technology, forms the basis of the patent system (through a period of exclusivity) is the key of theory of balancing interests.

The Trade and Environment Committee (TEC) that works on the premise of Convention on Biological Diversity (CBD) simultaneously the World Trade Organizations Trade Related Aspects of Intellectual Property Right agreement and the per say, deals with patents. Likewise, patents are essential when it comes to combating climate change. This has laid emphasis on *Green Technology* or the *Green Patents* that deals with innovative technology which ultimately benefits the environment. Nonetheless, blind and unregulated innovation leads to increase pollution as green and recycled waste and emission of innovation had cost advantage to business. The need to reduce pollution generated by innovation and promotion of innovation to reduce climate change cannot be denied. The ultimate outcome will be attainment of sustainable development goals.

II. METHODOLOGY

The study employs the doctrinal method of research since it has relied on secondary sources to gather the literature and necessary information.

III. TRIPS AGREEMENT AND ENVIRONMENT

None of the seven parts of the TRIPS Agreement solely deal with environmental. The seven parts spread across this agreement includes the general provisions under TRIPS agreement in part-I alongwiththe basic principles.Part-II of the Trade-Related Aspects of Intellectual Property Rights agreement pertains to "*standards concerning the availability, scope and use of intellectual property rights*". Further, part-III of the Trade-Related Aspects of Intellectual Property Rights agreement deals with IPRs enforcement.Part-IV of TRIPS agreement relates to maintenance and the acquisition of IPR. This includes the procedure related inter-parties. Part-V of the agreement on TRIPS deals with prevention ofdispute and settlement of disputes. Part-VI of the agreement on Trade-Related Aspects of Intellectual Property Rights relates to transitional arrangements. The last part of the TRIP agreement i.e. part-VIIis related to institutional arrangements and the final provisions. However, patentability of inventions may be excludedas per Article 27 (2) by members to TRIP agreement. This exclusion is in their territory in case the commercial exploitation is prevented for upholdingthe morals of the public or ordre public which extends to protection of human, plant life or health or animal or for the prevention ofharm of serious nature to the environment. However the exploitation forbidden by their law is not the sole bases of exclusion.[1] It can be deduced that if serious environmental harm is caused by patentability inventions their commercial exploitation is subjected to restrain.

Beside the aforementioned provision the linkage between intellectual property and environment has revolved around the CBD.[2] Even the work of the committee on Trade and Environment revolves around World Trade Organization's agreement i.e.Trade-Related Aspects of Intellectual Property Rights and the Biological Diversity convention.

The committee onTrade and Environment have heard three primary points of view. A number of developing nations have reaffirmed that Trade-Related Aspects of Intellectual Property Rights needs to be amended for patent applications. This application will reveal the source of any biological elements (and any TK)[3] that is part of the invention, with broad backing from other developing nations. There are two goals:

- to prevent the issuance of erroneous patents, they are patents for inventions that aren't actually novel,
- to guarantee that inventors have followed with national laws about obtaining authorization to exploit biological resources and sharing profits with resource owners[4]

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1 *Read*, provision 2 of Article 27 that pertains to Patentable Subject Matter, under Section 5.

2 The Convention on Biological Diversity.

3 Traditional knowledge.

4 Intellectual property and the environment *available at*: https://www.wto.org/english/tratop_e/envir_e /trips_e.htm (Visited on February 10, 2023).

IV. TRIPS AGREEMENT AND THE CBD

The aim of CBD[5] is to "*conserve biological diversity, ensure the sustainable use of its constituent parts, and ensure the fair and equitable distribution of the benefits resulting from the use of genetic resources*."

It is an international treaty to promote behaviours which will evolves a sustainable future. A common concern of humanity is the preservation of biodiversity.

In order to ensure their mutual support, even the Council on Trade Related Aspects of Intellectual Property is debating the association and link among the agreement on the Trade Related Aspects of Intellectual Property Right and CBD. Simultaneously, few nations aver about the overlap among the two. Therefore, these nations moot that amendments are quintessential to prevent clashes between these two.For this, the agreement on Trade Related Aspects of Intellectual Property needs to include several crucial aspects of CBD. Further, suggestion related to incorporation of a clause that WTO members must demand patent applications to seek certain details as a requirement for earning a patent right. This suggestion is for patent applications covering TK[6] and/or material of biological nature. These are:

- (i) identification of the source and place of origin of biological resource and the TK utilize in the innovation,
- (ii) the evidence about prior knowledge with permission. This permission must be taken from relevant countries government,
- (iii) the arrangement of fair and equitable benefit-sharing under the regime of specific country along with proof.[7]

According to a third perspective, the two agreements are in conflict with each other. However, implementation should be mutually beneficial which must be ensuredby national action.[8]

It is necessary to discern Article 27 of the agreement on Trade Related Aspects of Intellectual Property before elucidating Article 27.3(b)of the agreement on Trade Related Aspects of Intellectual Property. Governments must make inventions available for patenting and those that they may exclude from patenting are outlined in Article 27

5 CBD is known as Convention on Biological Diversity.

6 TK is the acronym for traditional knowledge.

7 *Read*, WTO documents IP/C/W/356, IP/C/W/403. In the submission by Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand and Venezuela, available in WTO document IP/C/W/403, dated 24 June 2003, it is stated that: "Disclosure of the source and the country of origin and evidence of PIC and fair and equitable benefit sharing in a patent application would play a significant role in preventing biopiracy and misappropriation and in some cases, prevent the issue of "bad patents" awarded without due regard to the prior use and knowledge with regard to the resource."

8 The WIPO Seminar on Intellectual Property and Development, Convention On Biological Diversity, *available at:* https://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103974.pdf (Visited on February 10, 2023).

of the TRIPS Agreement. Patentable inventions can be both process and item that must typically span from every possible technology.Generally, governments are empowered by the agreement on Trade Related Aspects of Intellectual Property to preclude patentability of various inventions. This includes animals, plants, and biological processes.[9] But in order to be protected, a plant variety has to be eligible to get protection under patents or a system designed specifically for that purpose (sui generis), or a combination of the two.[10]

Article 27.3(b), needs to be reviewed since it addresses the inventions relating to animal and plant patentability or lack thereof. Additionally, it deals with plant variety protection.

The discussion has expanded thanks to Doha Declaration paragraph 19 from 2001. According to this, the TRIPS Council should also consider how both the CBD andTrade Related Aspects of Intellectual Property relate to each other and, how to protect folklore and traditional knowledge.

The aforementioned convention pertains to linkage between TRIPS Agreement and an area of Environment. The succeeding part delves into use of IP in handling climate change.Environment and climate are related to each other, the later comes with in the umbrella of Environment. While environmental change also incorporates other elements, such as biological (*related to living organisms*) and geological (*related to the study of the physical structure and substance of earth*) factors, which do not always entail atmospheric processes, climate change primarily relates to changes in atmospheric conditions.

V. IP ANDCLIMATE CHANGE

A greater emphasis is being laid on green technology to combat climate change challenges. Many industrialised nations have seen the development of green technology's new forms, and to safeguard this new technology, they have enlisted the aid of intellectual property rights. So-called "*Green Patents*" refer to the *Green Technology*[11] *covered bypatents*. It is the innovative technology, which has several advantages for the environment and is patented and protected.

Applications of green technology are crucial, and they can only have a beneficial effect if they are dispensed in the general public. The creation of appropriate rules, the World Intellectual Property Organization and IP Laws may play a significant part in the globalisation of technology. Additionally, IP laws make sure that these essential applications are authenticated and receive the proper recognition. There are instances that determine sustainable innovations that are deployed to achieve

9 The micro-organisms and non-biological and microbiological processes have to be eligible for patents.

10 TRIPS: Reviews, Article 27.3(B) and Related Issues, available *at:* https://www.wto.org/english/tratop_e/trip s_e/art27_3b_background_e.htm (Visited on February 10, 2023).

11 The use of latest technology to save and protect the environment is known as Green Technology.

sustainable modern living. Concomitantly, these examples are environment friendly. These examples are:-

- *Substitution of Plastic Spoons by Edible Spoons*-They were introduced to substitutes plastic spoons. To reduce the production and use of plastic edible spoons were made out of wheat, rice, and sorghum flour. More information on the design of which may be discovered via Li Yubao's registered publication number CN107581860A.
- *System to Monitor and Manage Floods*-In order to forecast and deliver a projected recovery formulation based on a hydraulic model, this system combines technology and weather forecasts. The mechanism protects the surrounding areas against unattended flood-like conditions. One Concern Inc. (US) has patented this system under the designation WO2019204254A1.
- *Smog Free Tower*- An invention designed to reduce smog uses a tower-shaped piece of machinery with an air inlet cover that draws in outside air, cleans it, and then releases the purified air through an exhaust. The Henan Network Tech Co. Ltd. has this patent on file with publication number CN109821331A.
- *Environment-friendly energy material preparation flow*- It is the method for central processing of starch from waste collected from households. The process helps produce a substitute to plastic for solving the waste management problems that surround most communities. This Hefei Hanpeng New Energy Co. Ltd has this patent registered under publication number CN10905108A.
- *Biodegradable Bags for Food Packaging*-In this by avoiding the use of petroleum materials; biodegradable bags are constructed from layers of biodegradable polymer that are heat-sealed to resist oxygen and vapour and easily broken down by microorganisms in soil or water. The biodegradable bags are identified as belonging to Ishida Seisakusho Co. Ltd. by the patent publication number EP1369227B1.

It is evident that these can be used all over the world, and this is only feasible because they are patented. While these apps are being distributed globally for the greater good, IP laws ensure that they are safeguarded from theft, copying, and sub-standardization. Additionally, IP laws make guarantee that the correct product is delivered to the right person at the right time and support initiatives aimed at reducing climate change.

Despite the obvious advantages of green technology, very few patents are filed, which means that many discoveries taking place all around us go unrecognised. The main causes of the low frequency of patent applications include "*ignorance, lack of access to accurate information on intellectual property rights*, & *theft*." Seeing one's life's *labour go unappreciated* and unappreciated is quite depressing. Although people and nations as a whole concentrate on incorporating sustainability into daily activities,

there should be a coordinated effort to support researchers and inventors in obtaining patents and accelerating the rate of advancement and progress towards environmental preservation.

There have been instances where monopoly and false information caused inventions and patent claims to be invalidated. A grant can now be obtained in just one year thanks to changes made to the patent rules by the Indian Patent Office (IPO). The IPO is the world's quickest patent office. Public access to e-filing and e-certificate provisions is a significant step towards raising awareness among innovators. People will be encouraged to make the extra effort to put their original ideas into practise and to guard them against idea scavengers as awareness grows. There are conversations about exempting concepts for public benefits from patents from time to time, however it's important to realise that once an idea is protected, it becomes.

In order for the common causes of environmental protection, achieving UN sustainable development objectives, and balancing climate change to be served in the interest of humanity, protecting and deploying ideas must be part of the greater culture in society as well as individual responsibility.[12]

Green technology in various nations: In nations including Brazil, Spain, Canada, Japan, Australia, Korea, U.K., and U.S., Green Patents is widely utilised and promoted. The registration of inventions bythe (NTTPB) National Institute of Industrial Property of Brazil augmented using the Green Patent Program. The project has had 844 requests since 2012, and 294 letters patent have been granted as of February 2020. Green technology provided numerous benefits to Brazil's agriculture industry.

A multinational corporation (MNC) by the name of AGCO concentrated its Farm Solutions initiative on Brazilian agriculture.[13] By digitalization, these programmes aim to reduce the overuse of pesticides and save natural resources like water. Additionally, TECAM in Spain offer solutions that are oriented towards green technology and are environment friendly.[14]

***Green technology in India*:** Per say, India does have green technology, but it is extremely antiquated and only used limitedly. One can find solar power, hydropower, wind turbines, etc. in India. Only in a few locations in India, not the entire nation, have access to this technology. Also, India has an expanding number of industries, which inevitably leads to air, and water pollution, that in turn causes global warming and

12 Amit Koshal and Prayank Khandelwal, India: Climate Change and Intellectual Property, *available at:*https://www.mondaq.com/india/patent/1204204/climate-change-and-intellectual-property (Visited on February 16, 2023).

13 Green technologies gain ground in rural Brazil,*available at:* https://anba.com.br/en/green-technologies-gain-ground-in-rural-brazil/, (Visited on February 18, 2023).

14 10 Examples of Green Technology, *available at:* https://tecamgroup.com/10-examples-of-green-technology/, (Visited on February 18, 2023).

other environmental issues. Air pollution is greatly exacerbated by vehicles, burning of crops, and the firing of fireworks during festivals. So, the Green Patents can be very helpful in addressing these issues and resolving these environmental-related issues.

India can launch schemes to expedite the examination of green technology applications, similar to the UK and the USA. Further, by providing an excellent incentive to inspire people to develop green technology inventions. The use of green patents should be encouraged by introducing projects on green technology invention in the field of law and science. India should establish additional organisations, similar to those in Spain and Brazil, to solve the nation's problems with agriculture, unemployment, and better environmental legislation implementation.

To reduce the environmental pollution created by numerous companies and industries in India, it is important to encourage different groups, particularly corporations, to work together and develop technology-driven, environmentally friendly solutions.

VI. CONCLUSION

In industrialised nations, the use of green patents is encouraged and widespread. They are utilising every part of it to boost the economy, deal with their problems, and improve the environment. India has its own concerns with environmental issues that can be solved by employing green patents as an innovation tool.

The patenting system has certainly played a significant part in promoting the development of green technologies, but it has also benefited some of the worst offenders in society.

Even, though patenting system has contributed in advancement of humanity and technology it has accelerated green-house effect. The industrial revolution that sparked and resulted in novel industrial pollutants contaminated our environment. There is a need to use the same structure to create the essential green technologies in order to mitigate from this damage and pollutants.

This requires spreading awareness about green technology and its advantage is the need of the hour. Green patents needs to be promoted by governments of various jurisdictions. The role and contribution of patents in achieving sustainable development goals is significant however, balancing interest of innovators, businesses and environment must be accounted by Governments.

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The Indian Juvenile Justice System and the Mental Health of Children and Adolescents

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ABSTRACT

There is a close connection between the juvenile justice system (JJS) and the psychological well-being of the adolescents who are involved in it. Children who are in trouble with the law (CICL) and children who are in need of care and protection (CINCP) have a higher incidence of mental health- and substance use-related problems. In a similar vein, adolescents who struggle with mental health have a greater likelihood of coming into contact with the juvenile justice system (JJS). The Juvenile Justice Act of 2000 (also known as the JJ Act), together with its most recent revision (2015), places an emphasis on the developmental well-being, particularly the psychological well-being, of juveniles who come into contact with the JJS, as well as their social reintegration and rehabilitation. Mental health professionals (MHPs) have the potential to play a substantial part in the accomplishment of this objective by making contributions at all levels, including the promotion of mental health, the prevention of juveniles from coming into contact with JJS, the treatment of juveniles who have come into contact with JJS, and the rehabilitation of juveniles who have come into contact with JJS. The MHPs would have an advantage in both the clinical and legal arenas if they were well-versed in this subject area. Although the JJ Act is a child-friendly piece of legislation, its application in the real world is fraught with a great number of logistical obstacles, which, in turn, limit or undermine the full scope of the benefits it provides to juveniles in the areas of law, society, education, and health. The current viewpoint aims to highlight the significant mental health aspects of juveniles connected with JJS with reference to the JJ Act (care and protection of children act, 2015) and the possible role that MHPs can play. Additionally, this viewpoint examines important problems and the road ahead.

Keywords: *Child mental health, juvenile delinquencies, JJ Act (Care and Protection of Children, 2015), mental health professionals, juvenile justice system.*

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1. INTRODUCTION

Children deserve legislation that might protect their well-being and development because they are both the future of any society and a vulnerable element of that society. There are a number of laws in India that are designed to protect children, including the Child Labour Act (1993), the Juvenile Justice Act (JJ Act, 2000), the Prohibition of Child Marriage Act (2006), the Right of Children to Free and Compulsory Education Act (2009), and the Protection of Children From Sexual Offences Act (POCSO, 2012). Juveniles who are associated with the Juvenile Justice System (JJS) are referred to as "children in need of care and protection" (CINCP) and "children in conflict with the law" (CICL). The JJ Act addresses both of these categories of children. According to the available research, as much as seventy percent of the young people who come into touch with the juvenile justice system suffer from a diagnosable mental health condition. The more prevalent ones include internalising disorders such as anxiety disorders (30–38%) and mood disorders (7.3–13.9%), as well as externalising disorders such as conduct disorders (40.9–64.7%), attention deficit hyperkinetic disorder (ADHD, 4.1–19.2%), or drug use disorders (40.2–50.4%). Externalising disorders include attention deficit hyperkinetic disorder (ADHD, 4.1–19.2%). The risk of adolescent delinquency, violence, and recidivism is increased when a person suffers from an externalising disorder. On the other hand, early detection and intervention are linked to lower rates of recidivism and improved levels of social integration.

The people who are responsible for providing care to these juveniles in observation homes or child care institutions (CCIs) are frequently inexperienced and unskilled, and they do not receive on-the-job support from mental health professionals (MHPs), making it difficult for them to identify and respond to the psychological needs of these juveniles. This is also true, to a lesser extent, for the individuals who serve on the district's justice system board (JJB) and officers of the child police protection unit (CPPU). On the journey towards providing holistic and all-encompassing care to the juveniles who come into contact with JJS, this is a significant obstacle that must be overcome. As a consequence of this, the proactive role that MHPs play in training, skill development, and capacity building becomes significantly more crucial. In addition, it is not unusual for MHPs to come encounter such minors in the course of their clinical practise or when they are called as an expert witness in a court of law.

Despite the fact that the JJ Act has been in effect in India for more than two decades, that its most recent update took place only four years ago, and that it has both therapeutic and legal consequences for MHPs, there is a dearth of material coming from Indian psychiatry. The majority of the literature comes from either schools of social science or law. In addition, the material that is now available from the field of mental health is slanted towards the mental health of the CICL, while the mental health issues of the CINCP (orphans or adoptees) remain unaddressed.

1.1 Research Methodology Adopted

PubMed and Google Scholar were used to search the scholarly literature for terms such "juvenile delinquency OR juvenile justice system" and "mental health OR mental health professionals." There were 92 hits, however only seven articles were actually usable due to their origin in India. This included one full-text article that could be obtained by contacting the author as well as one book and one paper. To find relevant grey literature, we looked through the websites of various government institutions (including the Ministry of Women and Child Development, the National Commission on the Protection of the Rights of the Children, and the Integrated Child Protection Scheme). This narrative analysis examines the development of India's Juvenile Justice Act, as well as the juvenile justice system from the perspective of mental health, the difficulties of meeting the mental health needs of juveniles participating in the justice system, and the prospects for improvement.

2. JUVENILE JUSTICE SYSTEM: KEY DEVELOPMENTS

In 1986, India became the first country in the world to pass the JJ Act into law. It made it illegal to put anyone convicted of CICL offences behind bars under any circumstances. In 2000, India ratified the United Nations Convention (1992) on the Rights of the Child by adopting the JJ Act (Care and Protection of Children), which included the international requirements to deal with CICL and CINCP. This was done despite the fact that India had previously signed the convention. The Act ensures that children receive appropriate care, protection, and treatment by attending to their developmental requirements and employing a child-friendly approach in the assessment and disposition of situations that are in the best interest of children. This ensures that the children are provided with proper care, protection, and treatment. In addition, it required the final rehabilitation of these children through a variety of institutions that were founded as a result of this act of legislation. The Act was revised in 2006, 2010, and again in 2015, respectively. The most significant alterations are outlined in the following paragraphs.

2.1 Juvenile Justice Act 2006

This modification includes a provision that states "if a child who commits an offence while being juvenile and caught after the cessation of juvenility, the child should be treated as a juvenile" (taking into consideration their physical and mental immaturity at the time they committed an offence). It entrusts the state governments with the responsibility of reviewing (on a six-monthly basis) the number of cases that are pending under the JJ Act, speeding up the process of trials, establishing an adoption centre in each district, and holding the unit responsible for overseeing the implementation of the Act in each district. Additionally, it promotes the adoption of CINCP and promotes it as a form of rehabilitation.

2.2 Juvenile Justice Act 2010

This change takes away from the Act the section that called for the "separate treatment of juveniles or children suffering from leprosy, sexually transmitted disease, hepatitis B, tuberculosis, or children with unsound minds." It governs the authority of the competent authority of the special homes to transfer a child from one of those homes to another special facility, such as a mental health facility, and it does so by regulating that authority.

2.3 Juvenile Justice Act 2015

The following is a list of some of the more significant revisions and pertinent aspects of the Act:

The CINCP is defined by the Act as an individual "who is mentally ill or mentally or physically challenged or suffering from a terminal disease and having no support system (parents or guardians) if found so by the Juvenile Justice Board (Board) or the Child Welfare Committee (CWC)."

In addition, the Act outlines the standards that should be adhered to when working with juveniles who are connected with the JJS. It includes treating children with dignity and rights, maintaining their privacy and confidentiality during the various processes of juvenile justice, ensuring their safety, considering institutionalisation as the last resort only, focusing on restoration, and maintaining a non-stigmatizing attitude towards them. In addition, it includes treating children with dignity and rights, maintaining their privacy and confidentiality during the various processes of juvenile justice.

In addition, the Act outlines the composition of the Juvenile Justice Board (JJB) as well as the requirements for serving on that board. The Act requires that the non-magistrate board members (there are two of them) have experience (of at least seven years) in the field of health, education, or welfare activities relevant to children. Alternatively, they can be practising professionals with degrees in child psychology, psychiatry, sociology, or law. This requirement applies to both of the non-magistrate board members.

One of the most significant changes that have been made to the Act is in regard to the procedure that is to be followed in the event that it is believed that a heinous offence was committed by a minor who is younger than 16 years old. According to the amendment, a preliminary evaluation with regard to the mental and physical capability of the juvenile should be conducted in order to ascertain the juvenile's ability to grasp the consequences of the offence and the conditions in which he or she is alleged to have committed the offence. This is done in order to determine whether or not the juvenile was able to understand the circumstances under which he or she allegedly committed the offence. If the board determines, with the assistance of professionals in the field of mental health or in any other relevant field, that the child possessed the capacity to commit a serious crime, the board has the authority to recommend that the child be tried as an adult.

In addition, the Act stipulates that no person may be appointed as a member of the Child Welfare Committee (CWC) unless that person has been actively involved in health, education, or welfare activities pertaining to children for a minimum of seven years, or unless that person is a practising professional with a degree in child psychology or psychiatry, law, social work, sociology, or human development. This provision applies to both male and female applicants.

In addition to this, it legislated the procedure that had to be followed in reference to the CINCP. The Act requires that any individual (including a doctor) or organisation (including nursing homes or a hospital) that discovers a CINCP must, within 24 hours (excluding the time necessary for the journey), either give the information to the child-line services, the nearest police station, a CWC, or the CPPU, or hand over the child to a CCI that is registered under this Act. Alternatively, the child may be given to a CCI that is not registered under this Act. Failure to comply with the rule may result in disciplinary action, which may include a fine of up to ten thousand rupees or a prison sentence of up to six months, or both.

In addition, the Act stipulates that institutions that are registered under this Act are required to offer services of rehabilitation and reintegration to any juveniles who are in their care. In addition to this, it makes it mandatory for the institutions to provide interventions for mental health, such as counselling that is tailored to the need of the child.

The section of the Act that goes into great detail regarding the adoption process and the steps that must be taken is one of the most significant aspects of the legislation. It dictates that adoption is the course of action that must be taken in order to guarantee the right to a family for children who have been orphaned, abandoned, or relinquished.

The fact that health practitioners are prohibited from disclosing the identities of children registered under the jurisdiction of the juvenile justice law is one of the relevant considerations from their point of view. Any person who is found to be in violation of this is subject to penalty, which may include a period of imprisonment that may extend to a maximum of six months or a fine that may extend to a maximum of two lakh rupees, or both. Last but not least, it details the procedures that must be followed when transferring a child from a special home to a treatment facility for troublesome behaviours related to mental illness or substance abuse.

3. ROLE OF MENTAL HEALTH PROFESSIONALS AND THE IMPORTANT ASPECTS

There is a connection between the CICL's mental health and the delinquent behaviours they engage in. This could be due to their common biopsychosocial vulnerabilities, or it could be that one condition is making the other condition worse. When these interconnected elements are not addressed, further recidivism and poor functional outcomes are the inevitable results. As a result, it is of the utmost importance to meet the requirements of such juveniles in terms of their mental health. It is impossible to place enough emphasis on the fact that Mental Health Professionals (also known

as "MHPs"), in addition to their advising function in JJS, are able to make major contributions in the areas of prevention, therapy, and rehabilitation. Fortunately, the JJ Act (2015 modification) has given adequate weightage to this feature and required that no social worker be appointed in the JJ Board or the CWC unless one has experience in education or is a practising professional with a degree in child psychology, psychiatry, sociology, or law. This element also mandated that no social worker be appointed in the JJ Board or the CWC till one has knowledge in education or is a practising professional.

According to the rules established by the JJ Act (2015 amendment), a preliminary evaluation must be ordered to determine the mental and physical capacity of a juvenile between the ages of 16 and 18 who is suspected of committing a serious offence. The Board could seek the advice of seasoned psychologists or psychosocial workers, in addition to the aid of other specialists. According to the available research, teenagers with mental health problems are more likely to have legal run-ins if they are older than 14 years old (as opposed to younger as 14 years old). Because MHPs are usually called upon as an expert in such cases, their function becomes extremely important, particularly when such incidents become emphasised in the media and the judicial system is likely to get influenced by a variety of agencies (for example, the case involving Nirbhaya in 2012).

In order to prevent legal disputes, the Act requires that confidentiality be maintained while dealing with children who have had or are expected to have interaction with the Juvenile Justice System (JJS). This is in line with the most recent version of the Mental Healthcare Act (MHCA, 2017), which also places an emphasis on safeguarding a person's right to autonomy and anonymity when they have a mental illness. Due to the fact that MHPs are regularly involved in determining the mental health of juveniles involved with JJS and in providing care for these youth, maintaining strict secrecy is of the utmost importance in order to avoid unfavourable legal problems.

The JJ Act is built on a foundation of rehabilitative and reintegrative service provisions. It is a requirement that childcare facilities that are registered with the state provide mental health care facilities and facilities for referring patients to other mental health and addiction treatment facilities. It is expected that the MHPs who are providing care to these juveniles will devise an all-encompassing strategy to ensure both the quality and consistency of the care they provide.

The adoption rule that was included by the 2015 modification to the JJ Act provides consideration to the emotional needs and desires of the child who is being considered for adoption. When compared with their non-adopted peers, adopted children have a much increased likelihood of exhibiting troublesome externalising behaviours, neuroses, social ineptitude, and low academic achievement. Some of these issues stem from the stresses associated with pre-adoption and early childhood institutionalisation. Others stem from early childhood institutionalisation. Therefore, it is essential to address concerns regarding mental health throughout both the pre-adoption and post-adoption stages, and the function of MHPs in this setting simply cannot be emphasised enough.

In addition, the Act stipulates that, in the event that it is deemed essential, a juvenile may be transferred to a mental health facility (which may also include rehabilitation centres) in order to receive the appropriate care. However, according to the Mental Health Act of 2017, any person with an age that is less than 18 years old must be treated as a minor and must be admitted along with a nominated representative. This representation will form the child's advance directives.

With two concurrent acts currently in effect, the MHPs should make it a priority to stay current on the legislation because of the clinical and legal consequences they carry. It is essential to develop a thorough plan for post-discharge care in order to assure continuity of treatment at the CCI or in the community, to reduce the risk of developing psychiatric or behavioural issues, and to prevent the need for readmission to an institution.

4. PROBLEMS MEETING JUVENILES' MENTAL HEALTH NEEDS

Due to the fact that it attempts to meet the rights of both CICL and CINCP inside the same system, the Juvenile Act is flawed in its very design. Because of this, there is a lack of clarity among the professionals associated with JJS (including CPPU) due to the fact that there is no clear differentiation between two comparable groups that have different requirements. Detention and placement in observation homes for minors with intellectual challenges or mental problems is not an unusual practise. This will only make the CINCP's ordeal more difficult. As a result, there is a pressing need for both a deeper comprehension and a novel strategy regarding CINCP.

Even though the Act mandates that the fundamental requirements of the children associated with JJS, including the requirements of their mental health, must be met, this objective appears to be extremely difficult to accomplish in practise. Important limiting issues include a lack of awareness about child psychology (what constitutes a normal upbringing and what constitutes aberrant behaviour) and abilities on the part of the CPPU, social workers, and personnel of the CCIs. The staff members who work in CCIs frequently turn to aggressive behaviour and punitive acts as a kind of corrective measures because they do not have access to training or the necessary abilities. Therefore, it is essential for the employees of the CCIs to receive both initial training and ongoing training while they are working.

The fact that the institutes and non-governmental organisations (NGOs) in charge of CCIs only get a small grant is another significant barrier. The funding for the integrated child protection system (ICPS) has been increased to Rs 2,000 per kid per month as part of its revamped strategy, although its actual execution and impact are still to be observed.

Many CCIs operate without regular qualified MHPs, and the MHPs that are available are either volunteers or associated with the NGOs offering additional amenities like health, recreation, etc. despite rules in the Juvenile Justice Act requiring registered CCIs to have basic mental health facilities, including need-based counselling. Furthermore, post-discharge continuity of care is uncommon. National Commission for the Protection of Child Rights (NCPCR) (2018) NCR research found that children

in child-care homes face many mental traumas including bullying by the seniors, sexual abuse, overcrowding, foods with unspecified nutritive value, lack of tutors for education, and a lack of dedicated mental health professionals to assess mental health needs. This calls for the Judicial System to periodically inspect both registered and unregistered child care facilities. Although ICPS has taken action along these lines, the results are not yet known.

In India, the number of adolescents from lesbian, gay, bisexual, and transgender (LGBT) communities or those struggling with gender identity difficulties who come into touch with the Juvenile Justice System is increasing. The evidence from Western literature implies that the mental health requirements of such juveniles are frequently disregarded, despite the fact that they are subjected to bullying by more senior inmates and humiliation at the hands of staff members at the facility, and that they are at an increased risk of mental health problems. Even though there are not much data coming from India regarding this topic, we should not let that stop us from investigating and tackling these aspects. Training, clinical treatment, and research are all areas in which MHPs have the potential to make significant contributions in this context.

It is difficult to provide holistic treatment and rehabilitation for juveniles who are associated with the Judicial and Juvenile Services (JJS) system because it needs cooperation among several organisations, such as the legal, health, social justice, and educational systems, all of which may at times have diverse and competing aims. However, these challenges can be overcome. Therefore, establishing coordination and sensitising them to the bio-psychosocial components of juvenile delinquent behaviours could, to some extent, bridge this gap and help in leveraging the existing resources. This would involve educating them on the interplay between biological, psychological, and social factors. It is impossible to place enough emphasis on the part that MHPs play in this regard.

Another significant barrier is the stigma that surrounds these young people, as the community frequently views them as “wicked,” “threatening,” or “of bad character,” and exhibits bias against them based on their socioeconomic level and ethnicity. This results in the individual’s marginalisation, as well as the denial of much-needed social assistance and opportunities for reintegration. In addition, the exaggeratedly negative representation of such juveniles in the media only adds more stress to their lives and exacerbates the psychological and behavioural issues that they already struggle with.

In spite of the JJ Act’s requirement that confidentiality be maintained at all times, its infringement is all too typical in our country. MHPs have the potential to play a significant part in the dissemination of information across the community and the promotion of responsible reporting by the media. This would assist in the reduction of stigma, consequently assisting in the prevention of psychological and behavioural issues among juveniles and aiding their rehabilitation.

Teens miss out on early intervention due to a lack of knowledge about mental health issues and available treatments. According to Western research, many troubled teens and their families either assume that their problems will sort themselves out or are

sceptical about receiving therapy for their mental health or delinquency. As a result, these young people don't seek assistance until they have already come into touch with the JJS. This emphasises the need of primary prevention (educating the public) and secondary prevention (early detection and treatment).

Juveniles associated with the JJS must have access to ongoing community-based mental health care and rehabilitation services. The CICL community's social norms and values encourage antisocial behaviours and worsen CICL residents' emotional distress. They are more likely to be institutionalised and to reoffend when the community does not actively support their efforts to rehabilitate and reintegrate them into society. Mental health outcomes are improved and the juvenile delinquency rate is drastically lowered, according to the research on community-based and family-focused therapies (such as multi-systemic therapy). There is a need to determine the extent to which measures made by the NCPCR through ICPS, such as the provision of open shelter homes and family therapy, have been implemented and what effect they have had in the field.

5. FUTURE OF MENTAL HEALTH IN JUVENILE SYSTEM

The development of a standardised curriculum that includes orientation about child psychology and the various psychological needs of the CICL and CINCP, skill development in recognising and addressing psychological issues of the juveniles, and on-the-job training by MHPs should be done for the staff who work with a juvenile in contact with JJS in the child care homes (or at the CPPU).

To screen for mental health issues (including substance use problems) among all adolescents at the point of entry, a screening instrument that is straightforward, all-encompassing, and easy to use should be developed. This tool should be able to be used by non-mental health professionals with just rudimentary instruction.

Appointing Mental Health Professionals (MHPs), which may include child psychologists and social workers, on a consistent basis is something that ought to be done in order to guarantee capacity building within the CCIs. In addition, frequent audits of CCIs should be conducted to check for the availability of mental health professionals (MHPs), the quality of mental health services, and the establishment of responsibility for the relevant authorities responsible for running the institution. This might ensure that there is a professional workforce available at all times. Increasing the amount of money that is given to community correctional institutions (CCIs) would also be an encouraging move in this direction.

It should be required that all adolescents who come into touch with CCIs receive initial counselling of some kind. The counselling should cover the rationale behind keeping them in the institute, the kinds of scenarios they might face during their stay (for example, the likelihood of bullying by the senior inmates), and who should be the contact person in case of any mental or physical stress.

The training of the juveniles by the peer trainers, who are former residents of the juvenile homes, could be another innovative and practical solution. This type of training is similar to the peer education that is practised in substance abuse treatment

programmes. Juveniles may feel more at ease associating with their peers and picking up skills from them because their social and cultural backgrounds are typically very comparable to their own.

Juveniles should participate in modern vocational training (rather than traditional vocational training) that is specifically designed to improve their employability and ability to support themselves. This situation is better suited for structured bridging courses, online education, and technology-driven skill building. Initiatives that are sponsored by the government (under the Pradhan Mantri Kaushal Vikas Yojana) and that involve expert groups and non-governmental organisations (NGOs) may be well received.

Dropouts, first-time offenders, and youth with externalising illnesses are all groups who could benefit from a more robust preventative strategy. It is impossible to overstate the importance of community involvement and the partnership between NGOs and MHPs in this context.

It is important to encourage agencies to work together across sectors. Facilitating the social reintegration and rehabilitation of these juveniles would be impossible without raising awareness of child psychology and the socio-cultural factors of delinquent conduct and mental health disorders.

India needs to do more research on the prevalence of mental health issues among youth who come into touch with JJS so that effective therapies may be developed. This includes resolving the ethical challenges that arise while studying this population.

Community involvement, public-private partnership, and sponsorship programmes; involving multiple stakeholders (health, education, and law and order); and engaging family members, if accessible, of such juveniles, can all help assure successful re-integration into the community after release.

6. CONCLUSION

This research demonstrates that the Juvenile Justice System (JJS) and the mental health of adolescents are intricately tied to one another. MHPs have the potential to play a pivotal part in the improvement of mental health, the avoidance of mental illness, and the subsequent reduction in the need for JJS involvement in the form of therapeutic intervention, as well as the acceleration of social rehabilitation. The MHPs would have a therapeutic and legal advantage if they became familiar with the JJ Act (and its revision) and acted prudently. There are a lot of obstacles to overcome in order to make sure that the CICL and CINCP are psychologically healthy. The most important things that need to happen in order to move in this direction are for the involved employees of the JJS to undergo an attitude shift, adopt a skill-based approach to dealing with juveniles, and encourage engagement from the community and other stakeholders in conjunction with MHPs.

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Police Brutality and Custodial Violence - A Menace to the Human Rights; Story of Two Cases of Torture and Death

Miss. Deepali Anand & Dr. Basavaraj M Kubakaddi**

ABSTRACT

There is a surge in custodial violence during recent years. In our country where police are considered as the protectors; there is a different reality to it where they continued to be the slayers of the human rights of the people. The trend of torture has become popular because of its representation in the commercial films and that led for the common public to believe that it is okay. The trend has become so popular that brutality is seen as the shortcut to justice by many. In the particular paper the author will discuss the reality of the violence with the help of the two recent cases that happened in India and different data presented by different sources, different types of violence inflicted on the people taken in custody, constitutional and legislative provisions.

The main objective of the paper is to analyse the current trend with reference to two of the recent case that happened in India.

Keywords: *Custodial violence, Human Rights, Torture, Justice, Equality, Dignity.*

INTRODUCTION

India being a democratic country put the interest of people to the utmost. Every attribute of India is revolving around Human Rights. In polity, i.e., in a good form of democracy, the role of the investigator, the prosecutor, the adjudicator and the executor cannot be combines to prevent the likelihood of institutional bias in one person or institution.[1] For this the separation between the three agencies is a must and in this the criminal justice comes altogether. The police force is treated as a service for the democracy, they are for the implement of the laws and rules at the grass root level. An efficient and an honest police force is importance for the prevention of crime in a civilized society. They are considered as the protector of the people.

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1 Dr. R. Thilaraj, Human Rights and Administration of Justice (2004).

Torture, harm, abuse, and the use of physical force to inflict or intend to inflict injury are all examples of violence. Violence can cause both physical and psychological harm. The dictionary defines violence as “a behavior that physically harms or damages a person with a massive amount of force or energy.” Torture, or the infliction of excruciating pain on a person’s body or mind, is used to obtain information, force a person to confess to an offence, or simply to punish the person. Torture may result in death in custody if it becomes unbearable.

Custodial violence and police brutality is not a new term. It has been there since time immemorial. The use of violence by the police and the torturous method used by them have come a long way and the general issue is that everyone seems to adapt the process rather than questioning it. The prevention of torture bill that was introduced in 2010 has not yet passed in either of the house; this shows the lack of political will to do anything against this social evil.

There are many forms of custodial violence and sometimes the violence is so severe that it led to the death of individual leaving an emotional and psychological mark on the family. Certain forms which are practiced by the police is custodial rape, beating with marks without marks, stripping, molesting, making a person sit at the police station for long hours without any reason etc.

According to a report by the NCAT[2], in 2019, around 60% of custodial death victims belonged to poor and marginalized communities. The very fact that a majority of these crimes are perpetrated on persons from weaker sections of society, the poor and downtrodden who have little to no financial or political power, should be a major cause of concern.

OBJECTIVE OF THE STUDY

This research paper sheds light on the nature, scope, causes, consequences, and methods of prevention of custodial violence, which is a direct violation of prisoners’ basic human rights. The study also includes research on the two cases namely the Tuticorin (Thoothukudi) Case and Faizan Custodial Death Case and the effect of these event on the public. The paper also deals with various rights available to prisoners under current Indian laws that protect them from custodial crimes, as well as the importance of raising awareness of such laws and rights among ordinary men. The study concludes with recommendations for measures that could potentially prevent and reduce the volume of in-custody violence.

METHODOLOGY

Universe of the study

The current paper focuses on the two recent events of custodial violence, death and torture namely Tuticorin (Thoothukudi) Case and Faizan Custodial Death Case. Analysing the duty of the police and the steps taken by the law enforcement agency

2 National Campaign Against Torture, India: Annual Report on Torture 2019 (June, 2020).

regarding the protection of the human rights. And in the later part of the paper analysing the effect of these events on the public.

TOOLS AND TECHNIQUES

The methodology used in this research paper is empirical study.The current work is based on the reliable information and the two recent events of death, torture despair. Statistical data obtained from reliable sources such as national crime reports, NHRC reports, and other content derivatives such as journals, books, newspaper articles/ editorials, internet polls/surveys, case laws and so on. All of these sources' contents were meticulously reviewed and compared in order to derive the desired answers from the available channels.

CUSTODIAL VIOLENCE

Custodial violence, perhaps one of the most heinous crimes in a civilized society, is a source of concern for a variety of reasons. Custodial violence, including torture and death in solitary confinement, is a heavy blow to the rule of law, which requires that executive powers not only be derived from law, but also be limited by law. The law of arrest recognizes both individual rights and the collective responsibility of states to society. In most cases, striking a perfect balance between the two becomes a challenge. Transparency of action and accountability are two potential safeguards against any abuse of power to arrest a citizen.

Violence is used as a low-cost and simple method of investigation, as well as a tool of oppression. When an officer orders his subordinates to "thoroughly interrogate a suspect," it is almost unspoken that he means "torture."

The Supreme Court stated unequivocally in the case of D. K Basu v. State of West Bengal[3] that "custodial torture is a naked violation of human dignity." The situation is exacerbated when violence occurs within the four walls of a police station by those who are supposed to protect citizens," while also taking into account the difficulty of the police task in maintaining control over its civil population. Human Dignity is the highest level of fundamental right, and it is recognized even by our most powerful and prestigious statute book, the Indian Constitution. When an individual is taken into custody, he or she becomes the legal property of the state, which also means that the state and its missionaries become their legal guardians, and all of the state's institutions are at their disposal to reprimand and protect them. However, the concept of state custody has become so frightening that society fears cooperation and even the concept of police and police stations.

METHOD OF TORTURE

Most common methods of torture applied are: Prolonged solitary confinement, Solitary confinement coupled with coercive and harsh treatment, Physical assault with or without marks of violence, Overcrowding of an outrageous nature in rooms reaching

3 (AIR 1997 SC 610)

to the extent of intermingling persons under custody with mentally ill persons or with sexual offenders or with opposite sex or with sadistic senior students, Outraging the modesty of women under custody, Torture of children in front of parents and vice versa, Lack of sanitation. With this degree of ill-treatment, it is not only the guilty who confesses but even an innocent would succumb.

In the recent there has been a surge of custodial death even when the whole country was in lockdown due to covid. There were some cases of death which later on brought the public outburst towards the police. The two cases which affected the most has been discussed in the paper.

Case Study 1: Tuticorin (Thoothukudi) Case

The case gained attention after a father-son duo from Sathakulam in Thoothukudi Tamil Nadu, P Jayaraj and J Bennix, died in police custody. The timing of the same drew criticism as well. The case revolved around the murder of George Floyd in the United States at the time, and it received a lot of media attention.The section that follows chronologically details the heinous events that led to Jayaraj and Bennix's deaths.

The Madurai Bench of the Madras High Court took suomotu cognizance of Jayaraj and Bennix's deaths on June 24 in The Madurai Bench Of Madras High Court vs The State Of Tamil Nadu.[4]

On June 30, the Madras High Court stated that there was sufficient prima facie evidence to establish a case of murder against the ten police officers. The HC delegated the investigation of the case to the Central Bureau of Investigation (CBI). The Court appointed Anil Kumar, Deputy Superintendent of Police, Crime Branch Crime Investigation Department (CB-CID), Tirunelveli, as the investigating officer until the CBI assumed control.Following the transfer of the case, five of the ten accused in the custodial death case were arrested and charged with murder on July 2. The CB-CID had also requested that they be placed in judicial custody.

On July 24, Special Sub Inspector Pauldurai, who had been arrested on July 8 and was one of the accused in the custodial death, tested positive. Muthuraja and Murugan, two other police officers accused, tested positive on July 28.

Pauldurai, the accused Special Sub-Inspector of Police, was declared dead on August 10 due to COVID 19.

The CBI filed a second status report in the investigation on September 7, which is being monitored by the Madurai bench of the Madras High Court.

S.120 B (Party to criminal conspiracy); S.342 (wrongful confinement); S.201 causing disappearance of evidence of offence; S.182 (false information), S.302 (punishment for murder); S.193 (punishment for false evidence); S.211 (false information); S.218 (public servant framing incorrect record); S.34 acts done by several persons in furtherance of a common indictment.

4 Suo Motu W.P. (MD) No.7042 of 2020

Case Study 2: Faizan Custodial Death Case

Faizan was a victim of the riots that erupted in North East Delhi.During the Delhi Riots in February 2020, a video surfaced showing police officers harassing and assaulting a group of young men and forcing them to sing 'VandeMataram.' On February 24, the video was allegedly shot in KardamPuri, Northeast Delhi. Faizan was one of the four torture victims. Alt News confirmed that the footage contained sensitive content.Two days after being illegally detained, he was subsequently released, but due to severe injuries, he couldn't survive.[5]

A month after his death, there was no investigation, and police offered no explanations. This case was highlighted by the Communist Party of India (Marxist) in its petition in the Delhi High Court. The petition detailed the role of the police during the Northeast Delhi riots, and even Amnesty International, in its coverage of the Northeast Delhi riots, mentioned this case.

Action Taken by The Authorities in This Case: The BhajanPura Police Station registered Faizan's murder case on February 28, 2020. However, the case was later transferred to the Delhi Crime Branch.

The Delhi Police Special Cell filed a 24,584-page chargesheet on September 21, 2020,[6] with several allegations against various protesters arrested during the Delhi riots[7]. The role of the police in Faizan's death, on the other hand, was not highlighted. According to Ashlin Mathew's report in the National Herald, the incident was not mentioned in the chargesheet.

The Delhi High Court issued a notice to the Delhi police on December 24, 2020, in response to a petition filed by Kismatun, Faizan's mother.[8] The petition demanded a court-monitored Special Investigation Team (SIT) to probe into the alleged custodial death of her son during the Northeast Delhi riots.

The plea stated:

"(Faizan was in) control and custody of the policemen from the time he was wrongfully confined and assaulted on February 24, till he was finally released in a precarious health condition on February 25 from Jyoti Nagar police station around 11 pm" It further stated that he had succumbed to his injuries the next day at the LokNayak Hospital. Advocate Vrinda Grover, representing Kismatun, said her son was denied

5 Kismatun Vs. State of NCT Of Delhi (W.P.(CRL) 2195/2020, CRL.M.A. 18056/2020)

6 Outlookindia.com Delhi riots: FIR omits mention of police in the death of a man who was made to sing the national anthem (19 June 2020) https://www.outlookindia.com/website/story/india-news-delhi-riots-fir-omits-mention-of-police-in-death-of-man-who-was-made-to-sing-national-anthem/355017

7 Scroll.in 'delhi violence: victim seen in police brutality video from shahadra dies days after incident (feb29,2020 9:29am) https://scroll.in/video/954688/delhi-violence-victim-seen-in-police-brutality-video-from-shahdara-dies-days-after-the-incident)

8 Ibid

access to critical medical care throughout his illegal detention from the evening of February 24 till almost midnight on February 25. The plea advanced: "The MLC (medico-legal certificate) from GJB (Guru Teg Bahadur) Hospital dated February 24 records that Faizan was in need of specialised care, but the police took him to Jyoti Nagar police station. It was only when Faizan's condition turned precarious and it appeared that he may not survive due to the injuries, that he was released from the police station."

On February 1, 2021, the case was heard through online video conferencing, in which the Court assigned a new date, demanding more evidence to support the claims made in the plea.The apathy and brutality, in this case, go far from what one would imagine. Till now, Faizan's family has not received a copy of his autopsy report. SIT probe is currently being conducted to investigate this case.

Analysing The Two Case Studies: What Do They Say About Custodial Deaths In India?

Both the Tuticorin Case and Faizan case suggest that the police enjoyed entitlement and abused their powers arbitrarily. Both these cases stretch beyond the principles of normative justice, defying the accused persons' right to legal recourse.

It's no question that police brutality is more pervasive against the economically and socially underprivileged. Broadly in both these cases and Faizan's case, specifically, economic vulnerability and religious identity could have played a role in giving police free reign.

The police, hospital administration and the lower Court were complicit directly or indirectly in killing the father-son duo[9]. For instance, in the medical examination for custody, the doctor had declared Jayaraj and Bennix as 'fit for remand' despite their battered state.

Even the Magistrate had given a free pass to the police officials without following due procedure and probing the officials[10].

The NHRC[11] study on increasing custodial deaths reflects a severe lack of accountability. And the Tuticorin case serves as a testament of the same.The Human Rights Watch 2016 report suggests that the increased abuses and torture result from a lack of a routine 'accountability mechanism'. The report cited seventeen such cases where there were inconsistencies in arrest procedure, which included 'documenting the arrest,

9 "Deaths in Custody in India Highlight Police Torture", Human Rights Watch, June 30, 2o2o, https://www.hrw.org/news/2020/06/30/deaths-custody-india-highlight-police-torture

10 Hugo Gorringe and Karthikeyan Damodaran, The "Justice for Jayaraj and Bennix Means Ending a, Culture of Impunity, 2020 https://www.google.com/amp/s/m.thewire.in/article/rights/jayaraj-bennix-custodial-deaths-impunity/amp

11 "NHRC recorded 31,845 custodial-death cases between 1993 and 2016: Report", Business Standard, December 11,2019 https://www.google.com/amp/s/wap.business-standard.com/article-amp/pti-stories/nhrc-recorded-31-845-cases-of-custodial-death-between-1993-2016-report-119121001554_1.html

notifying family members, conducting the medical examination, etc.' However, due to the lack of checks and balances, these irregularities go scot-free.

Although in Faizan's case, such lapses were not explicit, some irregularities and blatant role of the administration together amounted to his death. But if the state maintained a check, such custodial deaths could have been avoided.

In D.K. Basu v. State of West Bengal[12] the Honorable Supreme Court had laid down specific guidelines for arrest or detention. Many of these guidelines were flouted in the cases mentioned above.

For instance, the guidelines require that the police officer must make an arrest memo. But the same was not present in the Tuticorin case. As stated in the D.K. Basu guidelines, the police personnel, must inform the arrest's timing and place to arrested persons' acquittancewithin 8- 12 hours of their arrest. However, not even a single person was informed regarding the arrests, in the case of Faizan and Jayaraj and Bennix.It is also required that the police record any minor injury on the arrested person's body. In both cases, the police inflicted major injuries while torturing the accused, but the same doesn't figure on record.It is required that the arrested person be allowed to meet their lawyer during interrogation. In the cases, neither of the deceased got to meet their lawyers.

Joginder Kumar vs State of UP[13] laid guidelines for illegal detention, which were also violated. As opposed to the guidelines, the arrested persons were not allowed to contact their relatives. Moreover, the Magistrate shirked from his duty of assuring that the due procedure was followed.Undoubtedly these events provoke both outrage and a feeling of dissatisfaction from the current institutions and administrative machinery.

The Protection of Human Rights Act of 1993 requires custodial deaths to be reported within 24 hours for better protection of human rights and matters connected or incidental. It also required a post-mortem examination by a medical board, as well as videotaping of the procedure. It is proposed that the autopsy report be made available to the family members. However, Faizan's medical reports were not provided to the petitioner, implying a combined malignancy of various entrusted authorities.

Joginder Kumar vs State of Uttar Pradesh also states that the police must provide grounds for an arrest. The police officer is accountable for the justification of his/her action[14]. But the police defied the same through the arbitrary action without giving any reasonable grounds.To date, no proper action has been taken against the officials involved in the Kismatun petitions. Instead, the Court has demanded more proof[15].

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12 Supra note 2 at pg. 3

13 AIR 1349, 1994 SCC (4) 260

14 Ibid

15 Niha Masih"An Indian man died after being beaten by police on video. One year later, no one has been held accountable for 2021 https://www.washingtonpost.com/world/2021/04/06/india-delhi-riots-deaths/

CONCLUSION

The delay in justice and deliberate obscuring of details in both cases demonstrate that the judicial system is frequently complicit.The purpose of this paper was to dissect and analyse the problem of custodial deaths in India. The reader should now have a good understanding of custodial deaths in India, what causes them, and what frameworks are in place to combat them.

The arbitrary nature of the police force, as well as the slow response of the judicial system, particularly lower courts, can be detrimental to correction and reform in the criminal justice delivery system.

The trial becomes a punishment when there is a flagrant disregard for all procedures. These cases, particularly those involving dissenters or political prisoners, only show the state's whims.It is critical to emphasise that ambiguities in the language of the law allow for miscarriages of justice. The term 'custody,' for example, is not defined in the law. Even though some guidelines and precedents provide an interpretation of the term, a legislative definition that is more specific and thus less prone to loopholes is required.

Despite the fact that the paper presents statistics from NHRC and NCAT reports, they cannot contain the grief and despair of the families of those who died in custody.

Both cases share some similarities, the most notable of which is apathy within the administration and executive, which operate with a disregard for the law and the Constitution. The Indian legal system and the Constitution contain a wealth of legal material in the form of precedents, codes, and guidelines. If each of these is followed, such violations may become uncommon.

To avoid the possibility of such violations, the Criminal Code of Procedure should be revised. Misuse of authority by a few leads tarnishes the image of the entire Police force and instils fear in the minds of the public.

Protection of Women during Armed Conflict with Special Reference to International Humanitarian Law

*Dr. G. Rajasekar**

INTRODUCTION

In the late 1980s, genocidal rape was coined to describe the new extreme of men's inhumanity to women in war when Serbs intentionally detained and raped women in camps to destroy them and their people by sexually assaulting the women. The 20th century, one in which conventions and covenants on human rights for all flourished, was also the century of record-breaking death and human rights violations perpetrated within war, both declared and undeclared. All wars, just and unjust alike, and the less conventional wars such as dirty wars of repression, low intensity conflicts within and between countries and political groups, ethnic conflicts and civil wars are largely unexamined public health disasters that leave in their wake humanitarian crises and human rights abuses; aggravated sexual exploitation of women and girls; and extreme environmental degradations. In pondering the harm and more specifically the health impacts of war on women, three intrinsic questions arise. What do we mean by war, as we set out to document its impact on women's health in particular? Who defines the harm of war and how do they measure it? What do we mean by health?

The first question is significant because if we define war solely as direct conflict employing weapons and exclude the war-related disruption of economic activity and social services infrastructure; the displacement of people within or outside their country; the increased rates of crime and sexual violence in conflict-ridden, unstable situations; decades of military occupation in strategic areas of the world with the twin impacts of pollution and prostitution in those areas; and the culture of hyper masculinity and male warrior narratives in military culture, we will fail to document the more systemic, gender-based, and enduring impacts of war on women.

The second question, concerning who defines war related harm and how they measure it, is central to making visible the harm of war for women. Data on wartime morbidity

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and mortality is collected by the military and includes primarily the direct effects of combat and combat-related exposures on combatants and less frequently on civilians.

The third question regarding the meaning of health offers the opportunity to define health in as dimensioned and complete a way possible. The consequences of war, so disparately suffered by women, unleash a dreadful morbidity of the soul, psyche and livelihood rarely diagnosed in clinical incidence of morbidity and mortality and missing from conventional health statistics and surveillance.

Rape and sexual exploitation in war, on the other hand, have been systematically disregarded as war atrocities and crimes until the recent revelations of the genocidal rape of women during the conflict in the former Yugoslavia and of Tutsi women in Rwanda. Yet, history reveals that senior officers of war and military occupation have commonly sanctioned and normalized the sexual exploitation of local women by military men.

International Humanitarian Law has accorded women general protection equal to that of men. At the same time the humanitarian law treaties recognize the need to give women special protection according to their specific needs. This protection is enshrined in the four Geneva Conventions of 12 August 1949 for the Protection of War Victims and their two Additional Protocols of 8 June 1977. The Conventions and Protocols protect women as members of the civilian population not taking part in an armed conflict as well as members of the armed forces when captured by the enemy.

In spite of various international instruments which guarantee women, rights for their welfare and protection to safeguard their morality, honour and dignity, still gross violation against women continues to exist. Therefore, this paper focuses on the protections that have been guaranteed under international law especially under IHL.

PROTECTION OF WOMEN UNDER IHL

The protection conferred to women under the provisions of IHL is general in nature as contained in Art 12 of the First and Second Geneva Conventions which provide that women shall be treated with all regard due to their sex". Further, to be more specific, reference can be made to the Third GC which demands the parties to the conflict to provide for separate shelters and sanitary facilities for female POWs. Women detained are highly prone to the risk of sexual and physical abuse when male staffs are employed in superior capacities in women's prison or when they are imprisoned along with men. The Third GC provides that women POWs must be under the immediate supervision of women. The aim of these specific provisions is to provide additional protections for women by taking into consideration their medical and psychological needs apart from the consideration pertaining to their privacy or child bearing role. For example, the Fourth GC provides that expectant mothers are to be the object of particular protection and respect. In circumstance where a territory has been occupied, IHL demands the occupying power to provide for additional food in proportion to the expectant and nursing mother's physiological needs and expressly

states that belligerents may establish hospital and safety zones for benefiting expectant mothers amongst others.

GENERAL PRINCIPLES OF PROTECTION OF CIVILIAN WOMEN

The starting point of discussion is that they are entitled to the same protection as men, be it as combatants or as civilians or persons hors de combat. In addition, recognizing their specific needs, IHL grants women additional protection and rights. This section will first set out the principal rules of general protection and then discuss the provisions that specifically afford benefit to women under different categories.

➢ Non-discrimination

One of the basic principle upon which the IHL rests is that the protections and guarantees therein provided are to be granted to every single individual without any discrimination. Thus all four Geneva Conventions and both Additional Protocols provide that the specific categories of persons therein protected must be "treated humanely and cared for without any adverse distinction founded on sex[1]"

This expressly prohibits discrimination but not differentiation. Indeed, different treatment of men and women and the recognition that women may have additional, specific needs is reflected in the provisions of IHL granting women special rights and protection. Distinctions on the basis of sex are thus prohibited only to the extent that they are unfavourable or adverse.

➢ Principle of humane treatment

Another category of rules which are important for the protection of civilians are the provisions requiring belligerents to provide "humane treatment". These norms are similar to human rights provisions that ask the States to lay down minimum standards of treatment and fundamental guarantees, which parties to a conflict must grant to everyone within their power. These fundamental guarantees are applicable in both international and non-international conflicts and, indeed, form the basis of Art 3 common to the Geneva Conventions which, until the adoption of AP II, was the only provision regulating non-international conflicts.

➢ Protection against the effects of hostilities

Principle of distinction requires parties to an armed conflict to distinguish between civilians and combatants at all times and not to direct attacks against civilians and the civilian population.[2]

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1 Arts 12 GC I and GC II. That women are to be afforded equal protection to men is expressly spelled out in GC III, Art 14, which provides that "women shall in all cases benefit by treatment as favourable as that granted to men". Non-discrimination provisions are also set out in common Article 3 GCs; Arts 88(2) and (3) GC III; Arts 27 and 98 GC IV; Arts 9 and 75 AP I and Articles 2 and 4 AP II.

2 Although long-established, the principle of distinction is reaffirmed in Art 48 AP I, which provides: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".

In addition, international humanitarian law also prohibits indiscriminate attacks, i.e. those attacks which, although not targeting civilians, are aimed at striking military objectives and civilians or civilian objects without distinction[3]. A number of rules of international humanitarian law stem from the principle that civilians must be spared from the effects of hostilities. These include the prohibition of starvation of civilians as a method of warfare[4], the prohibition on attacks on objects indispensable to the survival of the civilian population[5], the duty of parties to a conflict to take precautions in attack in order to spare the civilian population[6], the prohibition on carrying out attacks on "works or installations containing dangerous forces " (dams, dykes and nuclear electrical generating stations, attacks on which may cause the release of dangerous forces and severe losses among the civilian population)[7], the prohibition on the use of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment and thereby to prejudice the health or survival of the population[8], the prohibition on using the presence of the civilian population or individual civilians to render certain points immune from military operations i.e. using civilians as human shields[9], and, last but not least, the prohibition on attacks on the civilian population or on civilians by way of reprisals[10].

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3 This too is a long-standing principle which finds expression in Art 51 AP I in the following terms:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
   a) those which are not directed at a specific military objective;
   b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
   c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
   a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
   b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

4 Art 54(1) AP I.

5 Art 54(2) AP I.

6 Art 57 AP I. Of particular relevance is paragraph 2(a)(ii), which requires those who plan or decide upon an attack to: "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." It should be noted that the term "attacks" means acts of violence against the adversary, whether in offence or in defence (Art 49(1) AP I).

7 Art 56 AP I.

8 Art 55 AP I.

9 Art 51(7) AP I.

10 Art 51(6) AP I.

These basic principles apply in both international and non-international armed conflicts. While the provisions referred to so far are taken from AP I, AP II contains similar prohibitions on attacks on civilians, on starvation of the civilian population as a means of warfare and on attacks on works and installations containing dangerous forces, albeit in condensed form[11].

➢ **Restrictions and prohibitions on the use of specific weapons**

International humanitarian law also protects civilians from the effects of hostilities by prohibiting the use of certain weapons which, by design, cause casualties among combatants and civilians without distinction.

The principle of distinction, set out above, prohibits parties to a conflict from employing weapons incapable of distinguishing between combatants and civilians[12].Without specifically referring to this principle, the use of certain weapons has been prohibited, at least in part, because of their indiscriminate effects. The most notable examples are the instruments prohibiting the use of weapons of mass destruction, such as the 1925 Geneva Protocol[13], and the 1993 Chemical Weapons Convention[14]. The lasting effects of weapons on civilians are also a consideration which may lead to the restriction or prohibition of the use of certain weapons. For example, the use of anti-personnel mines was prohibited in 1997 largely because of their indiscriminate and long-lasting effects on civilians[15]. Other examples include booby-traps and other devices, the use of which is restricted in amended Protocol II to the 1980 Convention on Certain Conventional Weapons[16].

Protection Conferred Under Different Categories

IHL protect women as follows:

a) Combatants

b) POWs

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11 Arts 13-15 AP II.

12 Art 51(4)(c) AP I.

13 Protocol for the Prohibition of the use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 1925.

14 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1997.

15 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, 18 September 1997.

16 Protocol on Prohibitions and Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, to the 1980 Convention on Conventional Weapons. While the use of anti-personnel mines is categorically prohibited by the 1997 Anti-personnel Mines Convention, this Protocol merely restricts the use of mines, booby-traps and other devices. It is important to note, however, that it prohibits outright the indiscriminate use of the weapons in question and defines as indiscriminate *interalia* "any placement of such weapons which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (Art 3(8)(c)).

c) In Occupied Territories

d) Non–International Armed Conflicts

PROTECTION OF WOMEN COMBATANTS

IHL extends the same legal protection to women as that is afforded to men. During an armed conflict, wounded and sick combatants are protected under the First[17] and Second[18] Second71Geneva Conventions, which provide that wounded and sick members of the armed forces, whether in land warfare or at sea, are to be respected and protected in all circumstances[19]. They shall be treated humanely ad cared for by the parties to the conflict in whose power they may me found without any adverse distinction founded on the basis of sex race, nationality, religion or public opinion[20]. In particular, the conventions prohibit any violence to their persons, murder or extermination, torture and subjecting them to any biological experiment[21]. The provision further states that women shall be treated with all consideration due to their sex[22]. Though the phrase "consideration due to their sex" is nowhere defined, it can be interpreted to include within it sphere concepts like psychological specificity, honour and modesty and pregnancy and childbirth.

PROTECTION OF WOMEN PRISONERS OF WAR

Women who take part in hostilities and fell into the hands of enemy are protected by the III GC. Women who take part in *levee en masse*[23] are also protected under IHL and are entitled to POW status. Women who falls under any of the other category as mentioned in Art 4 of the III Geneva Convention are also entitled to POW status once they are found in the hands of the enemy. The categories mentioned in Art 4 are as follows:

i) Member of militias

ii) Member of volunteer corps

iii) Members of organized resistance movements belonging to a party to the conflict and are operating in or outside their own territory.

The persons belonging to categories can claim the POW status if they fulfil the following conditions:

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17 Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

18 Geneva Convention for the Amelioration of the condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949.

19 Art 12 para 1 of GC I and II

20 *Ibid* Art 12 para 2

21 *Ibid*

22 *Ibid* Art 12 para 4

23 Art 4(6) III GC: Inhabitants of a non-occupied territory who spontaneously take arms at the approach of the enemy, without having had time to organize themselves, provided they carry their arms openly and respect the laws and customs of war.

a) They are commanded by a person responsible for his subordinates
b) Have a fixed distinctive sign recognizable at a distance
c) Carry arms openly
d) Conduct their operations in accordance with the laws and customs of war.

In addition to this, the civilian women crews of military aircraft, war correspondents, supply contractors members of labour units or of services responsible for the welfare of the armed forces are entitled to POW status and protection hereunder, provided they conducted themselves upon the authorization received from the armed forces to which they identify themselves and have an identity card to that effect. Women members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the Conflict, who are not entitled to any favourable treatment under any provisions of the international law, are also entitled to the protection that is afforded to POW under the Third Geneva Convention.

Art 4 of the III GC provides that the following shall also be treated as POWs under the Convention:

i) Persons belonging or having belonged to the armed forces of the occupied country, if the occupying power considers it necessary by reason of such allegiance to intern them
ii) Persons belonging to one of the categories mentioned in Art 4, who have received by neutral or non-belligerent powers on their territory and whom these powers are required to intern under international law.

Additionally, women who are members of the medical and religious wings of armed forces, who do not fall within the categories of POWs, are entitled to receive POWs treatment. The difference being entitled to POW status and POW treatment is that while POW treatment ensures that person who are deprived of their liberty are accorded the full range of safeguards and not just minimum guaranteed laid down in Art 75 of the AP I however they may still be prosecuted for having participated in the hostilities.

GENERAL PROTECTION

Art 12 to Art 15 of the III Geneva Convention provides for the general protection to POWs. These articles provide that POWs are entitled, in all circumstances, to respect to their person and their honour. They must at all times be treated humanely. Women POWs must be treated with all the regard due to their sex and shall benefit from the same favourable treatment that is afforded to men. The convention forbids the practice of subjecting POWs to torture, physical mutilation or any type of scientific experiments which are in no way connected with their medical treatment and which are not adopted in favour of their interest. POWs shall at all times be protected against acts of violence or intimidation and against insults and public curiosity. It is further made clear under the convention that POWs shall not be unnecessarily be exposed to danger while awaiting their evacuation from a fighting zone the detaining power is bound to provide free of charge for their maintenance and medical attention.

SPECIAL PROTECTION

III GC also provides for privileged treatment based on the considerations of rank, sex, state of health, age or professional qualifications of women POWs. The special protections afforded in favour of women POWs under the III GC are as follows:

- Quartering: In camps where women and men POWs are accommodated together, separate dormitories and toilets shall be provided for women[24]. Further the detaining power must make sure that male POWs shall not have access to women prisoners.
- **Hygiene:** The camps in which women POWs are accommodated provision for separate toilets shall be provided to them[25].
- **Medical Attention:** POWs, whose conditions require for special treatment, a surgical operation or hospital care as in case of expectant mothers, must be admitted to a military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future[26].
- **Labour:** If the women POWs are physically fit they can be put to labour that is best suited for them by taking into consideration their age, sex, rank, physical aptitude, with an intention of keeping them in a good state of physical and mental health[27]. Further women POWs shall not be subject to any humiliating labour[28] which impliedly forbids detaining power from using sexual slavery as a weapon against women POWs.
- **Discipline:** Women POWs shall not be awarded or sentenced to a punishment that is more severe or serious that what is awarded to the women members belonging to the detaining power with regard to the similar offence[29]

24 Art 25 para 4 GC III: In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

25 Art 29 para 2 GC III: Prisoners of war shall have for their use, day and night conveniences which conform to the rule of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separated conveniences shall be provided for them.

26 Art 30 para 2 GC III: Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future.

27 Art 49 para 1 GC III

28 Art 52 para 2 GC III: no prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

29 Art 88 GC III para 2: A women prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the detaining power dealt with for similar offence; para 3: In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the detaining power dealt with for a similar offence.

- **Camp:** Women POWs undergoing punishment or sentence shall be confined in separate quarter from the male PO and shall be under the immediate supervision of women[30]. In same way women POW undergoing disciplinary punishment shall be held in separate quarters[31].

PROTECTION IN OCCUPIED TERRITORIES

In cases of declared war or any other armed conflict which may arise between two or more states, the civilian populations are protected under the Fourth Convention.

States are under an obligation to protect the civilians. During the existence of armed conflict, the general protection available during the peacetime are often violated and the suffering of civilians often outweigh of those whose participate in hostilities.

The basic principles set out in the International Humanitarian Law is that the parties to the conflict must differentiate between civilian and combatants[32] and in no circumstances the civilian population and individual civilians shall be object of the attack[33]. For these purposes "Civilian is defined as a person who does not belong to any of the armed forces[34]. The impact of the armed conflict on civilian women is generally more than what men experience. The women are often separated from the male member and displaced where they had to shoulder the burden of sustaining their family members (infants, children and old age persons), exposed to sexual violence, non-availability of health facilities and food.

Thus in cases of declared war or any other armed conflict which may arise between two or more states, the civilian population are protected under the IV Geneva Convention of 1949 and API of 1977. The protection provided under the convention applies to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Parties to the conflict are at the liberty to establish safety or neutral zones in order to shield the civilian population from the effects of the conflict and in particular the wounded

30 Art 108 para 2 GC III: A women prisoner of war on whom such a sentence has been pronounced shall be confined in a separate quarters and shall be under the immediate supervision of women.

31 Art 97 para 4 GC III: Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

32 Art 48, AP I: In order to ensure respect for and protection of the Civilian population and Civilian objects, the parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations against military objectives.

33 Art 51 AP I: The civilian population as such, as well as individual civilians shall not be the object of attack; See also Art 13 Additional Protocol II

34 Art.50 of API. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

sick, aged, children, expectant and nursing mothers of children less than seven years amongst them[35].

Art 27 of the Fourth Convention that protected persons are entitled, in all circumstances, respect to their persons, their honour, their family rights, their religious convictions and practices and their manners and customs. They must at all times be treated humanely and shall be protected especially against all acts of violence or threats and against insults and public curiosity. The article furthers makes it clear that women shall at all times be protected against any attack on their honour, particularly against rape, enforced prostitution or any other form of indecent assault. The convention expressly prohibits reprisal against protected persons, pillage, collective penalties, taking of hostages and all measures of intimidation or terrorism[36]. In case of international armed conflict, additional protocol I-Art-76 provides that women shall be the object of special respect and shall be, in all circumstances, be protected against rape, enforced prostitution and any other form of indecent assault[37]. All protected persons, who are aliens in the territory of the party to the conflict, if desire to leave the territory at the outset or during a conflict, shall be entitled to leave unless their departure is substantial to the national interest of the state concerned[38]. The convention accords preferential treatment to non-repatriated persons, children under fifteen years, pregnant women and mothers of children under seven years.

In occupied territories, protected persons protected persons accused of an offence can be detained and if convicted shall serve their sentence therein and they can also be interned if the security of the state is at stake. If women are detained or interned, they shall be confined in separate quarters and supervised by women officers[39]. In exceptional cases, the women internees, who does not belong to the same family, may be detained along with men in same quarters, where it is the obligation of the detaining power to provide them with separate sleeping quarters and sanitary conveniences[40]. Pregnant women ad mothers having dependent infants, who are arrested, detained or interned, shall have their cases taken up for consideration with utmost priority[41]

Further Art 124 of IV GC provides that the women internees undergoing disciplinary punishments shall be confined in separate quarters different from that of the male internees and shall be under the immediate supervision of women. Parties to the conflict must endeavour to avoid the pronouncement of death penalty on pregnant women or mothers having dependent infants for an offence related to the armed conflict. The death penalty thus pronounced shall not be executed on such women[42].

35 Arts 14 and 15 of GC IV
36 Arts 33 and 34 of GC IV
37 Art 76 AP I
38 Art 35 GC IV
39 Art 76 GC IV
40 Art 85 GC IV
41 *Supra Note*.37 para 2
42 *Supra Note*.37

In situations other than occupation, where the civilian population of a party to the conflict is not adequately provided with essential supplies; humanitarian and impartial relief actions must be undertaken and while doing so priority must be given to children, expectant mothers, maternity cases and nursing mothers.[43]

Fourth Geneva Convention encourages the parties to the conflict to conclude agreements for the release, repatriation, to return to places of residence or accommodation in a neutral country of pregnant women and mothers with infants among others[44].

Finally, a woman who has taken part in the hostilities but has not been granted the status of POW must in principle benefit from the provisions of the Fourth Geneva Convention unless she is detained as a spy or saboteur.[45] In the latter cases, such persons must nevertheless be treated humanely and must benefit from the fundamental guarantees provided in Art 75 AP I[46]

PROTECTION IN NON-INTERNATIONAL ARMED CONFLICTS

Women are not entitled to any special treatment in non-international armed conflict. Art 3 common to all four Geneva Conventions lays down the minimum standard that is to be respected by both the sides to the conflict in a non-international armed conflict. It provides that persons taking no active part in the hostilities, including the members belonging to armed forces, shall in all circumstance be treated humanely without any adverse distinction founded on sex amongst other criteria. To this end, the following acts are prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

a. Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
b. Taking of hostages;
c. Outrages upon personal dignity, in particular, humiliating and degrading treatment;
d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as in dispensable by civilized peoples.

Another important additional protected under AP II is that Art 4, similar to the fundamental guarantees provided under Art 75 of the AP I, prohibits "outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced

43 Art 70 para 1 AP I

44 Art 132 GC IV

45 Art 5 GC IV

46 Art 75 para 5 specifically provides that the women whose liberty has been restricted for reasons related to armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same lace and accommodated as family units.

prostitution and any form of indecent assault". Actually prohibition of sexual violence is implicit in the provisions of IHL as it well fits within the prohibition of violence to life, cruel treatment and torture and outrages upon personal dignity, which are applicable in both international and non-international armed conflicts. In the event of non-international armed conflict, the status of POW is not applicable. Women who participate in hostilities may be prosecuted for mere participation. However, the participants who found themselves under the hands of enemy are protected by IHL and are entitled to the fundamental guarantees[47] that must be ensured to all persons.

Nonetheless, women are entitled to certain basic protection as mentioned below:

i) Detained or interned women must be held separately from men and placed under the immediate supervision of women

ii) Interned women to be searched only by female guards

iii) Interned expectant and nursing mothers must be given additional food in proportion to their physiological needs

iv) Interned maternity cases must be admitted to institutions where they can receive adequate treatment

v) Due account mast be taken of their physical capabilities in awarding disciplinary punishments to detained and interned women and in the utilization of their labour.

AP II too provides that death penalty shall not be carried out on pregnant women or mothers of young children[48].

Further under common Art 3, an impartial body like ICRC, may offer it services to the parties to the conflict. Even though expressly the provision is limited but it impliedly aimed that providing food, water and medical necessities. The customary rules of humanitarian law provide that women and children are supplied with adequate food and have the individual and collective relief. Most of the customary principles are aimed at ensuring that specific categories of women like pregnant and breast feeding women as well as children are provided with sufficient nourishment for proper development of their physical and mental health with an intention to root out any nutrition based disease.

Art 3(2) provides that the wounded and sick must be respected, protected and cared for. AP II too contains a similar provision which provides the wounded and sick be respected, protected and treated humanely and shall receive the suitable medical care and attention on time. At 18 of AP II which regulates the relief actions in non-international armed conflicts doesn't mention expressly about clothing, however in cold climates, warm clothes are considered to be an essential supply for the survival of the civilian population which also includes women within its ambit.

47 Art 4 AP II

48 Art 6 para 4 AP II

Considering the continuing relevance of conventional IHL in the post-Rome Statute era. Some argue that international criminal law has rendered many of these issues obsolete. Rome Statute contains a range of gender-specific provisions. To a lesser degree, the statutes of the adhoc criminal tribunals for Rwanda and the Former Yugoslavia also contain such provisions. As a result of the progressive jurisprudence of the adhoc tribunals, rape can now be prosecuted as a crime against humanity, a war crime, and even as a method of genocide in international tribunals.

Efforts have been made to ensure prosecutions of perpetrators of gender-based crimes by affording support to victims and witnesses. Even the critics concedes that prosecuting rape as a grave breach should effectively expand the meaning of the Conventions and Protocols and obviate the need for formal amendment. Yet, in the future, failings in IHL may be reflected in international criminal practice, such as the faults identified by critics with the early indictments concerning sexual violence that were submitted to the ICTY.

International criminal courts can indeed promote progressive, creative interpretations of IHL's key texts. Experts and NGOs have also pushed for these developments. The ICRC has made some important contributions as, for example, in its 1992 aide-memoire. This document proclaimed that "the act of rape is an extremely serious violation of international humanitarian law" and indicated that the grave breach of "wilfully" causing great suffering or serious injury to body or health" found in Art 147 of the IV Geneva Convention includes rape and "any other attack on a woman's dignity."

However, the nature of conventional IHL remains vitally important, for those women, whose conflict victimization will not be subject to the jurisdiction of any ICC. Their only legal recourse, if any, may be adhoc, perhaps through national courts, most likely based directly on IHL, particularly when involving states that oppose international tribunals. Additionally, some militaries base their training programs directly on IHL, sometimes going so far as to incorporate its provisions directly into instruction manuals."

The ICRC introduction to the Commentary on the IV Geneva Convention expresses hope "that the Commentary will be of service to all who, in Governments, armed forces and national Red Cross Societies, are called upon to assume responsibility in applying the Geneva Conventions, and to all, military and civilians, for whose benefit the Conventions were drawn up.

Moreover, IHL remains a touchstone, a source to which governments, national courts, and international courts and mechanisms will always return. Given the fact that in 2006 the Geneva Conventions became the first treaties "in modem history to achieve universal acceptance" by being ratified by all 194 countries in the world, their symbolic importance cannot be overstated. They have legitimacy even with some governments that remain hostile to international criminal law and international criminal courts. Therefore, what IHL says about women in war remains significant. Progressive adjudication should be encouraged and welcomed. Yet, creatively patching together interpretations of texts to find space for women's experiences of war may not ultimately be enough.

CONCLUSION

The Geneva Conventions are accepted as the guardian of IHL and also having sufficient rules to prevent violence against women in armed conflict. But, the real problem is the failure in the implementation part. Some critics is of the view, that the comparison between the reality of armed conflict for women and the existing relevant norms of international law, that the latter are inadequate. This view suggests that implementation of extant IHL through international criminal courts alone, though an important step, may not entirely remedy the problem. Instead, perhaps something must be done to modernize IL, itself, in light of advances in understanding violence against women in conflict, especially those advances made in international human rights standards.

The international community has formally acknowledged in Security Council Resolution 1325 that "civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements Violence against women in war is widespread, often systematic, multi-faceted, and heinous.

In times of strife, it must not be forgotten that women face harm at the hands of a wide range of public and private actors. Invading soldiers may rape and murder. Armed groups may kidnap women and force them to fight. Even those sent by the international community to help, such as aid workers or peacekeepers, may sexually harass or abuse women. Furthermore, "ordinary" violence against women and girls, such as domestic violence, child abuse, battering, rape, or female genital mutilation, may be exacerbated by the pressures of a conflict situation.

It is argued by some that law reform, particularly in the IHL area, should not be a high priority in combating international crimes against women. Serious concerns have been raised about the potential triumph of "form over substance." Yet, in thinking about the role of law in stopping violence against women in armed conflict, it is instructive to note that according to the Beijing Platform for Action, violence against women is exacerbated by: "the lack of laws that effectively prohibit violence against women; and failure to reform existing laws".

Therefore, States and parties to an armed conflict must do their utmost to uphold respect for the safety and dignity of women in wartime, and women themselves must be more closely involved in all the measures taken on their behalf. Every State bound by the treaties of international humanitarian law has the duty to promote the rules protecting women from any form of violence in war, and should crimes occur, to bring the perpetrators to justice. If women have to bear so many of the tragic effects of armed conflict, it is not primarily because of any shortcomings in the rules protecting them, but because these rules are all too often not observed. The general and specific protection to which women are entitled must become a reality. Constant efforts must be made to promote knowledge of and compliance with the obligations of international humanitarian law by as wide an audience as possible and using all available means. The responsibility for improving the plight of women in times of war must be shared by everyone.

Attempt to Commit Suicide: Offence or Not its Time to Look Beyond IPC

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ABSTRACT

'Attempt to commit suicide', if done with the intention to get some wrongful gain by the person attempting suicide or to anyone he is interested in, or to cause some wrongful loss to anyone else, can be said to an offence and be culpable. Though in both the cases, the act is unconstitutional but in the latter case it is the abnormal circumstances due to mental and emotional disorder that compels the person to take such a step. But what if the circumstance of the case proves that such an act was committed because such person was under acute psychological or societal pressure? Considering such cases under mental Healthcare Act, 2017 is not sufficient. What is needed is a definition clearly differentiating between various offenders under section 309, IPC. Further, the Apex courts must re-consider the question of making Right to die a fundamental right and covering it within the ambit of Article 21.

Keywords: *Suicide, attempt to commit suicide, decriminalization, psychological factors, social factors, individual factors.*

INTRODUCTION

Suicide, the fourth leading cause of death among the people between 15-19 years of age[1], though punishable under Section 309 of the Indian Penal Code, is not defined anywhere in the Code. The much-debated issue (i.e., decriminalization of the section) has been discussed in various cases, but in none of them the foremost need of having a definition was highlighted.

The enactment of Mental Healthcare Act, 2017 (as codified by most of the nations in the world) may lead to increase in stress amongst the people, who try to end their

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1 WHO, Available at https://www.who.int/news-room/fact-sheets/detail/suicide#:~:text=WHO%20recognizes%20suicide%20as%20a%20public%20health%20priority.,high%20priority%20on%20the%20global%20public%20health%20agenda browsed on 22-03-2022

lives, as in our country, any illness if related to mental health is seen as a taboo. People, especially and not exclusively the ones belonging to illiterate group, consider a depressed or psychologically ill person as an insane. Mental illness and mental health are two different concepts and any misunderstanding or confusion between these terms make result into neglecting the signs that shows the need of assistance. The health literacy, which is uncommon in countries like India, is the need of the hour being extremely important.

As reported on 17th March 2022 by the national newspaper, The Times of India[2], A seventeen-year-old girl, studying in a Christian Missionary School in Tamil Nadu, committed suicide. She was allegedly being forced to convert to Christianity by the school. Madras High Court (Madurai Bench) transferred the probe to CBI which was challenged by Tamil Nadu Government. National Commission for Protection of Child Rights (NCPCR) moved to Supreme Court seeking its intervention in the case.

In another recently reported case[3], A 35-year-old Indian allegedly charged with committing triple murder of the family of his co-employee committed suicide in Kuwait prison. His family including his wife, who was with him when he was arrested and later on deported to India, claimed that he was falsely charged.

These are only some of the instances which makes suicide or attempt to commit suicide a serious issue and asks for more measures, other than enacting another Act[4], to prevent and control such acts.

The questions that need to be answered are-

1. Whether asking a person, who failed in his attempt to end his life, to go through a psychiatric treatment is sensible and responsible?
2. Is the reason for attempting a suicide relevant? If yes, then doesn't it asks for different treatment?
3. Does 'right to life' means and includes a burdened, tortured, traumatic life?

ATTEMPT TO COMMIT 'SUICIDE'- *DE LEGE LATA*

Oxford Advanced Learner's Dictionary[5] define 'Suicide' as *'the act of killing yourself deliberately'* and 'attempted suicide' means '*the suicide in which the person survives*'. Suicide is an offence where a person is punished not for the complete act (as that is not possible) but only for the attempt. Here, the question arises- Is it Human to

2 Available athttps://timesofindia.indiatimes.com/city/amaravati/andhra-pradesh-resident-accused-in-triple-murder-case-dies-by-suicide-at-kuwait-prison/articleshow/90290731.cmsbrowsed on 21-03-2020

3 Editorial,'Triple-murder accused dies in Kuwait prison',*The New Indian Express*,March 18th, 2022 Available at https://www.newindianexpress.com/states/andhra-pradesh/2022/mar/18/triple-murder-accused-dies-in-kuwait-prison-2431479.html browsed on 22-03-2022

4 Mental Healthcare Act,2017

5 https://www.oxfordlearnersdictionaries.com/definition/english/suicide browsed on 22-03-2022

punish a person who, himself, is thinking of ending his life? Should his act also be not included in any of the 'general exceptions' given under the Indian Penal Code?

Section 309 of the Indian Penal Code (IPC)[6] says-

> *"Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year (or with fine, or with both)."*

The Mental Healthcare Act (MHCA), 2017[7]has narrow down the scope of Section 309, IPC. Section 115(1) of the Act states-

"Notwithstanding anything contained in Section 309 of the Indian Penal Code, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code."

Further, Section 115(2) provides-

"The Appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide."

The Act only applied to those suffering from any mental illness.

FOIBLE IN THE LEGAL PROVISIONS

The major issues that can lift up the veil from the drawbacks of the provision have been briefly discussed below:

1. **Section 309- punishable or not?** – The passing of Mental Healthcare Act, 2017 has led to a confusion with regard to the consequences of a failed attempt to commit suicide as the law punishing the act (Section 309, IPC) still exists. The scope of Section 309 of the penal Code has been narrowed as the attempt to commit suicide is punishable with certain exceptions. People charged with such offence if can prove severe illness shall be exempted if covered and proved according to the Mental Healthcare Act. The interpretation of the term "severe mental illness" again leads to confusion. Mental illness/disorder can be defined as the condition which affects the thinking process of an individual. It may have an effect on mood, feeling and behaviour. In India, mental illness is not considered as even an illness by many. The symptoms of many are considered as an effect of control by some psychic powers. Reasons for the famous Burari death case are better known to the deceased persons but as was concluded by the police it was a case of mass suicide. In this case, 10 members of the same family committed suicide by hanging themselves from the ceiling in a circular formation[8] of the first floor of their house[9]. The evidence,

6 Act 45 of 1860

7 Act No. 10 of 2017, which came into force in July 2018

8 Believed to follow the Banyan Tree Ritual (BadhTapasya) which involves hanging like branches of the tree to attain salvation.

including the handwritten diary of some of the deceased persons, led to the conclusion that it was a case of unintentional mass suicide. The case was finally closed by the Delhi Police Crime branch.[10] Cases like these are many but many a times not reported or not considered in a proper manner. Laws like Section 309 makes it all the more difficult to aid in such cases to the people in need.

2. **Basis of making Section 309[11] culpable-** Which theory of punishment forms the basis of Section 309 of the Indian Penal Code? To begin with, it does not fulfil the objectives of **Deterrent Theory** of punishment. A person who decides to end his life, for whatsoever may be the reason, will not be affected by the fear of being punished. Punishing such people for their failed attempts will only lead to further torture. It cannot be **Reformative Theory** also as a psychologically Figure person is thrown among the hard-core criminals and there are more chances of him becoming a recidivist. Further, it cannot be said to be inspired by Punitive Theory as the accused is punished for trying to bring an end to his miseries and not for causing harm to others. Regarding the Retributive Theory, as quoted by Justice Iyer[12] in his book on ***'Perspectives in Criminology, Law and Social Change'-***

   "If you are to punish a man retributively, you just injure him. If you are to reform him, you must improve him. And men are not improved by injuries."

   Therefore, the accused and in this case, also the victim of a failed attempt to end his life must not be treated at par with other criminals.

3. **Undefined offence-** Section 309, IPC which tries to commit suicide an offence does not define the offence. Indian Penal Code, drafted by Lord Macauley is a complete code for defining all the possible offences. Every wrongful act, howsoever less severe it may be, is defined and finds a place in one or the other section in the Code, suicide being an exception. Though an exhaustive definition for 'Attempt to commit suicide' is not possible but by stretch of imagination, it should be broadly defined keeping in mind, the various factors influencing such an act. Such a definition is needed to determine whether the person attempting to commit suicide, should be punished or not. A suicide done with a particular *mens rea* should be made punishable instead of causing fear in the mind of an already stressed person. The *mens rea* could be an

9 Available at https://medium.com/coffee-times/delhi-house-of-horror-the-burari-deaths-fca907e5f636 browsed on 22-03-2022

10 Editorial, "Burari deaths: Suicide or murders? Delhi Police crime branch files closure report" *Mirror Now Digital*, Oct 22, 2021 Available on https://www.timesnownews.com/delhi/article/burari-deaths-suicide-or-murders-delhi-police-crime-branch-files-closure-report/825664 browsed on 22-03-2022

11 Indian Penal Code,1980

12 Justice V.R.Krishna Iyer, *Perspectives in Criminology, Law and Social Change,*(Allied Publishers Private limited, New Delhi, 1980)

intention or knowledge to wrongfully gain something or to cause wrongful loss to someone e.g., suicide bombing (wrongful loss to people at large) or attempt to commit suicide by a terrorist after his arrest (causing wrongful gain to his terrorist group) etc. are the cases which involves a person having something more than just a mental disorder which is the guiding force to commit the offence.

IS SURVIVAL NOT SUFFICIENT IN ITSELF

It would be wrong to think that a person attempting suicide does not get punished. He does. The agony undergone by him and the ignominy to be undergone is definitely a punishment, though not a corporal punishment; but then, Section 309 of the Penal Code has provided for a sentence that would be far more painful.[13] A suicide attempt is a clear indication that something is that grave in a person's life that he is compelled to end his life. Suicide is a psychiatric problem and not a manifestation of criminal instinct.[14] The Ministry of Health in England, shortly after passing of the Suicide Act, 1961, issued recommendation advising all doctors and authorities that attempted suicide was to be regarded as a medical and social problem.[15] International Association for Suicide (IASP) that sponsors 'World Suicide Day'[16] is also of the view that attempted suicide should be decriminalized as punishment only makes the problems of the victims worse.[17]

RELIGIOUS ASPECT OF SUICIDE

1. **Hinduism –** Suicide was regarded as permissible in some circumstances in ancient India. Manu Code[18] says-

   "31. *Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sink to rest."*

   Two commentators on Manu, Govardhana and Kulluka, say that a man may undertake the mahaprasthana (great departure) on a journey which ends in death, when he is incurably diseased or meets with a misfortune, and that, because it is taught in the Shastras, it is not opposed to the Vedic rules which

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13 Law Commission of India, 210th Report on Humanization and Decriminalization of Attempt to Suicide (October,2008) available at https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-report-no-210-humanization-and-decriminalization-of-attempt-to-suicide-pdf/ browsed on 22-03-2022

14 Ibid.

15 Martin Curtice and Charlotte Field "Assisted suicide and human rights in the UK"34(5) The Psychiatrist (2018) Available at https://www.cambridge.org/core/journals/the-psychiatrist/article/assisted-suicide-and-human-rights-in-the-uk/F1E5D6D66486C99E856DD3FF12291C06 browsed on 22-03-2022

16 Celebrated on September 10th

17 Supra Note 15

18 Available at https://www.sacred-texts.com/hin/manu/manu06.htm browsed on 22-03-2022

forbid suicide.[19] Satipratha (wherein a wife sits on the burning pyre of her husband believing that she dies with the death of her husband)[20] or Jauhar/ honour suicides – a practice of mass self-immolation by females performed by females who prefer to die with honour over survival and dishonour[21]. Similar practices have also been followed by people from other communities like mass suicide by Jews at Masada[22] or Seppukku of the Japanese[23].

2. **Christianity-** It is traditionally opposed to suicide and assisted suicide. Many Christians believe in the sanctity of human life, seeing it as a creation of God and obliging every effort to be made to preserve it, wherever possible. Even believing that suicide is generally wrong, liberal Christians may hold that people who choose suicide are severely distressed.
3. **Buddhism-** For Buddhists, suicide is clearly a negative form of action.
4. **Islam-** Islam views suicide strictly as sinful and detrimental to one's spiritual journey. Many claims Islam does permit the use of suicide- though only against the unjust and oppressors- if one feels there is absolutely no other option available, and the life otherwise would end in death.

Whether suicide is a moral act or not is not the issue. But it is the inflicting punishment on the person, who fails in his attempt to die, that requires concern.

REASONING BEHIND SECTION 309, IPC

The fundamental reason for making section 309, IPC a culpable offence was to discourage this self-destructive practice of suicide for the welfare of the individual and social elements affected by his act including his family. Initially, this reasoning was a very strong ground but with the span of time it is losing its relevance. It is because of the reason that a person, who has made up his mind and is determined to end his life, at all costs, and regardless of the repercussions that his act may have on those that care about him, cannot be stopped by law in this manner. Sooner or later, he is going to end his life to make himself free from the stress he has been suffering. Indeed, the 'sanctity of life' is not to be overlooked and 'extinction of life' be included in 'protection of life'.[24] But is that the only thing that the legislature has to keep in mind? A person attempts suicide for various reasons, some of which, at times, are beyond his control and for which he needs soft words and not harsh

19 Available at https://www.researchgate.net/publication/247153684_Physician-assisted_Suicide_and_Euthanasia_in_Indian_Context_Sooner_or_Later_the_Need_to_Ponder browsed on 22-03-2022

20 Available at https://theculturetrip.com/asia/india/articles/the-dark-history-behind-sati-a-banned-funeral-custom-in-india/ browsed on 22-03-22

21 Available at https://allthatsinteresting.com/jauhar browsed on 22-03-2022

22 Available at https://blogs.timesofisrael.com/fact-or-fiction-the-mass-suicide-at-masada-2/ browsed on 22-03-2022

23 Ibid.

24 *P.Rathinam v. Union of India*, (AIR 1994 SC 1844)

punishment. Treating the people who try to end their lives, as the ones with mental disorder (MHCA, 2017) is not the cure for this issue as the direct/ indirect reasons that lead to such grave steps vary from loss of livelihood to the increasing competition and unemployment in the society. The Hon'ble Supreme Court also in one of its decisions[25] has observed-

> *"In our country, while suicide in itself is not an offence as a person committing suicide goes beyond the reach of law but an attempt to suicide is considered to be an offence under Section 309, IPC……"*

Further the court said[26]-

> *"Though IPC does not deine the word 'Suicide', but the ordinary dictionary meaning of suicide is self-killing. The word is derived from the Latin word 'suicidum', 'sui' means 'oneself' and 'cidium' means 'killing'."*

The take of judiciary in this regard also presents a blurred picture. Initial discussion on this issue was undertaken by the court in State v. Sanjay Kumar Bhatia[27]where the Delhi High Court expressed:

> *"Instead of the society hanging its head in shame that there should be such social strains that a person should be driven to suicide compounds its inadequacy by treating such person as a criminal."*

Justice R.A.Jahagirdar of Bombay High Court said[28]:

a) Neither academicians nor jurists are agreed on what constitutes suicide, much less attempted suicide

b) Mens rea, without which no offence can be sustained, is not clearly discernible in such acts

c) Temporary insanity is the ultimate reason of such acts which is a valid defence even in homicides

SUICIDE AROUND THE WORLD

In Common Law from early times, suicide was a felony against one self-*felo de se*. It was considered to have legal and religious consequences on the person at fault and his family members.[29] Animpressiveshift in the English Legal approach towards suicide

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25 *Geo Varghese v. The State of Rajasthan*, (Criminal Appeal No. 1164 of 2021 arising out of SLP (Crl.) No. 4512 of 2019)

26 Ibid.

27 1985 Cr.L.J. 931

28 Available at http://www.legalservicesindia.com/article/492/Whether-Right-To-Life-Include-Right-To-Die.html browsed on 26-.3-2022

29 Available at https://www.sciencedirect.com/science/article/abs/pii/S0160252713000599 browsed on 23-03-2022

was witnessed with the passing of the Suicide Act, 1961. Thus, after the passing of this Act, both Suicide and its attempt ceased to be an offence. In Ireland, attempted suicide is not an offence. The law in Ireland punishes the person for aiding, abetting, counselling, or procuring the suicide or attempted suicide of another person for which the punishment is 14 years of maximum imprisonment.[30]

In United States, by early 1970's, comparatively small number of states listed suicide as a crime although no penalties were exacted. Two of such states repealed the law, stating in effect that although suicide is a 'grave social wrong', there is no way to punish it. Eighteen States has no laws against wither suicide or attempted suicide, but they specified that to aid, advise or encourage another person to commit suicide is a felony[31].

Many countries including the whole of Europe, North America, much of South America and Aida, including neighbouring Sri Lanka have decriminalized the offence. Only a handful of countries in the world like Bangladesh, Malaysia, Singapore, and Pakistan are amongst those who still punishes people attempting suicide.[32]

WHY THIS SHORTCUT TO DEATH?

Although suicide is a deeply personal act, suicidal behaviour is determined by a number of social as well as individual factors. The nexus between suicide and mental disorders is an established fact but there are many cases where suicide is a result of impulsive act committed by the people who fail to deal with life stresses like financial crunch (indebtedness), job loss, use of alcohol or other substances, relationship breakups or illness[33]. Also, there have been cases where the factors like conflict, trauma, abuse, disaster, domestic violence, discrimination amongst migrants, people having different sexual interests (LGBTQI)[34], lack of social support, cancellation of marriage or inability to get married, poverty etc[35]. The relationship of an individual with his family or close friends also plays a significant role in forming the suicidal behaviour of a person. These people may commit or attempt to commit suicide in order to relieve themselves from the unbearable burden of life which, for them, may be a greater torture than the pain of death.

30 Available at https://www.thejournal.ie/explainer-assisted-suicide-2045083-Apr2015/ browsed on 23-03-2022

31 Shneidman E.S., *Suicidology: Contemporary Developments* 16-17(New York: Grune& Stratton, 1976) BOOK Reference Style

32 *Supranote* 15

33 Available at https://www.who.int/news-room/fact-sheets/detail/suicide#:~:text=WHO%20recognizes%20suicide%20as%20a%20public%20health%20priority.,high%20priority%20on%20the%20global%20public%20health%20agenda. Browsed on 22-03-2022

34 Lesbian Gay Bisexual Transgender Qeer Intersex Asexual

35 Available at https://www.who.int/publications/i/item/9789241564779 browsed on 22-03-2022

More than 7,00,000 people die due to suicide every year and the number of people attempting to take their lives is far more. In 2019, it is the fourth leading cause of death among the age group of 15-19 years of age. As per the data shared by World Health Organization, in 2019, over 77% of the global suicides, occurred in low- and middle-income countries[36].

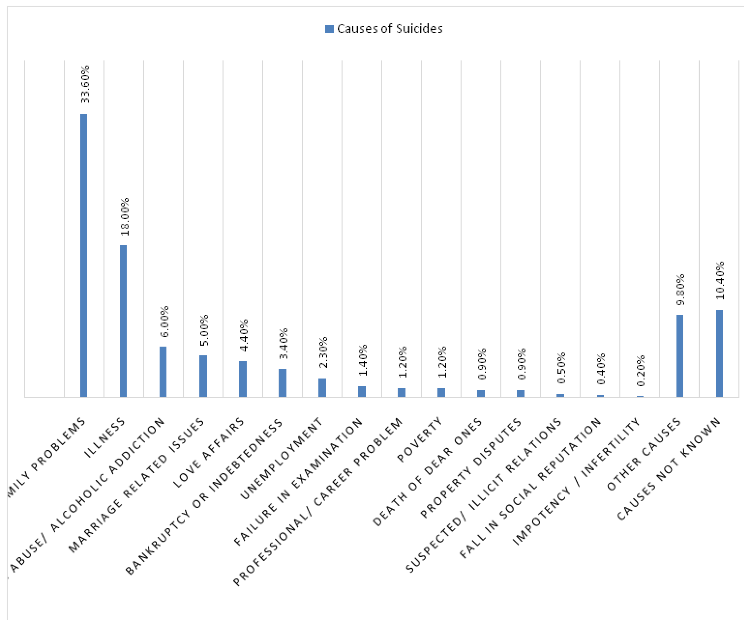

Figure 1[37]

As per the data available on the official website of National Crime Records Bureau (NCRB)- 2020 **(Figure 1),** the major reasons of people committing suicide in India was disputes amongst the families (33.6%) and illness (18.0%). There are still 10.4% cases where the cause of death or the reason of committing suicide is not known. Reasons like impotency or infertility (0.2% cases) or failure in examination (1.4% cases) if disclosed in the court rooms and sent for Psychiatric assistance will lead to humiliation and consequently give all the more reason to the victim to not to live.

36 Available at https://www.who.int/news-room/fact-sheets/detail/suicide#:~:text=WHO%20recognizes%20suicide%20as%20a%20public%20health%20priority.,high%20priority%20on%20the%20global%20public%20health%20agenda. Browsed on 22-03-2022

37 Accidental Deaths & Suicides in India 2020, Data retrieved from the official website of National Crimes Records Bureau (NCRB) available at https://ncrb.gov.in/sites/default/files/adsi2020_Chapter-2-Suicides.pdf browsed on 25-03-2022

1.9 STATISTICS ON SUICIDE CASES

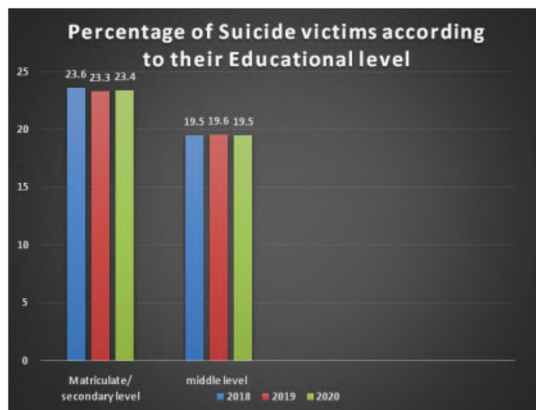

Figure 2[38]

As per the data available on the official website of National Crimes Record Bureau **(Figure 2),** in the last three years, the percentage of people,who were either Matriculate or have qualified secondary level of education committed suicides are more than those who have qualified Middle level.

Similarly, the number of married males committing suicide In India **(Figure3)** is more than the unmarried males. Further, this number is also more in case of males than females.

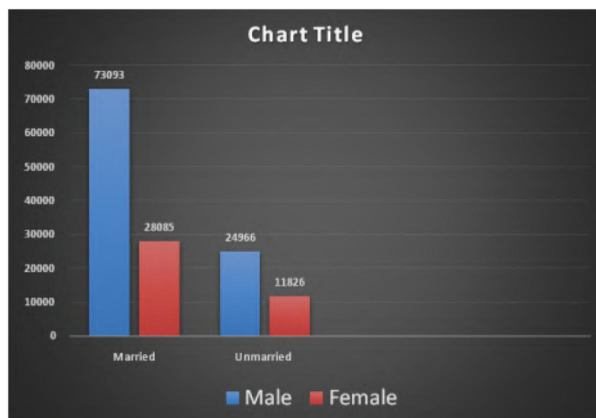

Figure 3[39]

Out of the total population in India, a major part of people committing suicide are daily wage earners (24.6 %) and second highest number is of housewives (14.6%) **(Figure 4).**

38 Ibid

39 Ibid.

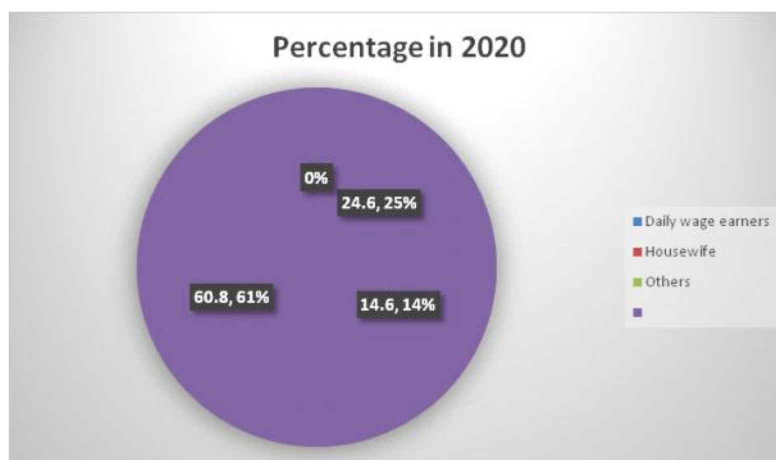

Figure 4[40]

CONCLUSION

"Sometimes to live is also a great act of courage in today's world"

To us, suicide does not make sense whatsoever, but to those who have done it, reached to the breaking point, it does make sense. Act of suicide can be said to be morally wrong but to call it an offence is inhuman. Just by decriminalizing section 309, IPC is not the only solution for an act committed by people falling into different categories. An acid attack victim, if tries to end her life, the reason being physical, mental and social torture and/or the huge amount of medical expenses required for multiple surgeries to get back some normalcy in her life- for her decriminalizing attempt to commit suicide is a good decision but a terrorist, who attempts suicide to break the nexus between him and the police or even a suicide bomber who commits such an act but is caught beforehand still deserves the punishment. Therefore, we cannot have straitjacket formula to consider or not to consider a particular act as an offence. The legislature needs to formulate the definition first and then the judiciary, accordingly, depending upon the facts and circumstances of the case, may decide whether such person needs to be acquitted and/ or sent for psychiatric help or be convicted. Change in the mindset through proper education and counselling sessions are required since childhood. Further, a transformation in the education system is required where instead of making it easy for the students to obtain marks, the mentors not only make them strong enough to work hard and score good grades but prepare them mentally to accept the result in case they do not score as per their expectations.

Therefore, it is not a question of criminalizing or decriminalizing the offence of attempt to commit rape but to deal with it differently as per the facts of the case and circumstances and reasons of the offence. In this case, the legislature must think out of the box and focus equally on prevention and cure of this act. Small steps for preventing this act may include limited access or availability of the substances that

40 Ibid.

may prove fatal to human life viz. pesticides or etc., counselling at school and college level regarding harassment, ragging, etc. and encourage socio-economic inter-personal skills amongst the masses especially adolescents, increase the awareness about mental health and its importance to as many number of people as possible with the help of legal, social awareness or health camps that can be organised by the students studying in all the educational institutions. Right to live with dignity being a fundamental right possessed by each one in the country, must include even a difficult life made easy with the help of the surroundings and people. The act of suicide can be stopped not by decriminalizing the offence but by the collaboration and coordination of the different sectors of society. It is not only the responsibility of the legislature, executive or the judiciary but also of the educational institutions, employers, family members, media, and ultimately each and every individual in the society to take care of each other.

Hence, '*right to suicide*' as a concept is too hypothetical to be directly applied and its inclusion in the legal system requires not ignorance but critical analysis of the possible ambit it may require. Suicide is not simply a legal issue alone and by terming it as legal question, we may be missing the crux of the matter.

International Perspective of Surrogacy Law

*Dr. Neha Bahl**

ABSTRACT

A growing number of childless couples are turning to surrogacy as an alternative to adoption because they want a child of their own but don't want to adopt. Due to physical issues that prohibit them from having biological children, many couples must turn to surrogacy.[1] Infertility is one of these disorders, as is the possibility that the pregnancy would be harmful to the mother or the child. An infertile couple's kid was traditionally given birth by a close relative, since there was no financial commitment associated in the procedure of hiring a surrogate mother for the purpose. But with the changing times and fewer family members willing to put up with the trauma and pain of childbirth, surrogate mothers' services have taken on a financial tone. We have a severe issue with infertility in our culture, and the social shame that goes along with it leads to husbands leaving their spouses. This has led to the widespread use of ''Surrogacy" as a means of overcoming one or both spouses' infertility issues.It has been common practice for millennia to use a surrogate mother as a gestational surrogate, but breakthroughs in reproductive technology have recently entered the argument. For those unable to have children of their own, infertile couples' resort to reproductive methods such as artificial insemination and IVF, as well as gamete and embryo donation and transfer. They now have a glimmer of hope thanks to surrogacy.

INTRODUCTION

The term society refers to a group of people. At any particular moment, this could be a geological, zoological, or botanical topic. There is a strong emphasis in this culture on genetics-based reproduction, or race development. Because of their unique ability to reproduce, botanical species, for example, may produce high-quality fruits and vegetables and create seeds for future generations. The ability of procreation is the reason for the existence of life. Mother Goddess has always been revered as a

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1 http://www.futuremedicineonline.com/detail_news.php?id=447; last visited on 22/01/2013, time: 10:40 pm (IST), place: Meerut, (UP), India.

fertility goddess since the Indus Valley culture began. Full-moon days have long been regarded as a time of fertility for the land. At some times of antiquity, even the planting and harvest festivals are significant fertility rites. Insects, birds, animals, and mammals, as well as humans, are all examples of diverse zoological species.

The importance of having children and the continuity of the family unit in Indian civilization dates back to time immemorial. Couples who struggle with infertility often turn to Indian mythology for advice on how to cope with their predicament, as infertility is seen as a societal disgrace. Why are Indians so fascinated with children? The tales from the Mahabharata may answer that question, according to Hindus in particular. Moreover, he points out to us the great religious yearning for a male kid as well as that of a female child. The act of giving birth to a child involves a woman's body, which is an issue of respect for her. Surrogacy may be advantageous if the couple does not have children, however it is incompatible with human dignity because another woman uses her uterus for financial gain and considers it as an incubator for another's baby.

As a species, we are all born with the desire to have offspring. It is true that many people are unable to have children due to various reasons, yet the obstacles that once made it impossible to have children are no longer as daunting as they once were. When a woman's womb is rented out to carry another woman's child, it's known as surrogacy. Surrogacy has grown in popularity, especially in India, as a way for childless couples to experience parenthood. A lack of a uterus is one of the most common reasons why women and couples seek out surrogacy. Most of them have also had a number of miscarriages or unsuccessful in vitro fertilization efforts under their belts. Pregnancy through gestational surrogacy is advantageous to the intended parents because the embryo is theirs through biological descent.

MEANING OF SURROGACY

"Surrogate" has its origins in Latin, where the term ''surrogatus'' means ''substitution or replacement,'' i.e., a person assigned to operate in the place of another, as defined by Black's Law Dictionary.[2] The term 'surrogate mother' or 'surrogate' is usually applied to the woman who carries and delivers a child on behalf of another couple. It is considered as a 'blessing' and 'miracle of science'.When a woman agrees to a pregnancy, acquired by assisted reproductive technology, in which none of the gametes belong to her or her husband, she intends to carry the pregnancy to term and pass it over to the person(s) for whom she is serving as surrogate. When a woman accepts to serve as a surrogate mother, she is using her ovaries to carry another woman's fertilized eggs to term and deliver the kid to the mother's biological family (s). Surrogacy is a medical word that refers to the use of a surrogate mother in lieu of the mother of the child. Either from her own egg, which is known as ''straight or partial surrogacy," or from a fertilized embryo from another woman implanted in her womb, which is known as ''gestational/full/host/IVF surrogacy," the surrogate mother gives birth on behalf of another woman.

2 Garner, Bryan A., Balck's Law Dictionary, 9th ed. 2009.

There is no involvement of the commissioning mother in partial or natural surrogacy, which is sometimes referred to as conventional surrogacy. The surrogate mother gives birth to a kid for another person using her own egg that has been fertilized through artificial insemination.[3] She is the child's biological or genetic mother since she is the one who carried the pregnancy to term. IUI (intra- uterine insemination) and ICI (intra-cervical insemination) are two methods of artificial insemination that may be used to create a child. Neither the surrogate nor the male partner has any genetic ties with the kid born as a consequence. The surrogate mother and the commissioning father are both genetically linked to the harvested kid. Prematurely menopausal women may be able to benefit from egg donation in the event that their ovaries are no longer functioning.

Traditional surrogacy may be an option for a mom who is concerned about passing on a hereditary condition to her child. Traditional surrogacy may be an option for pregnant women with life- threatening medical conditions such as diabetes, heart disease, renal illness, or other conditions that make it unlikely that they would be able to carry a child to term. When a fertilized egg from a woman who may or may not be genetically related to the intended parents is implanted into a surrogate mother in return for money, conventional surrogacy takes on a commercial perspective.

There is no genetic difference between a gestational, total, or IVF surrogate and a child conceived through this type of surrogacy. Using in-vitro fertilization, a surrogate mother carries the fertilized egg and gives birth to the kid. Both the surrogate mother's womb and the uterus of the commissioning parents are used to make IVF/test tube embryos, which are then placed into the surrogate mother. Here, a woman (the surrogate mother) becomes pregnant by carrying the child that was formed by the egg and sperm of the biological parents. Surrogate mothers and gestational carriers give their children to their biological parents or adoptive parents after they have given birth, and they give up their parental rights in the process.

INTERNATIONAL PERSPECTIVE OF SURROGACY

Gestational surrogacy is illegal in almost every country in the world. Altruistic surrogacy is a kind of it that is legal in certain places, but it is also strictly controlled. When a mother and father enter into a contract with a surrogate mother that is unenforceable in the vast majority of circumstances Uneven jail limits or guidelines by individual states and countries in federations like as the United States and the European Union exacerbate the situation. While being a surrogate mom or a commissioning determine is not illegal in the UK, business surrogate organizations and industrial moves by surrogacy dealers are, and no surrogacy association is, enforceable in regulation, the country sets an example in public coverage and debate about surrogate motherhood. Regardless of whether or whether she is a genetic or gestational surrogate mother, the surrogate mother has the criminal right to protect her child in the event of a custody dispute. The legal parents of a child born to a married couple via the use of

3 Rao, Mamta, Surrogacy: The Ehtico-Legal Challenge, January 2012, Vol. XIII, Issue-1, pp.12-14.

a surrogate mother may apply for and get a parental order declaring them the child's biological parents, provided that one or both of them provided the embryo with gametes.

Surrogacy preparations around the globe are a contentious issue, since each country has a different perspective on the practice. Commercial surrogacy is now illegal in three countries: Australia, Spain, and China. In the United States, France, and Germany, it is legal. To stop what they refer to as ''renting of the womb," these countries, along with Japan and The Netherlands, have banned surrogacy. Association with surrogacy is a felony in Australia. Commercial surrogacy is still illegal, but altruistic surrogacy is permitted. As in Canada, where altruistic surrogacy is permitted whereas commercial surrogacy was outlawed in 2004.Because of its potential for economic growth, France became one among the first countries to legalize it in 1994. While Israel became the first nation to create a government- controlled surrogacy organization that may forget about the surrogacy activities for my part with the assistance of the authorities. Israel. Some countries, including Australia, Sweden, Netherlands, Denmark, France, Germany, Great Britain, Italy, Spain, Canada and Switzerland, have rejected or greatly curtailed the practice of surrogate parenting. They have made this behaviour illegal and discouraged under their country's laws.

In India, commercial surrogacy isn't illegal, but it isn't either. It is outlawed in Ukraine, California, and many other countries, including England, the United States, and Australia, where only altruistic surrogacy is recognized. While countries such as the United States and Canada have strict laws against surrogacy, countries like Germany, Sweden, Norway, and Italy do not.Fertility tourism has made India a popular destination. The low cost of the whole process in India is less than one-third of what it costs in the United States and the United Kingdom, which is why so-called surrogacy firms draw couples from overseas each year (10- 20 lakhs). ART procedures are governed in a variety of ways in different nations, with Mexico and Brazil being the most well-regulated. ART is only available to married couples or those with a strong bond in those nations.

In this study, the researcher has compiled a list of countries throughout the globe where surrogacy laws are currently in place. In spite of this, several countries still do not have any regulations regarding the reputation of the same.

UNITED KINGDOM

Following the birth of a baby in 1985 under a partial surrogacy arrangement in the UK, a law known as the Surrogacy Arrangements Act, 1985,was hastily passed to restrict but not ban the practice. In light of the government's desire to keep surrogacy legal, the British Medical Association concluded that excluding physicians from participating in surrogacy preparations was neither realistic nor desirable. This document outlined criteria for doctors considering using gestational surrogacy to treat patients and made it clear that it should only be done for great reasons and after significant investigation and counseling. A couple may apply to the court for a pre-birth order so that they can be referred to as the criminal parents of any children born to the

surrogate.As mandated by the 1990 Human Fertilization and Embryology Act in the UK, consideration must always be given to the welfare of any child born as a consequence of surrogacy treatment, as well as the welfare of any current children. All couples in the United Kingdom that seek surrogacy therapy are guided by this principle.

The Catholic Church, on the other hand, is firmly opposed to any kind of assisted reproduction, especially those involving gamete donation and surrogacy. All of it is seen as morally repulsive and wicked. The Church's clerics believe that these methods violate a child's right to be born of parents who areto him and who are bound to one other via marriage. They violate the rights of the spouses, who can only become parents via the union of the two of them. The Anglican Church, on the other hand, has softened its stance on surrogacy and no longer condemns it. There is no prohibition against surrogacy in Judaism, which is very family-oriented and obligates Jews to produce children. The father who provided the sperm and the mother who carried the child are both considered the biological parents of the child born via surrogacy in the Jewish tradition.

THE SURROGACY ARRANGEMENT ACT, 1985

Surrogacy Arrangement Act,1985 has been revised by Human Fertilization and Embryology Act, 1990, thus it's important to mention that. Surrogacy preparations were intended to be prohibited under the Surrogacy Abuse Prevention and Control Act of 1985. It is unlawful and punishable by law if a surrogate mother's desire to have a child is pursued on a commercial basis, and the price is paid by the mother or another person. It's not a crime, however, if the commissioning couple and the surrogate mother agree that the surrogate mother may be paid for her services, as recompense for the infertile couple, provided this money is paid to the surrogate mother. However, a person, firm, or organization that negotiates, makes, or otherwise aids in the payment of a surrogacy association is guilty of the offence at issue here. Advertising surrogacy in newspapers and other publications is also illegal in the United Kingdom. Also, to deliver classified advertising.Since its implementation in 2008, certain parts of the Human Fertilization and Embryology Act have been updated to reflect changes made to both that law and the Surrogacy Arrangements Act of 1985. A non-profit organization will be able to charge a fee for services such as arranging surrogacy agreements and accumulating data under this Act of 2008, and they will be able to sell such services. In the event that this law is put into effect, couples who have never been married but have had at least one sexual relationship might comply with their parents' wishes.

FLORIDA SURROGACY LAW

Gestational surrogacy agreements and traditional surrogacy are both clearly permitted under Florida law, although neither is available to couples that have had similar relations. Since the Florida Gestational Surrogacy Statutes establish severe requirements on contracts, this excludes couples who have had identical-intercourse relationships

from applying for surrogacy, since they are not legally married, participation is restricted to ''couples who may be legally married. The rule that governs ''conventional surrogacy arrangement,'' the commissioning couple and the gestational surrogate must sign a binding and enforceable gestational surrogacy contract before commencing gestational surrogacy. A gestational surrogacy arrangement will no longer be binding or enforceable unless both the gestational surrogate and the commissioning couple are at least 18 years old and lawfully married. A prohibition against ''gay'' adoption was affirmed in the case of Lofton v. Kearney, which was based on Florida statute.There is a ''pre-deliberate adoption arrangement'called as 'Traditional Surrogacy,' which involves a ''volunteer mother,'' and needs court docket popularity for the adoption to take place. Pre-planned adoptions allow the mother of the child to change her mind within 48 hours after the child's birth; the adoption must be approved by a court; and the purported mother and father do not need to be biologically linked to the child in order to adopt. To be eligible for a 'Gestational Surrogacy agreement,' the intended mother must show that she is incapable of carrying a pregnancy or supplying a child, and at least one of the intended parents must be genetically related to the child in order for the surrogate to agree to relinquish her rights to the child upon birth. A surrogate mother is required to undergo a medical evaluation; the intended parents must agree to accept any resulting child, regardless of any impairment the child may also have; and both sets of legal guidelines make the surrogate the default parent if an expected figure who's assumed a biological figure turns out no longer to be related to the kid.

VIRGINIA SURROGACY LAW

In Virginia, a surrogacy contract must be pre-approved by a court docket. According to the contract, it's possible that the alleged mother and father are really the inmate parents. It's possible that the surrogate mother and her spouse, if any, might be designated as the legal mother and father, with the intended parents able to obtain parental rights via adoption if the contract is nullified. Surrogates may record a permission form waiving their rights to the kid in the event that the agreement was never approved. Nevertheless, if she doesn't, the parental rights will rely on whether or not the intended parents have a genetic relationship with the child, depending on the circumstances under which they want to adopt in order to get parental rights themselves. Notwithstanding all of the foregoing, if the surrogate is the genetic mother, she may also terminate the settlement within the first six months of pregnancy.For a surrogate to be approved by the court, she or he must be married and have given birth to at least one child; the parties must have passed through medical evaluations and counselling; the intended mother must be infertile or unable to give birth; and at least one of the parties must be genetically linked to at least one of the intended children. It doesn't matter whether the child is healthy or not; the intended parents have to accept birth of the child. The surrogate mother is solely responsible for the medical care of the pregnancy, and no one else is involved in the decision-making process. The court must hire a surrogate's advocate and a parent ad litem to represent the interests of any children born as a consequence of the adoption process. According

to the agreement, the court-approved aided idea is valid for a period of one year. Compensation that exceeds reasonable clinical and auxiliary costs is not permitted. Recruitment costs are a misdemeanour, and the persons involved may be entitled to collect damages from the facilitator or corporation. Non-proven agreements may be cancelled under many circumstances, and the law provides for a distribution of costs.

JAPAN SURROGACY LAW

Regulated assisted reproductive technology has not yet been implemented in Japan. Citizens are now forced to turn to the courts to resolve a slew of legal disputes, leaving them in an unsure position about their legal rights as a result of the absence of rules and laws. A ban on surrogate births was enacted by Japanese obstetricians in 1983, but the restriction is not legally enforceable, and a few families have delivered children via surrogate mothers with the assistance of a doctor in central Japan who is defying the country's scientific circles. With the rise of couples moving overseas to find surrogate mothers in countries like India, the government has been compelled to revisit its regulations and policies on surrogacy. Surrogate births, according to a panel of fitness, felony, and ethical experts at the Science Council of Japan, entail health concerns to both the surrogate mother and the child. Because of the negative connotations associated with surrogacy in Japan, it is illegal for a Japanese mother and father to publicly seek a surrogate child.It is now illegal in Japan to be a surrogate mother because of worries about the safety of the child, the difficulty of obtaining custody of the child, and emotional distress that may be caused at some point in the process. This argument demonstrates the increased compassion for infertile couples in Japan's public. After Japan's first surrogate birth was made public in 2001, the Health Ministry advocated for an absolute ban on surrogacy in the country. It was illegal to use a surrogate mother, but the Society of Obstetrics and Gynecology acted appropriately in 2003, noting the surrogate mother's mental and physical hardship, as well as the risk that using a surrogate mother might complicate one's own familial connections. in vitro fertilization was heavily limited by the Society in the past.'The conversation is incredibly welcome, but it is exceptionally difficult to decide whether surrogate start can be supported,' said State Minister for Gender, Equality, and Population SanaeTakaichi, in response to Prime Minister Shinzo Abe's assessment of the ''very tough" topic of surrogacy. To yet, it has not been made clear whether or not the authorities intend to provide a sympathetic perspective on surrogacy despite popular pressure to make changes to current law. In March 2008, the Science Council of Japan advocated a ban on surrogacy and stated that physicians, merchants and their customers should be penalized for industrial surrogacy agreements.

ISRAEL SURROGACY LAW

A majority of Israeli Jews are pro-pregnancy and do their best to have a child of their own. When it comes to new reproductive technologies, Israel is a global leader thanks to its seasoned-natalist approach to the subject. This country presently has the most fertility clinics per capita in the world. Israel's government health insurance covers IVF treatment up to two stay births for childless couples and those who choose to be single mothers. In Israel, it is impossible to decide not to become a

mother.The 'Embryo Carrying Agreements Act,' passed in 1996, made gestational surrogacy legal in Israel. Surrogacy contracts must be approved by a representative of the kingdom, making Israel the first country in the world to implement this kind of kingdom-managed surrogacy. Surrogacy agreements may only be submitted by Israeli residents of the same faith, thanks to a government-appointed Approval Committee. Only infertile heterosexual couples may use surrogates, who must be unmarried, widowed, or divorced. Israeli surrogacy regulations have led some intended parents to seek for surrogates outside of the nation because of the many restrictions in place.

CONCLUSION

Adoption has long been considered a viable choice for couples who are unable to have children of their own. However, adoption has evolved into a time-consuming, costly, and complicated legal procedure. A smaller pool of youngsters is also becoming available for adoption. When a kid is in need of a home, adoption is the best way to help them. There are no more legal connections between an adopted child and his or her birth parents; instead, a new one is formed with his or her adoptive parents. If a person is not the biological parent, adoption is the only way they may become the legal parent. In contrast, surrogacy is the deliberate development of a child to fulfil the requirements of an infertile couple. As a result, couples who are unable to conceive on their own are being compelled to turn to surrogacy as a last resort. Infertility treatments are increasingly included surrogate pregnancy as an option. Infertile couples may explore it as an alternative before accepting the reality of their infertility. Various methods of artificial reproduction may be used to achieve surrogacy. A surrogate mother can be artificially impregnated with sperm from a donor or a guy. It is less typical to inseminate a woman through sexual relations with the commissioning male.[4] There is no need for the surrogate mother to undergo any medical procedures because she is the child's gestational and genetic biological mother. Instead, an embryo generated from at least one of the commissioning couple's gametes or two distinct donors may be implanted in the surrogate mother. In some circumstances, the surrogate mother and the kid she carries have no genetic connection.

A couple, one of whom is unable to conceive, contracts with a surrogate mother to become a parent via her womb. Once the surrogate mother has been artificially inseminated with male sperm, she relinquishes all parental rights and hands over custody of the child to her intended parents. As a result, human surrogate mothers who receive fertilized ovaries and carry the embryos to term are now a reality that is being practiced all over the world. The primary motivation is the desire to pass on a genetic heritage to one's future descendants.

4 Section 497, IPC, 1860 defines 'Adultery': Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to offence of rape, is guilty of offence of adultery and is punishable with imprisonment of either description for a term which may extend to 5 years or with fine or with both. In such a case, the wife shall not be punishable as an abettor.

Plea Bargaining: Comparative Analysis Between Legal System of India & USA

Dr. Puja Jaiswal & Mr. Devyang Bahri***

INTRODUCTION

Plea bargaining can be characterised as pre-trial negotiations or agreements when the defendant agrees to plead guilty in return for certain concessions from the prosecution, such as a lesser sentence.The origins of Plea Bargaining can be traced back to the year 1431, when a French Saint John Arc was browbeaten to confess to avoid death penalty. Another instance in the history can be found in Salem Witch Trial of 1692, when the accused 'Witches' had to confess their crime in exchange for the lenient sentence.[1]

Plea Bargaining means to make a request or an emotional appeal, which intends to negotiate or deal. In other words, Plea Bargaining is a waiver of one's Constitutional Right of trial, which should be voluntary and must be devoid of any fear, coercion or misrepresentation.[2] Plea bargaining has been seen as an important strategy for resolving diverse interests and is regarded as a win-win situation for both the conflicting parties rather than a win-loss situation.It involves three areas of Bargain.

- The first one is *Charge Bargain*. It happens when the defence and the prosecution come to an understanding for the defendant to admit guilt to a lesser charge or just to some of the charges levelled against him.It allows the accused to bargain with the prosecution to reduce the number or severity of accusations brought against him.
- The second is the *Sentence Bargain*. This occurs when the sentence an accused would face if he entered a guilty plea is disclosed in advance. If, for instance,

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1 Bagri Rashmi, Plea Bargaining: A Look At What was And What Should Be, LiveLaw, 21 January 2022, 11:45 A.M. Available At - https://www.livelaw.in/know-the-law/plea-bargaining-crpc-pleads-guilty-code-of-criminal-procedure-190016, Last Accessed on – 12th August, 2022.

2 Brady v. United States, 397 U.S. 742

a defendant is facing serious allegations and is afraid of suffering the "maximum" sentence, this might help the prosecution get a conviction. Sentence bargaining is encouraged by the Indian judicial system.

- The third is the *Fact Bargain*. This style of bargaining entails the accused confessing to information that is pertinent to the situation's reality. This lessens the requirement for the prosecutor to present evidence to support the claimed facts. In return, one agrees not to introduce certain additional facts into evidence.

Previously, courts utilised plea bargaining to elicit admissions. With the growth of the criminal justice system, plea bargaining is now utilised to expedite the resolution of criminal cases and reduce the burden on the courts.Many observers of law, however, do not believe that plea bargaining is an effective method of delivering justice in a judicial manner. It has been suggested that plea bargaining undermines the actual character of justice and fair treatment in several ways. It is sometimes stated that plea negotiating provides the defendant with an easy way out of a criminal trial that may result in a much harsher punishment, and thus plea-bargaining harms the notion of justice and the legal system.

PLEA BARGAINING IN UNITED STATES OF AMERICA

While the idea of "Plea Bargaining" is used in both India and the USA, the actual implementation varies. To make a meaningful comparison between the two legal systems, it is important to understand the notion of plea bargaining and significant instances connected to it in each system independently.

In contrast to India, the United States permits plea bargains for almost all federal offences, and the procedure is only moderately governed. The prosecutor is the primary negotiator and is in control of the plea bargaining process. He makes use of the research report and the evidence. The judge's role is limited to approving the agreement's terms after confirming its voluntariness. The accused in the USA has the choice of entering a guilty, not guilty, or no contest plea. The *Nolo Contendere* concept, which views the plea as an implicit admission of guilt, will be used by the court to determine his guilt.

The fair trial principle is enshrined in the *US Constitution's Sixth Amendment*. However, the act of plea bargaining was left out. However, this method, constitutionality has been maintained by the US judicial system. Martin Luther King Jr.'s assassination[3] is the most famous instance of the use of plea bargaining. These days about 90% of criminal cases are resolved through plea bargaining rather than a proper court trial in the United States.

The accused in a criminal trial in the United States has three possible pleas to choose from: A) guilty, B) Not guilty, or C) nolo contendere (I don't want to argue) as my plea. In a US court, a criminal case is resolved every minute on the basis of a guilty

3 Huie, William Bradford (1997). He Slew the Dreamer: My Search for the Truth About James Earl Ray and the Murder of Martin Luther King (Revised Ed.) Montgomery: Black Belt Press. ISBN 978-1- 57966-005-5, Last Accessed on – 22nd August, 2022

plea agreement or a nolo contendere plea. The plea of "*Nolo Contendere*," also known as the "*Plea of Nolvut*" or "*Nolle Contendere*," implies, "I do not wish to contend," and, as stated in ***Fox v. Schedit*** and similar was observed in ***State exrel Clark v. Adams***[4], it has no roots in early English Common Law. "This doctrine can also be expressed as an implied confession, a quasi-confession of guilt, a guilty plea, a substitute for a guilty plea, a formal declaration that the defendant will not contest the charges, a request to the court to determine whether to enter a plea of guilty, a promise between the government and the defendant, and the defendant's agreement with the government that the accusation must be taken as true for the purposes of a particular case."

The "*incidence of plea*" is the transformation of a "*Nolo Contendere*" plea into an implicit admission of guilt that is equivalent to a guilty plea for the purposes of the case in which it is made. The case of ***United States v. Risfeld***[5], provides a clear explanation of this claim. However, it should be noted that a new aspect emerged in the case of ***Lott v. United States***[6], where the Court added that "the plea itself does not constitute a conviction, and therefore is not a determination of guilt, after stating that the plea is equivalent to an admission of guilt for the purposes of the case." It is outside the Court's jurisdiction once a plea of "*Nolo Contendere*" is required to declare the guilt of the accused, as can be inferred from several judicial rulings.

Since rejection or acceptance is in hands of the accused there is no chance of punishment or revenge. This is the justification for the ***Bordenkircher v. Haynes***[7] ruling of the US Supreme Court. The US Supreme Court affirmed the accused's sentence of life in prison despite acknowledging the legitimacy of the plea agreement. The accused had turned down the offer to "plead guilty" in exchange for a 5-year term. The possibility that the accused might be obliged to pick the less desirable course of action was not entirely disregarded by the US Supreme Court.

Plea bargaining was once unpopular in colonial America, but as the population grew and courts became packed and trials grew longer, its acceptance grew. ***Brady v. United States***[8] is the first US Supreme Court case mentioned in this context. The Supreme Court ruled that a bargained plea of guilty was not invalidated in this case simply because it was reached out of concern that the trial would end in the death penalty.

However, the accused's plea is not needed to be accepted by the court. Depending on the specifics of each case that is presented to the Court, the Court may accept or reject such a plea. The Court has a duty to confirm that the accused entered their plea willingly and without coercion or pressure. There must be secrecy protection for the accused.

4 363 US 807

5 340 US 914

6 367 US 421

7 434 US 357 1978

8 397 U.S. 742 (1970)

PLEA BARGAINING IN INDIA

In India, the Supreme Court of India, was for a very long period of time had been against the concept of plea bargaining. As indicated hereinbefore, it was taken as a tool to undermine the actual character of justice. The Hon'ble Supreme Court in ***State of Uttar Pradesh v. Chandrika***[9]has rightly held that, "the court could not discard of the criminal cases on the grounds of plea bargaining." It was highlighted that the court had to decide the verdict on the merits of the case even if the accused pleaded guilty or confessed to the deed.

The Law commission of India repeatedly proposed in its 142nd, 154thand 177th report to introduce Plea Bargaining as new division in CrPC, but all their efforts were futile. However, in 2005, the parliament despite facing a strong opposition by the Supreme Court inserted a new chapter in the Code of Criminal Procedure through the Criminal Law (Amendment) Act, 2005 inserting sections 265-A To 265-L in CrPC providing for plea deal in particular types of criminal cases.[10]

The chapter introduced talks about the offences for which the process of plea bargaining may be considered as an appropriate approach of conflict resolution and the process of plea bargaining as well. Section 265-A of the Criminal Code lays out the pertinence of plea-bargaining mechanism. The procedure starts when the accused (who is above 18 years) files an application for plea bargaining before the beginning of the trial in a Court where the case is pending. It is to be noted that it is only available in cases when the offence is punished by up to 7 years in jail. It does not apply if the offence has a negative impact on the socioeconomic scenario of country, has been committed against women, or has been committed against a child under the age of 14 years. After the defendant makes an application for the same with his consent, the court gives the conflicting parties a specific amount of time in which they have to work out an appropriate and acceptable solution to the case. Also, if the accused pleads guilty, the court may lower the sentence by up to 14 percent of the appropriate punishment.[11]

Plea bargaining is prohibited for offenders committing offences under the Dowry Prohibition Act, 1961; Protection of Woman from Domestic Violence Act, 2005; the Scheduled Castes and Scheduled Tribes (Prevention from Atrocities) Act, etc. In situations where the plea-bargaining technique has been employed, the first court's judgement is definitive. The verdict is not subject to further appeal. In instances involving plea bargaining, the Court has all of the authority granted to it by the CrPC in the trial of all other criminal offences.

9 State of Uttar Pradesh v. Chandrika, AIR 2000 SC 164.

10 Abhishek Wadhawan, *An Analysis of The Plea-Bargaining Mechanism In India The Past Present and The Future,* LAW AUDIENCE JOURNAL, VOLUME 1 , Page 12 , (2019), https://www.lawaudience.com/an-analysis-of-the-plea-bargaining-mechanism-in-india-the-past-present-and-the-future/#google_vignette, Last Accessed on – 22nd August, 2022

11 Hullur Sanjiva Muralidhar, *A Critical Study Of The Law Relating To Plea Bargaining And Criminal Justice In India,* BharamgoudarRatna R., 2016, http://hdl.handle.net/10603/220567, Last Accessed on – 22nd August, 2022

The Indian court has the worst issue with cases in criminal processes not being resolved after a long length of time. The quality of social justice has been diminished as a result of the court system's case backlog and inevitable delays. There is little doubt that delays and rising cases in court reflect a deprivation of justice because a fast trial is the cornerstone of criminal justice. The adage "justice delayed is justice denied" may be appropriately used after taking into account the Indian context.

COMPARATIVE STUDY OF PLEA BARGAINING IN INDIA AND USA

Though the Indian judiciary had been quite apprehensive with respect to plea bargaining, the US Supreme Court embraced this process. It is one of the most important pillar of the US courts to dispose cases speedily and efficiently, that Justice Charles Clark once observed- "*Plea bargains have accompanied the whole history of this nation's criminal justice system*".[12]

An accused in the US court is posed with three choices: 1) Plead guilty; 2) Not guilty; and 3) Plea of nolo contendere i.e. I do not wish to contend.[13]After America gained its freedom, this plea agreement idea—which was rejected during colonial times—proved to be a game-changer. These days, this process is so essential to how the judiciary manages cases that its absence can cause disaster.

The Sixth Amendment didn't explicitly recognised this process, and the mechanism of plea bargaining in USA was developed by the judiciary through a number of cases. Thereafter, this mechanism in the federal system was officially recognized by passing of the 1974 amendment to Federal Rules of Criminal Procedure.In the landmark case of ***Brady v United States***[14], the US Supreme Court upheld the constitutionality of the process of plea bargaining to be a legitimate and constitutional mechanism, along with citing apprehensions in relation to the potential misuse of this provision. In***Lott v. United States***[15], court has rightly held that "accepting the plea of *nolo contendere*, does not in itself establish the guilt of the accused, though it is a tantamount factor in establishing the same."In the year 1969, the accused James Earl Ray pleaded guilty for assassinating Martin Luther King, Jr. to avoid the execution of sentence. He finally got imprisonment of 99 years.[16]

In another case of ***Santobello v. New York***[17], the US Supreme Court fully accepted and welcomed the plea bargain mechanism. Specifically, the Court stated: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component to the

12 Bryan v United States, 492 F.2d 775 (5th Cir. 1974).

13 USA Federal Rules of Criminal Procedure, rule 11.

14 Brady v United States, 397 U.S. 742 (1970).

15 Lott v United States, 367 US 421 (1961).

16 William Bradford, *He Slew the Dreamer: My Search for the Truth About James Earl Ray and the Murder of Martin Luther King* (Montgomery: Black Belt Press, ISBN 978-1- 57966-005-5, 1997).

17 Santobello v. New York, 404 U.S. 257 (1971).

administration of justice." Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities. The Court further found that plea bargaining was "not only an essential part of the process but a highly desirable part."[18]

Through every new case related to plea bargaining, the Supreme Court of United States affirmed its support to the mechanism. In a well-known case of ***Bordenkircher v. Hayes*** (1978) case, the Court decided that "it is not unreasonable for a prosecutor to ask for an enhanced sentence when the defendant refuses to take guilty plea." In other words, the Court's position is that the prosecutor has a legitimate interest to persuade the defendant to plead guilty.[19]

In ***Alabama v. Smith***, the Court stated that it "upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial."[20] Similarly, in ***United States v. Mezzanatto***, the Court noted that "the plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return."[21]

According to a US report by NACDL, "less than 3 percent of criminal cases have gone to trial in the last five decades. The remaining 97 percent have been decided by the process of plea bargaining."[22]According to the Bureau of Justice Statistics of 2005, "in 2003 there were 75,573 cases disposed of in federal district court by trial or plea. Of these, about 95 percent were disposed of by a guilty plea. While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process."[23] This has served exponentially in reducing the burden of cases upon the judiciary. The administration of justice is so much influenced by the plea mechanism that Justice Anthony Kennedy of the U.S. Supreme Court stated in 2012 that "*criminal justice today is for the most part a system of pleas, not a system of trials*."[24]

Despite stealing the idea of plea bargaining from the US, India's rules and jurisprudence in this area are still in their infancy. The Indian judiciary is overburdened with cases, and the percentage of cases resolved by plea bargaining is still less than 1%,

18 Ibid.

19 Bordenkircher v. Hayes, 434 U.S. 357 (1978).

20 Alabama v. Smith, 490 U.S. 794 (1989).

21 United States v. Mezzanatto, 513 U.S. 196 (1995).

22 National Association of Criminal Defence Lawyers, "The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It" (2018).

23 Bureau of Justice Assistance, US Department of Justice, "Plea and Charge Bargaining" (Jan, 2011).

24 Lafler v. Cooper, 566 U.S. 156, 170 (2012).

in contrast to the US, where more than 90% of cases are handled through the plea bargain procedure. Additionally, Indian courts are still hesitant about this mechanism, in contrast to the US, where the judiciary developed it and made it a key component of providing justice. Apart from the disparity in this mechanism's prevalence, there are differences in how this mechanism operates in the two nations:

a) In US, the mechanism of plea bargaining doesn't depend upon the offence that the accused has committed.[25] Whereas in India, the process of plea bargaining can be used only when the accused is charged of an offence prescribing maximum punishment of less than seven years. Also, it would not be available in case of offences against women or children below the age of fourteen.[26]

b) In US, the negotiation with respect to the plea bargaining happens between the prosecutor and defendant, outside the court. The American courts hold that "any remarks directed to future or ongoing plea negotiations which suggest what will satisfy the court transform the court from an impartial arbiter to a participant in the plea negotiations" and are forbidden by Rule 11.[27] Whereas in India, this mechanism can be used only through an application made by the accused to the court, in order to avoid coercion or undue influence.

c) The judge also has discretion over whether or not the plea negotiating application from India is admissible. The plea may be thrown out by the court if it determines that it was influenced by particular factors. In contrast, this is not true in the USA.

As a result, there are disparities in how common and effective this mechanism is in India and the US. Although this clause was adopted in India with the intention of lightening the load on the legal system, it had no real impact. In contrast, the USA has had success with its methodology and has decreased the number of lawsuits, allowing the judiciary to focus on pressing issues.

Even though the "Plea Bargaining" idea was imported into the Indian legal system from the US, it differs from how it is used there.Some of the key distinctions between the "Plea Bargaining" in India and the USA are as follows:

THE TYPE OF OFFENSE

Plea agreements are permitted in various offences in the USA. Anyone who has been accused of a crime has the option to negotiate a plea bargain. The Indian Constitution's Section 265A lists several exceptions, nevertheless.In India, the following accused parties are ineligible to participate in plea negotiations:

- Person accused of committing a crime that carries a maximum sentence of seven years

25 *Id.* at 2.

26 Code of Criminal Procedure, 1973, Chapter XXI(A).

27 United States v. Kraus, 137 F.3d 447, 455 (7th Cir. 1998).

- Person accused of committing a crime that carries a maximum sentence of seven years in prison
- Person accused of committing a crime that carries the death penalty
- Person accused of committing a crime that carries a mandatory life sentence
- Person accused of committing a crime against women
- Person accused of committing a crime against a child under the age of fourteen
- Person accused of committing a crime that has an effect on the socioeconomic situation of the country.

VICTIM'S POSITION IN PROCEEDINGS

Under Indian law, the victim is crucial to the plea negotiation process. The victim has the authority to reject or veto any proposed resolution if one cannot be reached that is acceptable to all parties. However, in the US, the victim does not actively take part in the Plea Bargaining procedure.

AVAILABLE MECHANISMS FOR ENFORCEABILITY

In the USA, a plea negotiation request is only submitted after the prosecutor and the defendant have spoken. To ensure that the application for plea bargaining is made willingly by the accused, the negotiating procedure with the accused in India does not even begin until the application has been submitted. As a result, there is less likelihood that the defendant will be forced into accepting a plea bargain or that confidential negotiations will occur.

DECISION-MAKING OF THE JUDGE

A judge cannot use discretion in the USA while granting a plea agreement application. The judge in India's legal system, however, has the discretion to accept or reject a plea deal agreement made by the accused.

FINALITY

According to Indian law, if the court finds the sentence to be insufficient or justified by unjust circumstances, it may be reversed by filing an SLP under Article 136 or a writ petition under Articles 226 and 227 of the Indian Constitution. But in the USA, everything comes to an end.

In the USA, plea bargaining can result in convictions in as much as 90% of cases, whereas in India, it only accounts for about 10% of criminal cases[28]. This discrepancy emerges as a result of the variations between the American and Indian approaches of plea bargaining.

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28 https://enhelion.com/blogs/2021/02/18/plea-bargaining-in-india-and-usa-a-comparative-study/#:~:text=The%20conviction%20rate%20via%20Plea,practiced%20in%20USA%20and%20India.,Last Accessed on – 12th August, 2022

Even though India has a far lower conviction rate than the US, it is nonetheless effective in ensuring that the plea bargaining application was made voluntarily. Justice must be preserved even if it is delayed. In India, selecting the less severe penalty is a voluntary action rather than a step in the plea negotiation process.

As a result, there is a good chance that an innocent individual will not receive punishment in India through plea bargaining. However, it is vital that cases be resolved quickly. In order to decrease the number of convicts awaiting trial, the legislative must implement reforms and give the judiciary the necessary equipment.

CRITICAL ANALYSIS OF PLEA BARGAINING IN INDIA& USA

Despite producing better results in the disposal and management of cases, the plea bargain mechanism is now being heavily criticised among scholars, lawyers, and even judges. In an editorial piece, the Wall Street Journal published that:

> "*The triumph of plea bargaining in the federal system, which has gathered pace in recent years, is nearly complete.... This relentless growth in plea bargaining has sparked a backlash among lawyers, legal scholars and judges evidenced by recent federal court decisions, including two from the Supreme Court. Weighing on many critics is the possibility ... that the innocent could feel pressured into pleading guilty.*"[29]

Only 4,816 out of a total of 10,502,256 cases brought under the full punitive law went for plea-bargaining in 2015, according to data collected by the government, proving there was no usage of the plea-bargaining procedure in India. This was only 0.045% of the total. The next year, it decreased to 0.043 percent. The proportion of cases that involved a plea bargain, however, grew to 0.27 percent in 2017. But tragically, this fad did not continue. Plea bargaining has not been used to resolve more than 1% of cases in the past 15 years. As a result, the rapid preliminary's main objective has not been entirely and effectively achieved.[30]

Examination of the police's role in plea negotiations is also taking place. The idea of plea bargaining is bound to worsen the problem because India is notorious for its police-involved imprisonment. Additionally, the significance of casualties in plea negotiations is undervalued. One of the obvious grounds for its analysis is this. In addition, the public expresses immediate scepticism and mistrust for the plea-bargaining process in response to the court's evaluation of the accused. Additionally, the inability to keep any order the court issues denying an application quiet may shift public opinion in the accused's favour.

Additionally, offenders are dealt with carelessly, without therapy, and without any thought for the general public's safety. The foundational idea of "crime and

29 Gary Fields & John R. Emshwiller, "Federal Guilty Pleas Soar as Bargains Trump Trials", *Wall Street Journal*, Sept. 23, 2012, https://www.wsj.com/articles/SB10000872396390 443589304577637610097206808 (Last visited on 15th September, 2022).

30 Anushka Singh, *An Analysis and Evolution of Plea Bargaining in the Indian Context*, Vol. 4 Iss 3; 3124, IJLMH, [(3124)], [(3144)], (2022).

punishment," which serves as the basis of the criminal justice system, is called into doubt. Those who are found guilty after entering a not guilty plea at trial could receive unfair consequences. The punishment might be used to penalise the criminal for exercising his right to a trial under the constitution by refusing to submit a negotiated guilty plea. Such views overlook societal requirements, fairness, and the suffering of the victim. Plea bargaining avoids formal judicial processes and due process, allowing illegal police activities to continue uninterrupted.

The core Constitutional criticism which it faces is that when a person, who before trial confesses crime and gets a lenient punishment, then why a person who has chosen to exercise her/his Constitutional Right to trial would get harsher punishment? Why an exercise of one's own constitutional Right is punitive? Or in other words, why a person is punished for an act which the law plainly allows? The Supreme Court of the United States was called upon to address this question in ***Bordenkircher v. Hayes***[31], Brennan J., concurring with the majority held that "though punishing a person for an act being lawful is a violation of a due process but in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."In his book[32], Steven Grossman while addressing the same question suggests that like one's exercise of Constitutional Right of freedom and expression can be punished for being excessive, in the same way one can be punished with regard to the Right to Trial, if there are compelling state interests involved. But the flaw in the latter justification is that what is excessive cannot be said to be an exercise of a lawful right, whereas on the contrary, Right to Trial is a Constitutional Right and is within the bounds of law.

The Supreme Court of India, on the other hand, is standing on completely contrary edge. The Apex Court, in no uncertain terms, has considered the concept of plea bargaining as taking wrath of Article 21 of the Constitution of India. In ***Thippasswamy v. State of Karnataka***[33], the Supreme Court held, "It would be clearly violative of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly and then in appeal or revision, to enhance the sentence."

Also, in ***State of Punjab v. PremSagar***[34], the Supreme Court is seen concerned about the untrammelled discretion given by Plea Bargaining while deciding the quantum of sentences and has strenuously stressed on the courts to be conscientious and having due application of mind and established principles of law while deciding the punishment.Even after the incorporation of Plea Bargaining into the Cr.P.C. the due procedure cannot be given go by. The parties are required to be adequately heard

31 434 U.S. 357

32 Grossman Steven, Plea Bargaining Made Real, p 63, Carolina Academic Press, North Carolina, 2021.

33 (1983) 1 SCC 194

34 (2008) 7 SCC 550

and merely because the accused has pleaded guilty, it does not mean that the role of victim or complainant has obliterated[35].

The idea of plea bargaining has been the focus of discussions about its ability to stand within the confines of the complex and bureaucratic criminal justice system. While we use the U.S. as an example to encourage plea bargaining in India, we must be careful while making this comparison because there are many differences between the legal systems of India and the U.S.The process of Plea Bargaining is not solely on behalf of the accused. The victim's participation in this method will attract corruption due to avarice. If the accused agrees to plea bargain, the victim may make a large compensation claim and take help of other officials to satisfy that demand by handing them a portion of the settlement money. Likewise, the "Concept of Plea Bargaining" endangers the "right to a fair trial" as police officials may depend solely on the process rather than pursuing justice.

After years of working of these mechanism, there arises criticism among the class of judges with respect to this process. Just like a trial judge observed and wrote: "*These gains in efficiency are not ... without consequence.... The glut of plea bargaining and the pandemic waiver of [trial] rights have rendered trial by jury an inconvenient artefact.*[36] Another judge noted: *Because there is no judicial check on the enhanced mandatory minimums prosecutors can inject into a case, they can put enormous pressure on defendants to plead guilty. In many cases, only a daring risk-taker can withstand that pressure. Most people buckle under it.*"[37]

CONCLUSION AND SUGGESTIONS

Given its limited and confined reach, the American system of plea bargaining—which only benefits the wealthy—is not recommended, but it is also not anticipated to be effective in India. The changes and the highly controlled rules have destroyed the core of plea negotiations. Trials are preferable to plea deals for defendants because they provide more protections against rights breaches and because convictions do not always occur in India.

The scope should be expanded rather than restricted to offences for which the sentence does not exceed 7 years in order for the procedure to actually achieve in its goal of expediting the settlement of cases. The American approach, which allows for a reduced charge if the accused reaches a timely plea deal, also offers some useful insights. A plea agreement's concessions must also be preferable to the penalties and choices an accused person would face in court.

It should be emphasised that while if embracing the victim's request and moving toward a restorative form of justice was one of the key purposes of implementing plea bargaining in India, the same thing may have contributed to the process' failure. It might be difficult for the prosecution and the accused to reach a conclusion that

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35 Girraj Prasad Meena v. State of Rajasthan, (2014) 13 SCC 674

36 United States v. Vanderwerff, No. 12-cr-00069, 2012 WL 2514933.

37 United States v. Kupa, 976 F. Supp. 2d 417, 432 (E.D.N.Y. 2013).

appeases the victim since the victims are typically motivated by the punitive kind of justice. Therefore, removing the tri-partite structure would be advantageous for plea bargaining in India.

One discouragement to Plea Bargaining in India is complex and sophisticated criminal legal system resulting in surfeit of loopholes. The procedural law especially criminal procedural law provides abundance of rights, which causes the accused to choose trial over pleading guilty. Another discouragement is that unlike the U.S., Indian Prosecutors are not at liberty to bargain, on the contrary, it may result in disciplinary action against them.

What Justice (retd.) Sunil Ambwani, former Chief Justice of the Rajasthan High Court, gleaned from a Public Prosecutor, appearing in an interview, in Judicial Training and Research Institute at Lucknow, the reasons for Plea Bargaining being unsuccessful and slothful in India[38], are –

- It damages the public prosecutor's reputation for being accommodating and may lead to disciplinary actions, as already mentioned above.
- Lack of encouragement from the governments.
- Low conviction rates in criminal trials push defendants to choose trial over plea bargaining
- The criminal justice system in India lacks public trust.
- Even if the penalty is light after a conviction, it seldom motivates the offender to agree to a plea deal.

Plea bargaining is not an option due to lengthy proceedings and the likelihood of getting bail increased, and unless the accused is indigent, the cost of legal representation should not deter them from going to trial.

On the other hand, the concept of plea bargaining does help the courts to manage the spiralling number of cases. By using this concept, petty offences can be settled easily, and the prosecutors can focus on the severe cases. As a mark of critical analysis, it would be germane to advert to Dan Canon, who in his book[39], places an example where the Attorney General of Alaska in 1974, had issued a blanket ban on Plea Bargaining. Then, it was anticipated that everything would come to a standstill. However, he claims in his book that the allegedly reduced average time for a felony case from 192 days to 90 days was completely unhelpful. The rationale for the restriction is that although the defendants continued to enter guilty pleas after it was imposed, they ceased negotiating with the prosecution. Instead, everything was left up to the judges, saving the defendants' time from having to do so. Additionally, Plea Bargaining is not as straightforward as it would seem on the surface; rather, it calls for a significant

38 Ambwani Sunil, Plea Bargaining In India, LiveLaw, available at - https://www.livelaw.in/columns/criminal-law-plea-bargaining-charge-bargaining-sentence-bargaining-tablighi-jamaat-169521, Last Accessed on – 23rd August, 2022

39 Canon Dan, Pleading Out: How Plea Bargaining Creates A Permanent Criminal Class, p 194, Basic Books, New York, 2022.

amount of intellect, time, and in-depth technical expertise. However, it is difficult to imagine the said example manifesting in India on account of 21 judges per million people as on date[40].

Additionally, if the prosecution is weak and the trial is dismissed for lack of witnesses or evidence, resulting in an acquittal, the prosecution will have the chance to prove the defendant's guilt by working with the defendant to negotiate a plea. Plea bargaining is also a better alternative to the victim's ultimate relief since it enables the victim to avoid a drawn-out legal process where the accused is found guilty. The approach helps shorten court proceedings and gives a great deal of undertrial inmates imprisoned in various jails around the nation additional relaxation. Plea bargaining is furthermore a type of conflict resolution.It also enables a person to plead blameworthy without legal support.

Plea bargaining also results in the acceptance of criticism. The entire criminal system might be weakened, according to a number of detractors, if supplication bartering leads to less harsh sanctions and more obvious damning differences. Plea bargaining is seen as a practical method for speeding up the administration of justice and lowering the length of time cases are pending. In a plea agreement, the prosecution and the defendant agree on a reduced charge or sentence in exchange for the defendant's guilty plea to the original charge or term.

The idea of plea bargaining has frequently come under fire from the Supreme Court, which has ruled that such discussions are not permissible in criminal trials. Plea bargaining, however, offers simple, inexpensive, and quick justice by resolving disputes, including the trial of criminal cases, and taking into account the current realistic profile of the pendency and delay in the disposition of criminal cases. As a result, the government found it acceptable and eventually implemented it.

40 India Has About 21 Judges Per Million People, The Economic Times, February 10, 2022, 6:13 PM IST, available at - https://economictimes.indiatimes.com/news/india/india-has-about-21-judges-per-million-people/articleshow/89481479.cms, Last Accessed on – 24th August, 2022

Uniform Civil Code: A Contemporary Study

Prof. Dr. Neeti Pandey & Dr. Ritu Gautam***

ABSTRACT

This article mainly examines the idea of the Uniform Civil Code, its implications the legal perspectives. The paper discusses the origin or derivation and introduction of the concept of Uniform Civil code and its need.

This paper also discusses the issues involved in implementation of Uniform Civil Code, its advantages and disadvantages. It also touches upon the certain opinions about implementation of Uniform Civil Code posing conflict with secularism.

It further examines the constitutional provisions regarding Uniform Civil Code, the related judgments and judicial approach towards its implementation. This paper finally puts forward some suggestions and recommendations for its implementation and concludes with the impact it will create on our judicial system and social justice.

This study has relied upon articles, commentaries, books, memos, and other writings to assimilate diverse opinions and views of authors and jurists with an objective of presenting a holistic viewpoint.

Keywords: *Uniform Civil Code, Personal Laws, Secularism, Constitution, Judiciary.*

INTRODUCTION

India is a land of diverse culture and multiplicity of reliogions, faith and religious practices. It is one of the unique place where almost all religions like Christianity, Islam, Hinduism, Buddhism, Jainism, Sikhism, Zoroastrianism, etc., can practise their faith without any fear, restriction or oppression. The Preamble of our constitution, after 42nd amendment of 1976, enshrines that India is a secular country. By the term "secular" its binding on the statenot to discriminate people, form any bias of religion in its its policies nor favour any particular religion or religious practice. This implies that everyone will be free to practise whichever religion they choose. Additionally, Sections 25 and 26 of our Constitution recognise this as a fundamental right.

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This phrase has a lot of weight in India because it's crucial to remember that Pakistan and India were divided for religious reasons. Political institutions have historically exploited religion as a tool and a catalyst for conflict. Religion is a factor in conflict in Israel.

Different religions are governed by separate laws in India. For instance, the Hindu Marriage Act of 1956 governs marriage, divorce, alimony, and other problems for Hindus, Sikhs, Jains, and Buddhists.

Laws pertaining to Christianity control Christians, whereas Islamic law governs Muslims. Hindu law, Christian law, and Islamic law are the three primary schools of personal law in India.

In India, the concept of a uniform civil code has been debated for many years, and various political and social reform groups have long called for it. The UCC is not legally enforceable but is seen as a guiding principle for the government to follow because it is contained as a Directive Principle in the Indian Constitution.

The UCC is a contentious topic in India, as supporters claim it would advance equality and secularism while opponents claim it would impede people's freedom of religion and cultural practises.

Overall, the controversy surrounding the UCC in India has drawn attention to the delicate and complicated interplay between law, religion, and culture in that nation, which has to be examined objectively and resolved in a progressive, comprehensive manner.

Uniform Civil Code is a proposed legal framework in India called the Uniform Civil Code (UCC) would define and apply a set of uniform laws covering personal issues like marriage, divorce, adoption, and inheritance to all citizens, irrespective of their faith.Article 44 of the Constitution states that the state shall work to ensure a Uniform Civil Code for the citizens throughout the territory of India. This is where the code comes from.

The issue right now is that there are discrepancies and contradictions in the personal laws. There is no agreement. Additionally, there have been instances where specific laws have granted or denied rights to women. A uniform Civil Code can be published to address these shortcomings. All country citizens must adhere to the same personal law under the Uniform Civil Code. This Code would replace India's current system of religiously specific individual laws with one that is more inclusive of all residents' beliefs. The authors of Section 44 of our Constitution[1] took this into consideration. However, it faced fierce opposition because it was thought to be a breach of Section 25 of the Constitution[2].

In order to ensure that the Unified Civil Code concept can be successfully implemented in India and to determine if it is appropriate for a country like India or not, this essay attempts to approach the idea in a more practical and practical manner. Its legal implications are considered.

1 https://indiankanoon.org/doc/1406604/

2 https://theindianconstitution.com/article-25-religious-conscience-freedom/

The Indian Parliament has received the Uniform Civil Code Bill. But due to opposition, it was never made into law. The fact that Islam does not recognise adoption and would therefore be in violation of Article 25 of the Constitution, which guarantees the freedom to practise and profess any religion, is one of the reasons the concerns were made.

However, only practises that are fundamental and important to any religion are protected by Article 25. Even in Arabia prior to the Islamic era, adoption was a prevalent practise. According to Article 38(2)[3], the state is required to work towards eradicating all inequity. Therefore, a consistent rule would only make an effort to reduce the status disparity between children adopted by Hindus and children adopted by non-Hindus. (Sharma)[4] This book examines how legal, cultural, and religious issues interact when there are disputes inside and across communities. Numerous policies and guidelines have also been implemented. Chodosh and Shetreet According to the author, India has suffered since the Uniform Civil Code has been disregarded for a very long period.[5]

Hazarika has discussed and contended in his book that the Uniform Civil Code is a neglected idea that requires review and discussion.[6] Whereas Ratnaparkhiemphasises that it is time to give the unified civil code importance and set the course.[7] This book explores the drawbacks of adopting a single civil code in India and explains why this is still such a foreign idea. He describes the difficulties in doing the same. Kumar explains and demonstrates in his book how to properly establish a unified civil code while avoiding riots and public disturbances.[8]Dagamwar in his work, contrasts the personal law of Muslims and Hindus with the Uniform Civil Code.[9] Kidwai and Chavan conducted the study and in their book compared various laws in an objective manner to decide whether or not they need to be urgently amended.[10]

UNIFORM CIVIL CODE AND PERSONAL LAW

In most personal affairs, especially when talking about marriage, inheritance, adoption, or even inheritance, women are viewed as inferior to males. In particular, Hindu women do not have the same rights as Hindu men in any way whatsoever, according

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3 https://indiankanoon.org/doc/982915/

4 Sharma, Sharda. (2008). Uniform Civil Code and Adoption Laws in India.SSRN Electronic Journal. 10.2139/ssrn.1162110.

5 Uniform Civil Code for India by Shimon Shetreet, Hiram E. Chodosh, ISBN13: 9780198077121

6 Hazarika, "Should India Have a Uniform Civil Code?" SSRN Electronic Journal,2010

7 Uniform Civil Code: An ignored constitutional Imperative, available at https://www.amazon.in/Uniform-Civil-Code-Constitutional-Imperative/dp/8171567223

8 Kumar, Uniform Civil Code: Challenges and Constraints. 2012

9 Dhagamwar, Vasudha, and Indian Law Towards the Uniform Civil Code. 1989

10 Chavan, Nandini, and QutubJehan Personal Law Reforms and GenderEmpowerment: A Debate on Uniform Civil Code. Hope India Publications, 2006, available at https://books.google.co.in/books/about/Personal_Law_Reforms_and_Gender_ mpowerm.html?id=QIMp5ctu_ngC

to the Hindu law of 1955 and 1996. Polygamy was widespread among Hindus prior to 1955. Except in the instance of Stridhan, Hindu women are not permitted to acquire any property outright. She only had a small estate, which upon the passing of the owner's male heirs, known as the modifiers, went to them.

She has a limited stake, meaning that she is unable to handle any issues that emerge with the property's surrender, mortgage, or sale on her own. A Hindu lady does not have the legal authority to adopt a child on her own. She is unable to serve as her child's natural guardian while her spouse is still alive. These instances sufficiently illustrate the patriarchal structure of Indian society. Even though Hindu law was codified, it still has some discriminatory clauses. For instance, except in some regions like Andhra Pradesh, Maharashtra, Karnataka, and Tamil Nadu, a Hindu woman is not permitted to be the partner of a partner among Hindu partners.

Women in pre-Islamic Saudi Arabia enjoy a secondary status while debating Islamic law because society there has always been patriarchal. Since then, women are viewed as inferior to men; the spread of Islam significantly accelerated Muslim women's decline and issues. The Holy Quran accords men and women equal rights and elevates women to honourable positions.

The status of Muslim women, especially wives, is fragile and low due to some parts of Islam. In Islam, a male is permitted to have four marriages, however a woman is not permitted to do so because doing so would be seen as immodest and dirty. Even while it is discriminatory for husbands to divorce their wives by saying three talaqs, women do not even have the legal right to do so. This describes the Holy Quran's message. This was been deemed invalid and unconstitutional by the Allahabad High Court.

When some Muslim scholars claim that Islam is more liberal and progressive in this area, a Muslim woman is nonetheless subjected to discrimination. According to the law, the Muslim man will be entitled to double as much of the deceased person's inheritance as the woman when two scholars or remains of the same calibre and of the opposite sex inherit it. A Muslim wife is not compelled to pay alimony beyond the Iddat period, even if it is necessary.

The need in the Criminal Procedure Code that a husband support his wife—including a divorced woman—until she is able to support herself is a secular law that applies to everyone, but there is debate over whether Muslim males adhere to this requirement.

Due to the connection of law and religion, the Indian state is unable to amend its specific religious rules, thereby depriving Indian women of their legal equality. Although secularism is a fundamental component of Indian democracy, there is presently disagreement over its application and bounds.[11]

The uncertainty of future secularism was thoroughly examined by Agnes in his book. The idea of an extensive civil code in India is referred to as the "Uniform Civil Code

11 Uniform civil code and gender equality by ArchanaParashar, available at: https://search.library.uq.edu.au/primo-explore/fulldisplay?vid=61UQ&search_scope=61UQ_All&tab=61uq_all&docid=61UQ_ALMA21113085690003131&lang=en_US&context=L

of India."[12] The question at hand is whether or not UCC replaces citizens' rights to be regulated by various particular laws based on their religion or ethnicity if it governs everyone, regardless of their religion.[13] The Indian Parliament has received the Uniform Civil Code Bill. But due to opposition, it was never made into law. The fact that Islam does not recognise adoption and would therefore be in violation of Article 25 of the Constitution, which guarantees the freedom to practise and profess any religion, is one of the reasons the concerns were made.

In the well-known "Mohd Ahmed Khan v. Shah Bano Begum case", the Supreme Court argued that Muslims are likewise subject to the provisions of Section 1255 of the Criminal Procedure Code and that even a Muslim husband is obligated to support his divorced wife beyond the iddat period.[14]

In response to the uproar, the Muslim Women (Protection of Divorce Rights) Act of 1986[15] was approved by parliament, effectively overturning the Shah Bano case verdict. The result of this rule is that, unless both parties timely indicate to the court that they desire to be governed by the Ministry of Justice, a Muslim husband is not compelled to provide for his divorced wife after the divorce period. criminal procedural legislation. It's comparable to having the option to dispose of something, but choosing not to do so in order to maintain one's privacy or other rights, or to adequately compensate the woman who has endured such hardship.

UNIFORM CIVIL CODE AND INDIAN CONSTITUTION

The fundamental argument is that if the Constitution's authors had wanted to impose a uniform civil code throughout India, they shouldn't have included it in article 44's list of principles that should guide state action. Part IV (Articles 36-51) of the Indian Constitution[16], guiding principles for State policy are, as their name implies, just recommendations for the State. They are not legally binding, and the Court will not enforce them. These are merely current state requirements that will support effective government.

India is a secular and democratic nation, according to the Preamble to its Constitution. Therefore, there is no official religion. No one should be subjected to discrimination in a secular state because of their religion. a religion that is solely focused on the interaction between man and God. This suggests that a person's daily life should not be hampered by their religion. As a cause and effect relationship, the process of secularisation is strongly related to the objective of creating a single Civil Code. It was contended before Judge Jeevan Reddy in the case of S.R. Bombay v. Union of

12 Agnes, "The Supreme Court, the Media, and the Uniform Civil Code Debate inIndia."The Crisis of Secularism in India, 2006, pp. 294–315

13 Choudhary, "A Proposal for Uniform Civil Code for Law of Succession in India." SSRN Electronic Journal, 2010

14 https://indiankanoon.org/doc/823221/

15 https://www.indiacode.nic.in/handle/123456789/1873?sam_handle=123456789/1362

16 https://www.mea.gov.in/Images/pdf1/Part4.pdf

India[17] that religion was a matter of personal faith and could not be combined with secular purposes. However, the state may regulate religion by passing legislation.The idea of active secularism is different from the ideology of secularism embraced by the United States and other European nations, according to which there is a wall between religion and religion, and it is prevalent in India. Church's state.

Spirituality and personal faith are purposefully separated in India by secularism. This is because the US and Europe have seen renaissances, reformations, and enlightenments, and as a result, they are able to pass laws that forbid the government from interfering with religion. India, in contrast, has not yet seen any kind of renaissance or reform, hence it is the responsibility of the state to interfere in religious matters in order to eliminate barriers to state control. It is extremely obvious why a nation like India is unable to have a Renaissance. Conflicts are likely to continue to grow and negatively affect passed laws rather than decreasing. For instance, a custom or tradition may be acceptable within one's own law, but it might not be acceptable to others who follow another law. Thus, when traditions are followed, the conflict's character shifts from being based on mutual differences to being based solely on animosity. When it comes to a society like India, where religion determines the way of life, people connect with their religion rather than knowing that it is religion, which makes it difficult for them to accept or adjust to certain changes. Man and that individual established religion. not a product of religion. Cemeteries are where this way of thinking can be found because some individuals still practise burning. There must be a single, overarching law that applies to everyone, regardless of their faith, and that does not favour any one group within society.

India's Constitution's preamble enacted the creation of a "secular" democratic Republic. This implies that there is no official state religion, that the state does not adhere to any one religion, and that there will be no religious discrimination.

The freedom of religion and the freedom to conduct religious affairs are guaranteed under Articles 25 and 26 of the Indian Constitution[18], which are enforceable basic rights. In addition, Article 44[19], which is not enforceable in court, mandates that the state make efforts to create an Indian civil code that is uniform. The unified system or uniform law that regulates everyone as one and does not make distinctions based on one's religion or philosophical beliefs is known as the uniform civil code.

Many questions come up as a new notion matures and enters people's thinking, and detractors open the door for them. What would make up the Unified Civil Code was a crucial concern that arose during the process of combining several laws. Since each religion's individual laws have unique provisions, their union would not only be offensive but also result in open antagonism. In order to achieve a balance between the protection of fundamental rights and the religious values of the diverse communities

17 https://indiankanoon.org/doc/60799/

18 https://www.bbau.ac.in/dept/HR/TM/Religious%20s%20under%20the% 20Indian%20 Constitution.pdf

19 https://indiankanoon.org/doc/1406604/

that exist in the nation, the Uniform Civil Code should therefore include such legislation. Law may apply to secular issues like marriage, divorce, alimony, and other related topics.

UNIFORM CIVIL CODE IN GOA

The only state in India, Goa, has a civil code that is the same for everyone, regardless of caste, gender, or religion. A common family law exists in Goa. Goa is the only Indian state to have a unified civil code as a result. In Goa, the rules governing marriage, divorce, and succession apply equally to Hindus, Muslims, and Christians. The Portuguese Civil Code of 1867[20] was passed by parliament and given the power to be amended and repealed when Goa was made a Union Territory in 1961 as a result of the Goa Daman and Diu Administration Act of 1962[21].

Marriage in Goa is an agreement between two people of the same sex with the aim of cohabiting and creating a legally recognised family that is recorded with the civil status authorities. However, there are some restrictions that forbid these kinds of people from getting married, such as the requirement that any spouse found guilty of "having committed or encouraged the murder of another spouse must not marry." There are also specific rules and regulations that must be followed by the parties before they can live together and begin their lives.

THE SPECIAL MARRIAGE ACT, OF 1954[22]

Regardless of their faith, this system of marriage legislation allows for the civil union of two people of the opposite sex. Indians frequently got married outside the rules of their own personal law. Except for Jammu and Kashmir, where special status under Section 370 has been granted, this rule is applied nationwide in India. The Hindu Marriage Act of 1955 and its law are comparable, giving an insight of how secularised the law is for Hindus. Everyone in the Muslim community is required to marry in accordance with the rules about marriage.

Polygamy is prohibited by this law, and Indian succession will control the succession process. However, there are rules that must be followed in Goa for divorce. According to this rule, Muslims who have registered for marriage in Goa are not allowed to accept more than one wife. During the marriage, all property belongs to the pair, and each spouse is entitled to one-half of the property; if one spouse passes away, the other spouse receives the other half. In the same report, the children also receive the other half of the assets.

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20 https://www.indiacode.nic.in/bitstream/123456789/8312/1/ocrportuguesecivilcode.pdf

21 https://www.indiacode.nic.in/handle/123456789/1369?view_type=search&sam_handle=123456789/1362

22 https://www.indiacode.nic.in/bitstream/123456789/15480/1/special_marriage_act.pdf

CONCLUSIONS AND RECOMMENDATIONS

If we look objectively there are arguments in Favour of Uniform Civil Code in India which include

- Step Towards Gender Equality: Personal laws in India often discriminate against women, particularly in matters related to marriage, divorce, inheritance, and custody. A uniform civil code would help to eliminate such discrimination and promote gender equality
- Simplicity and Clarity of Laws: A uniform civil code would simplify the legal system by replacing the current patchwork of personal laws with a single set of rules that apply to everyone. This would make the law more accessible and easier to understand for all citizens.
- Uniformity and Consistency: A uniform civil code would ensure consistency in the application of the law, as it would apply equally to everyone. This would reduce the risk of discrimination or inconsistency in the application of the law. It would eliminate discrimination based on religion or personal laws, and ensure that everyone has the same rights and protections under the law.
- Modernization and Reform: A uniform civil code would allow for the modernization and reform of India's legal system, as it would provide an opportunity to update and harmonise the laws with contemporary values and principles.
- Meeting the Aspirations of the Youth: With the world moving into the digital age, the social attitude and aspirations of the youth are being influenced by universal and global principles of equality, humanity, and modernity. The enactment of the Uniform Civil Code will help to maximise their potential in nation-building.
- Social harmony: The UCC could help to reduce tension and conflict between different religious or community groups by providing a common set of rules for everyone to follow.

But at the same time there opinions which are at loggerheads at the idea of implementation of Uniform Civil Code. The prominent few are:

- Religious and Cultural Diversity: India is a diverse country with a rich tapestry of religions, cultures, and traditions. A uniform civil code could be seen as a threat to this diversity, as it would require the abandonment of personal laws that are specific to particular religious or cultural communities.
- Against the Right to Freedom of Religion: The right to freedom of religion is protected under the Indian Constitution. (Article 25-28). Some argue that a uniform civil code would infringe on this right, as it would require individuals to follow laws that may not be in accordance with their religious beliefs and practices.

- Lack of Consensus: There is a lack of consensus among the various religious and cultural communities in India on the issue of a uniform civil code. This makes it difficult to implement such a code, as it would require the buy-in and support of all communities.
- Practical Challenges: There are also practical challenges to implementing a uniform civil code in India, such as the need to harmonise a wide range of laws and practices, and the potential for conflicts with other provisions of the Constitution.
- Political Sensitivity: The issue of a uniform civil code is a highly sensitive and politicised issue in India, and it has often been used for political gain by various parties. This has made it difficult to address the issue in a constructive and non-divisive manner

In addition to gender justice, the Uniform Civil Code also considers how a nation deals with its own diversity. Religion freedom coexists with other rights like equality and non-discrimination in India. India's liberal multiculturalism creates a balance rather than adopting a random strategy or allowing civilizations make their own decisions.

Is there a more effective way for India to handle these negotiations? The consensus is that liberalism should be modelled after Western democracies. However, how do France and the United States view religious liberty, the separation of church and state, and the rights of majorities and minorities? What are the UK and Canada doing? But since the situations are different, India cannot serve as an example for Western nations.

Despite their claims to be secular, most Western nations have a tilt towards Christianity, and Islamic law is unmistakably upheld in Middle Eastern nations. Even if we advocate for a single Civil Code, we must acknowledge that social standards cannot be too remote from the law. We run the risk of encouraging individuals to seek out alternative communal justice, like sharia courts, without the backing of society or the ability of the state to put our own values into practise. eitherkhappanchayat. The decisions made by a unified civil code would need to be prudent. The decision then becomes whether to impose it and eliminate all individual liberties or to give Indians the freedom to live according to their own religious beliefs if they so want.

The moment has come for us to publicly discuss our beliefs and differences in order to work towards a civil law system that we can all agree on. No real effort has been made to start such a discourse in the seven decades that have elapsed since the Constitution's enactment.

It is therefore obvious that Articles 25 and 26 of the Constitution are not violated by the Uniform Civil Code. It ought to be a new legislation, not a compilation of existing laws.

The distinction between religion and law must be made clear to all. This is so that, notwithstanding the adoption of a unified body of laws, people can nevertheless practise their faith in accordance with the Constitution. Their freedom to practise or

preach their faith will not be restricted by the Uniform Code. Religious texts, for instance, specify penalty for crimes, but the only criminal code that applies in India is the one from 1860. So it's time to separate the concepts of law and religion and put the emphasis on empowering everyone. Uniform laws are desperately needed in India.

Now the moot point is that what should be the way forward:

- Step by Step Approach: In order to achieve a UCC in India, a brick-by-brick approach should be taken rather than an omnibus approach. A just code is far more important than a uniform code.
- Checking the Social Adaptability: There is a need to consider social adaptability of UCC while forming a blueprint for a uniform civil code.
  - o Starting with the areas of personal law that are most widely accepted and uncontroversial, such as laws related to marriage and divorce.
  - o This could help to build consensus and support for the UCC, while also addressing some of the most pressing issues faced by citizens.
- Discussion and Deliberations with Stakeholders: Also, involving a broad range of stakeholders, including religious leaders, legal experts, and community representatives, in the process of developing and implementing the UCC. This could help to ensure that the UCC takes into account the diverse perspectives and needs of different groups, and that it is seen as fair and legitimate by all citizens.

REFERENCE CASE LAWS

1. Mohd Ahmed Khan Shah Bano Begum
2. R. Bommai v. Union of India
3. Shayara Banu Union of India &Ors.
4. Sarla Mudgal Union of India
5. John Vallamattom Union of India
6. Acharya Jagdishwaran and Avadhut Commissioner of Police, Calcutta
7. Lily Thomas, Etc. vs Union of India &

The Criminal Procedure Identification Bill, 2022: Whether Violative of Article 21 of the Constitution of India?

Dr. Shweta Dhand & Ms. Jasreena Saluja***

ABSTRACT

Our democracy is already glitched up but it seeks to give each Indian equal rightsas human beings under Article 21 of the Constitution. Our laws are based on the overriding principle of innocent till proven guilty. With the advancement of technology and to curb crime and criminals as they tend to change their modus operandi, there was an urgent need to hold scientific approach in the investigation, data collection and analysis. The Identification of Prisoners Act, 1920 allowed data collection of fingerprints, foot-print impressions, photographs which somewhere lacked in supporting sufficient attributes while investigation. In regard to the situation the Law commission recommended to amend Identification of Prisoners Act, 1920 to bring it in line with modern technology. The Criminal Procedure Identification Bill, 2022 replaced the 102 years old Prisoners Act, 1920. The Bill encompassed a very wide category of data to be collected infused with a scientific approach in crime investigation with addition to collection of biometric details, biological samples, and their analysis, behavioural attributes, examinations under sections 53 and 53A of Cr. PC. The Bill certainly has to go through the rough road before it is implemented in more refined form. The new Bill passed has been considered violative affecting the Right to Privacy of human beings. As per the new Bill, the data is allowed to be stored for 75 years or till the person is fully acquitted.

***Keywords**: Arbitrary, Bill, Data, Fundamental Rights, Investigation, Privacy.*

INTRODUCTION

While India still does not have a codified Privacy Protection law, prima facie the new Bill appears to be in direct conflict with Right to Privacy. It cannot be denied that if personal data is allowed to be collected and stored for 75 years, the Police and other law enforcement agencies might develop a tendency to misuse the data to

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harass certain people. Certain categories of people may also be harassed en masse or persecuted. Data may also be used for other illegal purposes such as political, and commercial purposes without anybody's consent. When data of certain category of persons is collected, analysed and put to use in criminal investigation, then one cannot rule out certain arbitrary and discriminatory actions by the state and law enforcement agencies. Such personal data collection and storage for 75 years may lead to developing policies and action plans based on prejudices and lead to unequal treatment of people. No doubt, law and order, security and sovereignty of the State, safety of the citizens are of prime importance, but the State while achieving these objectives must work out ways to also safeguard fundamental rights such as the right to privacy and equality of its citizens. Scientific approach in investigation, analysis of crime and criminology will require an infusion of technology, data collection and analysis.[1]

Over a vintage period, the only law prevailed for governing the prisoners and police officials was 'The Identification of Prisoners Act 1920' in India which allowed the Police to gather underlying information such as fingerprints and footprints of the detained and convicted persons. Also, a Magistrate may order measurements or photographs of a person to be taken to aid the investigation of an offence. In case of acquittal or discharge of the person, all material must be destroyed.[2]With the upgrading technology and the need for scientific analysis of crime and criminology to curb crime and criminals, the provisions of the above Act were not up to the par. There have been advances in technology that allow other measurements to be used for criminal investigations. The DNA Technology (Use and Application) Regulation Bill, 2019 (pending in LokSabha) provides a framework for using DNA technology for this purpose.[3] In 1980, the Law commission had recommended to amend the Identification of Prisoners Act to bring it in line with modern technology and support the requirements of criminal investigation.[4]In March 2003, the Expert Committee on Reforms of the Criminal Justice System (Chair: Dr. Justice V. S. Malimath) recommended amending the 1920 Act to empower the Magistrate to authorise the collection of data such as blood samples for DNA, hair, saliva, and semen.[5] Later in 2005, the Code of Criminal Procedure (Cr. PC) was amended to empower a magistrate to order to collect handwriting samples and photographs of any person for the purpose of investigation. Even this was found to be lacking from the perspective of progressing scientific analysis of crime and criminology and developing crime investigation systems in the modern world.[6]

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1 https://www.dnaindia.com/analysis/report-the-criminal-procedure-identification-bill-2022-the-need-the-gaps-and-the-potential-hazards-2948440

2 https://prsindia.org/billtrack/the-criminal-procedure-identification-bill-2022#_edn1

3 https://prsindia.org/billtrack/the-criminal-procedure-identification-bill-2022#_edn1

4 https://www.dnaindia.com/analysis/report-the-criminal-procedure-identification-bill-2022-the-need-the-gaps-and-the-potential-hazards-2948440

5 https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

6 https://www.dnaindia.com/analysis/report-the-criminal-procedure-identification-bill-2022-the-need-the-gaps-and-the-potential-hazards-2948440

The above scenario showed the need of an urgent necessary change or introduction of highly effective law, the agencies had very little scientific data to support their investigations and they remained dependent on primitive ways of identification procedures such as fingerprint and footprints. Scientific approach in the investigation, analysis of crime and criminology will require an infusion of technology, data collection and analysis. The new Bill is the step that lead to the introduction of the Criminal Procedure identification Bill on March 28,2022 in the Lok Sabha and was passed on April 4. Later the Bill was passed in the Rajya Sabha on April 6, 2022. The Criminal Procedural Identification Bill seeks to replace the Identification of Prisoners Act, 1920.

OBJECTIVE OF THE STUDY

This paper aims to analyse the different aspects introduced in the new Bill, "Criminal Procedural Identification Bill, 2022" which replaced the Prisoners Act,1920 that prevailed from the British era for making investigation with infusion of technology and scientific approach in data collection and analysis. The main objectives of the study are:

1. To understand the need for the replacement of Prisoner's Act, 1920.
2. To understand the gaps between the Prisoner's Act, 1920 and the Criminal Procedural Identification Bill, 2022.
3. To interpret the potential of the Criminal Procedural Identification Bill, 2022.
4. To understand the hazards especially in regard with Article 14 and 21 of the Constitution of India.
5. To check whether it holds scrutiny and government opinion.

METHODOLOGY

The researcher follows the Doctrinal method of research. The relevant data from specified documents and databases in order to analyse the problem in hand and reach valid conclusions would be carved out. The research will be done by studying the laws and regulations covering the domain of National Law and State Laws and regulations. Further, the research is done using secondary sources like journals, newspapers, articles and websites.

1. THE IDENTIFICATION OF PRISONERS ACT, 1920

The Identification of Prisoners Act was established on 9 September 1920 that defines the legislative points governing the police and prisoners. It was the Act No. 33 of 1920. The act authorized the collection of photographs and measurements of convicts and others. It states that any person who has been convicted of a crime has to submit their photograph and other physical measurements to the police in-charge. Any refusal to comply will be considered a legal offence under Section 186 of the Indian Penal Code, 1860. In 2018, requests to change the Act was placed, which stated that the Act should be modified to include Aadhaar data and biometrics details such as iris scans, signature, and voice sample.[7]

7 https://en.wikipedia.org/wiki/Identification_of_Prisoners_Act

1.1. PERSONS WHOSE DATA CAN BE COLLECTED

- Convicted or arrested for offences punishable with rigorous imprisonment of one year or more.
- Persons ordered to give security for good behaviour or maintaining peace.
- Magistrate may order in other cases collection from any arrested person to aid criminal investigation.

1.2. PERSONS AUTHORISED FOR COLLECTION OF DATA

- Investigating officer, officer in charge of a police station, or of rank Sub-Inspector or above
- Magistrate

2. THE CRIMINAL PROCEDURE IDENTIFICATION BILL, 2022

2.1. The Criminal Procedure (Identification) Bill, 2022 was introduced in LokSabha on March 28, 2022. The Bill replaces the Identification of Prisoners Act, 1920. The Act authorises the collection of certain identifiable information about specified persons such as convicts for investigation of crime. The Bill expands the ambit of such details, and persons whose details can be taken. It authorises the National Crime Records Bureau to collect, store, and preserve these details.

2.2. Details about convicts and other persons: The Act permits the collection of photographs and specified details about convicts and other persons including finger impressions and footprint impressions. The Bill expands the list of details that can be collected. It will now include palm-print impressions, iris and retina scans, behavioural attributes such as signature and handwriting, and other physical and biological samples such as blood, semen, hair samples, and swabs, and their analysis.

2.3. Persons whose details may be taken: As per the Act, the following persons may be required to give photographs and specified details:

- persons convicted of certain offences (such as offences punishable with a minimum of one year of rigorous imprisonment),
- persons ordered to give security for good behaviour or maintaining peace under the Code of Criminal Procedure, 1973 (CrPC), and
- persons arrested in connection with an offence punishable with at least one year of rigorous imprisonment.

The Bill widens the ambit of such persons to include all convicts, arrested persons, as well as persons detained under any preventive detention law. Arrested persons will not be obliged to give their biological samples unless they have committed an offence against a woman or a child, or an offence punishable with a minimum of seven years of imprisonment.

2.4. Retention of details: The Bill requires the details collected to be retained in digital or electronic form for 75 years from the date of collection. The record may be destroyed in case of persons who:

- have not been previously convicted,
- and are released without trial, discharged, or acquitted by the court, after exhausting all legal remedies. A Court or a Magistrate may direct the retention of details in case of such persons after recording reasons in writing.

2.5. Resistance to giving details: As per the Bill, resistance or refusal to give details will be considered an offence under the Indian Penal Code, 1860. In case of such resistance or refusal, police officers or prison officers may collect details in the manner prescribed under Rules made by the state government or the central government.

2.6. Persons authorised to collect details: Under the Act, details may be collected by police officers who:

- are in charge of a police station
- conduct investigation under the CrPC,
- are at least at the rank of a Sub-Inspector.

The Bill permits the collection of details about specified persons by either a prison officer (not below the rank of Head Warder), or a police officer (in charge of a police station, or at least at the rank of a Head Constable). Note that a Head Constable is generally two ranks below a Sub-Inspector.

2.7. Powers of Magistrate: Under the Bill, a Magistrate may direct a person to give details for the purpose of an investigation or proceeding under the Cr.PC. Depending on certain factors (such as the area concerned), the Magistrate may be a Metropolitan Magistrate, a Judicial Magistrate of the first class, or an Executive Magistrate.

2.8. Role of the National Crime Records Bureau (NCRB): The Bill empowers NCRB to collect the details about the persons covered under the Bill from state governments, union territory (UT) administrations, or other law enforcement agencies.

- Other functions of NCRB under the Bill include:
- storing and destroying the details about specified persons at the national level,
- processing the details with relevant criminal records, and
- disseminating the details to law enforcement agencies. Further, state governments and UT administrations may notify agencies to collect, preserve and share details about specified persons in their respective jurisdictions.

2.9. Rule-making power extended to the central government: The Act vested rule-making power only in the state government. The Bill extends this power to the central government as well. The central or state government may make rules on various matters, including:

- the manner of collecting details,
- and the manner of collection, storage, preservation, destruction, dissemination, and disposal of details by NCRB.[8]

8 https://prsindia.org/billtrack/prs-products/prs-bill-summary-3946

3. BILL MAY VIOLATE THE RIGHT TO PRIVACY AS WELL AS EQUALITY

The Bill permits the collection of certain identifiable information about individuals for the investigation of crime. The information specified under the Bill forms part of the personal data of individuals and is thus protected under the right to privacy of individuals. The right to privacy has been recognised as a fundamental right by the Supreme Court (2017). The Court laid out principles that should govern any law that restricts this right. These include a public purpose, a rational nexus of the law with such purpose, and that this is the least intrusive way to achieve the purpose. That is, the infringement of privacy must be necessary for and proportionate to that purpose. The Bill may fail this test on several parameters. It may also fail Article 14 requirements of a law to be fair and reasonable, and for equality under the law. The law provisions are arbitrary, excessive, unreasonable, disproportionate, devoid of substantive due process and in violation of fundamental rights of the citizens of India as well as of the basic structure of the Constitution.

3.1. The issue arises due to the fact that:

(a) data can be collected not just from convicted persons but also from persons arrested for any offence and from any other person to aid an investigation;

(b) the data collected does not need to have any relationship with evidence required for the case;

(c) the data is stored in a central database which can be accessed widely and not just in the case file;

(d) the data is stored for 75 years (effectively, for life); and

(e) safeguards have been diluted by lowering the level of the official authorised to collect the data.

3.2 Persons whose data may be collected:

The Bill expands the set of persons whose data may be collected to include persons convicted or arrested for any offence. For example, this would include someone arrested for rash and negligent driving, which carries a penalty of a maximum imprisonment of six months. It also expands the power of the Magistrate to order collection from any person (earlier only from those arrested) to aid investigation. This differs from the observation of the Law Commission (1980) that the 1920 Act is based on the principle that the less serious the offence, the more restricted should be the power to take coercive measures. The DNA Technology (Use and Application) Regulation Bill, 2019 waives the consent requirement for collecting DNA from persons arrested for only those offences which are punishable with death or imprisonment for a term exceeding seven years.

3.3 Persons who may order data to be collected:

Under the 1920 Act, a Magistrate may order data to be collected in order to aid the investigation of an offence. The Law Commission (1980) remarked that the 1920 Act did not require the Magistrate to give reasons for his order. It observed that the

ambit of the law was very wide (*"any person" arrested in connection with "any investigation"*), and refusal to obey the order could carry criminal penalties. It recommended that the provision be amended to require the Magistrate to record reasons for giving the order. The Bill does not have any such safeguard. Instead, it lowers the level of the police officer who may take the measurement (from sub-inspector to head constable) and also allows the head warder of a prison to take measurements.

3.4 What data may be collected:

The Bill widens the ambit of data to be collected to include biometrics (finger prints, palm prints, foot prints, iris and retina scan), physical and biological samples (not defined but could include blood, semen, saliva, etc.), and behavioural attributes (signature, handwriting, and could include voice samples). It does not limit the measurements to those required for a specific investigation. For example, the Bill permits taking the handwriting specimen of a person arrested for rash and negligent driving. It also does not specifically prohibit taking DNA samples (which may contain information other than just for determining identity). Note that under Section 53 of the Code of Criminal Procedure, 1973, collection of biological samples and their analysis may be done only if *"there are reasonable grounds for believing that such examination will afford evidence as to the commission of an offence"*.

- ***Biological samples:***

The Bill makes an exception in case of biological samples. A person may refuse to give such samples unless he is arrested for an offence: (i) against a woman or a child, or (ii) that carries a minimum punishment of seven years imprisonment. The first exception is broad. For example, it could include the case of theft against a woman. Such a provision would also violate equality of law between persons who stole an item from a man and from a woman.

- ***Retaining data:***

The Bill allows retaining the data for 75 years. The data would be deleted only on the final acquittal or discharge of a person arrested for an offence. The retention of data in a central database and its potential use for the investigation of offences in the future may also not meet the necessity and proportionality standards.[9]

4. LAW DOES NOT STAND SCRUITNY

"The colonial government brought the 1920 bill to threaten and terrorise people participating in the Independence movement. It was their intention to weaken the movement. When the government planned to replace the old law with a new one after 100 years, it was expected that the law will be liberal and will take into account human rights and jurisprudence established around the world in how to treat criminals but the draft does not stand scrutiny unfortunately."[10]

9 https://prsindia.org/billtrack/the-criminal-procedure-identification-bill-2022#_edn1

10 https://www.medianama.com/2022/04/223-criminal-procedure-identification-bill-debate-parliament/

4.1. Lack of consultation with civil society:

"Governments have a culture of undertaking consultations with the civil society before coming out with legislation. There has been not even a single consultation (since 2014) with the civil society. Moreover, the legislative intent is not clear when the government writes that people who have been booked for crimes which carry punishment of less than seven years may not be obliged to provide their measurements. It should have been 'shall' instead of 'may'.

4.2. Acquitted people can't have data erased:

"In the absence of a proper data protection law, it will be impossible to extinguish all these records for people who have been acquitted as the data would have been disseminated all across the country by law enforcement agencies," Under the Bill, the National Crime Records Bureau is allowed to collect, store, process, and share data with law enforcement agencies at the national or state level.[11]

5. GOVERNMENT'S VERDICT WITH REGARD TO THE CRIMINAL PROCEDURE IDENTIFICATION BILL,2022

- Home Minister Amit Shah in the Parliament said the bill is only aimed to strengthen the capacity of the police and forensic department.
- "Under section 3, the government of India has the right to make rules. That no person involved in a political agitation has to give (physical and biometric) measurements only for political agitation. But, if a political leader is arrested in a criminal case, then he will have to be at par with a citizen.

5.1. The method precludes custodial torture:

The provisions of the Bill are intended to preclude the use of third-degree methods (custodial torture) and making available the benefits of science and technology to prosecuting agencies.[12]

6. CONCLUSION

Addressing the opposition's concern about the misuse of data and violation of one's right to privacy, Home Minister Amit Shah in the Parliament said the Bill is only aimed to strengthen the capacity of the police and forensic department.[13] The new Bill is a step in the right direction, and may face some rough weather before the law is implemented in a more refined form.[14] Hence, the research was really useful to understand various vital essentials of the Bill and its enforcement would also help us fix the loopholes and would hopefully also increase the conviction rates which will surely result in improvement in the law and order system and internal security of this country.

11 https://www.medianama.com/2022/04/223-criminal-procedure-identification-bill-debate-parliament/

12 https://zeenews.india.com/india/criminal-procedure-identification-bill-2022-passed-in-parliament-how-it-will-empower-police-prosecution-check-details-2451412.html

13 https://zeenews.india.com/india/criminal-procedure-identification-bill-2022-passed-in-parliament-how-it-will-empower-police-prosecution-check-details-2451412.html

14 https://www.dnaindia.com/analysis/report-the-criminal-procedure-identification-bill-2022-the-need-the-gaps-and-the-potential-hazards-2948440

Right to Abortion: Ethical or Illegal

Dr. Sonu* & Ritu Y.K. Behl**

"No matter what men think, abortion is a fact of life. Women have always had them; they always have and they always will. Are they going to have good ones or bad ones? Will the good ones be reserved for the rich, while the poor women go to quacks?"

Shirley Chisholm
An American Politician

ABSTRACT

The objective of this paper is to discuss in an all-encompassing manner the purpose of abortion and the policies and laws impacting it. Hitherto, a taboo word, abortion implies a deliberate termination of pregnancy that has occurred spontaneously or purposely. With the perpetual sexual assault on women down the ages and decrease in family size due to exigencies of modern life, abortion is an increasingly acceptable option. Despite availability of contraceptive methods unintended pregnancies are inevitable-often due to the imperfection of these methods or the reluctance/resistance of the persons to use them. The result-an "unintended pregnancy" i.e., a pregnancy which was not desired at the time of occurrence. The resulting births from such "unintended pregnancies" are "unplanned births". A study was conducted in India by the HFS (Health Facilities Survey) in 2015 to probe the frequency of abortion and unintended pregnancy.The HFS depicts that approximately 45% women aged 15-49 years in India have access to reproductive health care in recognized facilities.[1] In its 2015 study conducted in States- Assam, Bihar, Gujarat, Madhya Pradesh, Tamil Nadu and Uttar Pradesh, the figure

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1 Singh S, Shekhar C, Acharya R, Moore AM, Stillman M, Pradhan MR, Frost JJ, Sahoo H, Alagarajan M, Hussain R, Sundaram A, Vlassoff M, Kalyanwala S, Browne A. The incidence of abortion and unintended pregnancy in India, 2015. Lancet Glob Health. 2018 Jan;6(1):e111-e120. doi: 10.1016/S2214-109X (17)30453-9. Erratum in: Lancet Glob Health. 2017 Dec 12: PMID: 29241602; PMCID: PMC5953198.

of 47.0 abortions per 1000 women underestimates the incidence of abortion due to lack of inclusion of facility-based services and also because abortions are frequently performed outside facility settings. Moreover, a certain stigma is perceived to abortion and this is also a major reason for inaccurate data.

In India abortion has been legally available since the passing of the MTP, Act (Medical Termination of Pregnancy Act, 1971). The global plethora of laws surrounding abortions do not really facilitate ease in taking this recourse. It is only if abortion is available on the request of the women and is both accessible and affordable that it will render all abortions safe and acceptable. Unfortunately, there are relatively few laws on abortion and fewer still are fit for the purpose.

ABORTION RIGHT VS RIGHT TO LIFE

Abortion has always garnered much debate on both national and international forums being a highly sensitive and controversial issue. The dilemma being the sensibilities pendulating between the woman's right to untimely terminate her pregnancy versus the right to life of an unborn child. Article 21 of the Constitution of India enshrines the right to life and provides that, "*No person shall be deprived of his personal life and personal liberty except according to procedure established by law.*" It is pertinent to mention that"person" here includes both men and women. For a woman, the right to abortion has been recognized as an essential and fundamental right. The right to life and personal liberty being most sacrosanct, precious and inalienable restrains the government to make laws violative of this right. Women have the freedom to choose and determine their options for sexual health and can shape their sexual options at will. These are internationally accepted and recognized norms. In order to fulfill its commitment, the government in India too passed formal laws and policies promoting reproductive rights. The contentious issue is whether or not a child yet to be born can be equated with a human and thus bestowed with the same position as that of a "person". The debate wrestles around the term-Pro Life and Pro Choice. To complicate matters further, all religions condemn abortion and thus a woman may be pushed into a corner due to societal pressure and taboos.

R.M. Dworkin, a renowned American legal luminary and scholar studied the question of abortion. He rejected the extreme approach adopted by the derivative claimers of conception.[2] According to him new born infants should be treated as persons morally and legally, though they were not persons from a philosophical view. Thus, the unborn child was entitled to life while abortion was viewed as a deemed murder or nearly so. Dworkin opined that a foetus has no interest before the third trimester.[3]

2 Dworkin Ronald (1999), "Freedom's Law: The Moral Reading of the American Constitution", 90, Oxford University Press

3 Ibid. He says that "not everything that can be destroyed, has an interest in not being destroyed".

In India sec-312 IPC (Indian Penal Code) relates to unlawfully causing a woman to miscarry.[4] It may be mentioned here that the architects of the Indian Penal Code have employed the words 'miscarriage' and 'unborn child' but not the word 'abortion' in this provision and the former two have not even been defined. However, legal interpretations clarify that 'causing miscarriage' implies abortion performed illegally and criminally which is punishable under the Code.[5] Under sec-312 IPC, voluntarily causing miscarriage is a crime when (i) a woman is 'with child' i.e., gestation has commenced or (ii) a woman is in an advanced state of pregnancy i.e., 'quick with child' or motion of the foetus is discernible by the said pregnant woman. This provision permits untimely end of pregnancy aimed at saving the life of the pregnant woman. The basis for this being that the life of an unborn child may not be destroyed, except to protect the life of its mother. This provision thus criminalizes abortion except for a medical purpose intended to preserve the life of the pregnant woman.

HISTORY

Abortion has been practised since ancient times. Various methods including use of implements, abortifacient herbs, abdominal pressure etc. have been used to effect abortions. Enforcement of abortion laws fluctuated over time. In the West, abortion rights movements successfully got existing abortion laws repealed. Now abortion is majorly legal in the West, but anti-abortionists, using religion as their spearhead, often challenge these laws. In ancient time, usually non-surgical methods were employed to induce abortions. Reference to preservation of male seed is found in the Vedic and Smriti Laws of India. In the Ramayana there is reference to abortions being performed by surgeons and barbers.[6] In Theaetetus, Plato refers to the ability of a midwife to induce abortion in the initial phases of pregnancy.[7]

Nineteenth century saw advances in medicine, surgery, sanitation and technology. Social attitude towards abortion also shifted with the advent of women rights movements. Abortion had been widely practised earlier the world over, but the anglophone nations passed anti-abortion laws. The trend of liberalisation the laws

4 Section 312 IPC-Causing Miscarriage-Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.Explanation-A woman who causes herself to miscarry is within the meaning of this Section.

5 Baxi Upendra, Abortion & the Law in India, Journal of the Indian Law Institute, 1986-87, Vol-28-29, Alice Jacob, New Delhi

6 Valmiki Ramayana Sunderkanda- Book of Beauty, 28thSarga 6th Shloka available at https://www.valmikiramayan.net/utf8/sundara/sarga28/sundara_28_frame.htm accessed on 8.6.2022 at 4:54pm

7 Plato (1921) [c.369BC] 149 d,"Theaetetus in Harold North Fowler", Plato in Twelve Volumes 12, Cambridge, Massachusetts: Harvard University Press

on abortion commenced in 1920s to 1930s. This was pursuant to changing trends in the field of conception prevention. Two stalwarts, namely, Marie Stopes of England and the other being Margaret Sanger of US, brought the issue out of the proverbial closet and led to the establishment of birth control clinics.

It may be of interest to note that while there have been repeated calls for decriminalisation of abortion, no one seems to envisage a need for permitting abortion at the instance of the pregnant woman. 'Decriminalisation' altogether removal of criminal sanctions against abortions. It would necessarily include-

- not punishing anyone for having an abortion.
- not punishing anyone for providing safe abortions.
- not permitting police to investigate or prosecute safe abortions.
- not involving Court in deciding whether or not to permit abortions.
- providing training for providers of abortion facilities.
- making rules/laws/guidelines for safe and legal abortions.

International movements seek "safe and legal abortion" i.e., permitting abortion within some legal parameters identifying the grounds on which it may be permitted. This distinction between "legalisation" and "decriminalisation" usually makes abortion permissible as an exception to the general law in most countries. Canada is perhaps the only country which completely decriminalised abortions vide a Supreme Court decision in*R vs Morgentaler.*[8]It was observed that the provision of abortion found in the Canadian Criminal Code was unconstitutional, being violative of women's rights enshrined in section 7 of the Canadian Charter of Rights and Freedoms. It led to a change in ideology about women's rights. It also expanded the right of women to choose abortion and led to a debate over the legal and social position of abortion in Canada.

Usually the words 'legalisation' and 'decriminalisation' are used interchangeably as abortion can be legalised or decriminalised on some or all grounds. While the semantics and terminology of these words cannot be changed, legal provisions cannot be ambiguous and must state clearly as to what is intended.

ABORTION LAWS IN USA

In USA, the abortion laws changed dramatically in the wake of the Supreme Court decision in *Roe vs Wade*[9]wherein it was opined that the Texas Criminal Abortion Statute violated 'Due Process Laws' of Fourteenth Amendment[10] as abortion was criminal except when aimed at protecting the life of the mother. The Court further held that while the US Constitution did not expressly recognise the right to privacy,

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8 (1988) 1 SCR 30

9 410 US 113 (1973)

10 US Supreme Courts Reports, Vol 35, The Lawyers Co-operative Publishing Co., New York p.147 to 199

the US Supreme Court had recognised "a right to personal privacy and certain zones of privacy" as being implicit in the Constitution. The Supreme Court settled the risk-benefit duel by tethering State Regulation of abortion to the three trimesters of pregnancy: during the first trimester, governments were completely estopped from prohibiting abortions in the second trimester, reasonable health regulations could be imposed before permitting abortion and in the third trimester, there could be complete prohibition of abortion, subject to the condition that there were provisions in law for exceptional cases imperative to protect the life and/or health of the mother. "The right to choose to have an abortion" was held to be "fundamental". The Courts were now required to minutely scrutinise the disputed abortion laws strictly. This was an example of judicial review of the highest echelon ever in the United States.

The Supreme Court of US modified the above observations in its 1992 decision of *PlannedParenthood of Southeastern Pennsylvania Vs Robert P.Casey,*[11]setting a fresh bench mark for assessing the rationality of laws imposing restrictions on abortions. Itenquired into the question whether or not a regulation imposed by the state governing abortion imposed an "undue burden" i.e., whether it was a "substantial obstacle in the path of a woman seeking an abortion before the foetus attains viability." The Due Process Clause of the Fourteenth Amendment confers a constitutional protection on the right of a woman to terminate her pregnancy. It provides that no state shall *"deprive any person of life, liberty or property without due process of law….".* This Clause applies to both substantive law as well as procedural matters.

Clearly, the US Supreme Court recognised the right of a woman to choose to have an abortion as being included in the right to privacy. Upto twelve weeks of pregnancy abortion was permissible for a woman on demand with her health and life being priority as her Fundamental Right. The State cannot interfere with it without there being compelling reasons to do so.

The settled legal position changed dramatically in an unprecedented manner. On June 24th, 2022, the US Supreme Court in a judgment[12] likely to have far reaching consequences reversed the decision in *Roe vs Wade*[13]striking down the right to abortion. It was held that the US Constitution does not grant the right to abortion. The immediate consequence of this is that atleast 26 of the 50 States in USA are likely to ban abortion rendering them illegal immediately or as soon as practicable. The last abortion clinic in Mississippi had opposed the State's efforts to ban abortion after 15 weeks and consequently overturn *Roe vs Wade.*[14]The Court held, "the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."[15] The judgment was passed by the conservative majority though three liberal judges had dissented.

11 (1992) 120 L.Ed 2d 67

12 Passed in Dobbs vs Jackson Women's Health Organisation (date of decision June 24th, 2022)

13 Supra note 10

14 Ibid

15 The judgment in Dobbs vs Jackson Women's Health Organisation(date of decision June 24th, 2022)

ABORTION LAW IN INDIA

The Indian Penal Code, 1862 and Code of Criminal Procedure, 1898 derived from the British Laws criminalised abortion and made it punishable for the woman undergoing abortion as also the abortionist, except when it was performed for protecting the woman's life. Fuelled by the high rate of maternal mortality resulting from perilous abortions, liberalisation of the law pertaining to abortions commenced in India in 1964, upon the receipt of the Shah Committee Report.[16] This report found that risky abortions were performed by exponents lacking sufficient and necessary skills. These were usually performed on married women who were under no socio-economic pressure. The Shah Committee in 1966 after considering the medico-legal and socio-cultural aspects, suggested legalisation of abortions to "prevent wastage of women's health and lives on both compassionate and medical grounds" as a suitable improvement. A few States opposed the proposed legislation as a master plan to check the ballooning of population, which allegation was denied by the Shah Committee. Abortion was legalised in the entire country excluding the then State of Jammu & Kashmir by the MTP Act, 1971 (No.34 of 1971). Sadly, regardless of passage of four decades access to safe abortion care is still not available to the vast majority of Indian women.

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971 & REGULATIONS, 1975

The MTP Act, 1971 completely safeguards the registered allopathic medical practitioner. It provides complete protection to him from both legal and / or criminal proceedings consequent to causing any injury to a woman undergoing abortion, provided that such abortion was performed by the practitioner in good faith and in conformity with the terms and conditions of the Act.

The MTP Act, 1971 permits abortion of upto a twenty weeks pregnancy. Opinion of a second doctor is required if pregnancy is beyond twelve weeks. The abortions are permissible if there is serious danger both to the physical and / or mental well-being of the pregnant woman in her perceivable surroundings. For instance, if the pregnancy has resulted from a sexual crime like rape, contraceptive failure, the child to be born is suffering from deformity or disease or the woman herself is mentally challenged. Government hospitals can perform abortions subject to approval / certification of any private sector facility. A registered allopathic medical practitioner can perform an abortion on a pregnant woman to protect or save her life, even without stipulated experience, training and second opinion.

The MTP (Rules and Regulations), 1975 stipulate the norms, standards and method for approving a facility for performing abortions; it lays down procedure for obtaining consent, methods for maintenance of records and reports besides ensuring confidentiality. An abortion performed without government approval is deemed illegal

16 Govt. of India, Report of the Shah Committee to study the question of legalisation of abortion, 1966; Ministry of Health & Family Planning, New Delhi

even if done in a hospital or facility and it is for such an institution to secure prior permission / consent of the authorities to perform abortions.

Despite the above laws and rules, adequate medical facilities for abortion are still not readily available. Most of them are urban based. Hardly any Primary Health Centres provide such facilities. Also, the quality of abortion services is abysmally poor.

THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2002 & AMENDMENT RULES & REGULATIONS, 2003

The MTP (Amendment) Act, 2003 and its rules and regulations were enacted after much consultation involving both government and non-government agencies including activists. To reduce bureaucracy interference approval for abortion facilities is now to be taken from District Committees instead of those at the State level. Such committees are bound to scrutinise the facility within two months and thereafter to complete the approval process within two months or two months after removal of defects. Punitive measures of imprisoning individual providers for 2-7 years for not obtaining approval has also been included. The MTP Rules also specify equipment and medication which may be used.

WHAT IS STILL MISSING?

The MTP Act, 2003 faces major criticism for its very strong medical prejudice. The policy of "physicians only" results in exclusion of mid-level health providers as also exponents practicing alternative systems of medicine. The mandatory requirement of obtaining a second medical opinion for the purpose of undergoing an abortion in the second trimester results in further restricting access to proper abortion care, more so in the rural areas. As per the Act, the provision for abortion facilities must be made at or public hospitals by the State. Resultantly, they are exempted from the regulatory processes applicable to the private sector. This frequently results in inferior quality of abortion care. So preferably the same stringent criteria should be applied to government hospitals as are applicable in the private sector. The need of the hour is to ensure that the pregnant woman has complete access to abortion services which are acceptable to her, besides being safe, affordable and accessible. In India, it is the doctor who has the final say. Though abortion is permissible under various circumstances, it is left to the woman to make out a case for justifying her abortion.

The law on abortion is open to varying interpretations. Thus section 3 of the MTP Act, 1971 which does not refuse abortion care to unmarried / separate women / widows may be misused because of the phrase "Where any pregnancy occurs as a result of failure of any device or method used by any 'married' woman or her husband for the purpose of limiting the number of children…" and abortion services may possibly be denied to an unmarried woman or require the consent of the husband of a married woman. The demand of activists to replace "married woman" with "all women" is yet to be considered.

Similarly, compulsory reporting of contraceptive usage post-abortion may be used as a means to compel / achieve family planning targets.

PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, 1994 (PNDT ACT, 1994)

The PNDT Act, 1994 since amended by the Pre-Conception and Pre-Natal Sex Selection and Determination (Prohibition & Regulations) Act, 2002 bars the abuse of diagnostic tests performed ante-natally for determining the sex of the foetus to prevent their abortion. The advertising of these tests for sex determination is also prohibited. Facilities which use these tests are required to be mandatorily registered. They are prohibited from disclosing the sex of the foetus.

Despite the evident distinction in the purview of the PNDT Act and the MTP Act, they are often linked-most inappropriately. The matter was examined pursuant to the public interest litigation filed by Dr. S.George with two NGOs-MASUM and CEHAT. Experts rejected the requirement of amending the MTP Act, as the requirement was that of the actual and strict application of the PNDT Act and not its amendment. Revealing the identity of the pregnant woman undergoing abortion was also not considered appropriate being violative of her privacy. Restricting abortion to merely twelve weeks of pregnancy would have resulted in illegal abortions. It would have been unethical to record the sex of the aborted foetus. It would also have rendered other abortions suspect. Resultantly, access to abortion services would have been rendered even more difficult. The heart of the problem lies in the application and execution of laws in the existing legal framework. Not only is the government require to ensure that the abortions are carried out by qualified medical practioners, but also to ensure that the abortions are being done for the right reasons.

Unfortunately, abortions are often used as substitutes for regular family planning. Ever, so often abortions are sought on mundane grounds like weddings, excursions, examinations et al.

JUDICIAL PRONOUNCEMENTS

The ethical debate about the morality of abortions rages unabated. The Supreme Court in *Suman Kapur's Case*[17] held that an abortion undergone by a woman, without the consent of her husband would amount to mental cruelty. It would also be a basis or reason for seeking a divorce. It was observed therein that -

> *"Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse."*

The above observations clearly indicate that the right to undergo abortion, is not guaranteed, but remains limited to the existence of certain circumstances as enshrined in the MTP Act.

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17 Suman Kapur vs Sudhir Kapur AIR 2009 SC 589

In a highly progressive approach, the Supreme Court opined that acute foetal abnormality could constitute a reasonable basis for medically terminating a pregnancy which was beyond 20 weeks. The Supreme Court permitted the rape survivor having a 24-week pregnancy to go for an abortion while adopting this far-reaching approach in *Ms. X vs Union of India.*[18]

In another judgment having similar impact, the Apex Court recognised the right of a mentally retarded rape victim to exercise her reproductive choices. In *Suchita Srivastava vs Chandigarh Administration*[19] a three Judge Bench of the Supreme Court considered the case of an orphaned mentally retarded rape victim. The Punjab & Haryana High Court had determined that her foetus ought to be aborted without her consent u/s 3 MTP Act, 1971 as it was in her best interest since she was incapable of looking after and caring for the child. She also did not have any parent / guardian to care for her. While staying the order of the High Court, the Apex Court observed that it was from the right to liberty enshrined Article 21 of the Constitution, that the right to reproductive choices emanates. It was held that withdrawal of the right of a woman to make a choice about her own body, would infact constitute a transgression or breach of her right to her own privacy. Drawing a distinction between mental illness on one hand and mental retardation on the other, the SC considered that even the mental retardation of the woman would not deny her the exercise of her right to decide her reproductive choices. The Court thus opined that no order terminating her pregnancy could be passed without her consent. It was observed that -

> *"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial condition is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods."*[20]

Without a doubt, the Apex Court intended well, while making the above observations. Therefore, it now becomes even more important to analyse what is the actual meaning of the words "exercising a right over one's own body". Theoretically, the woman may have the right to decide whether or not to continue her pregnancy, but the question remains whether her socio-economic status and other realities of life actually permit her to avail such freedom. There can never be a universal set of rules applying to all women. The circumstances of women in a particular city, state or country are so myriad that it would be well-nigh impossible and wholly incorrect to treat all cases at par. In our country women are the primary care givers and the uncomfortable issue such freedom raises poses a fresh set of problems for feminists. In *Suchita*

18 Writ Petition (C)No.593 of 2016 (Supreme Court of India) decided on July 25, 2016

19 (2009) 9 SCC 1

20 SLP Civil-5334/2009

Srivastava's case,[21] the victim-a mentally retarded orphan, was already living in a protection home. So, once she opted to go ahead with her pregnancy and to have the child, the Hon'ble Supreme Court could easily direct the authorities concerned to care for the child. It remains a mystery what would have been the outcome of the case had this not been the case. In a country like ours, socio-economic factors certainly have a strong bearing on a woman and certainly impinge upon the free exercise of the options available to a pregnant woman.

The point was again raised in *Nikhil D Dattar vs Union of India*,[22] where the married woman sought abortion as the foetus she was carrying had developmental abnormalities. The Bombay High Court declined her permission observing among other things that the mandate of the MTP Act was not fulfilled. This was opined as there was no definitive medical opinion whether a child – if born, would actually have such physical / mental abnormalities which may constitute a serious handicap. The basis of this judgment was "degree of handicap of the foetus", as opposed to *Suchita Srivastava's* case[23] which was based on the "degree of handicap of the woman".

A few more cases highlight the development of the law on abortion in the recent years. *Indulekha Sreejit vs Union of India*[24] considered sec-3 of the MTP Act, 1971 with reference to the case for termination of a 31 weeks pregnancy. The Kerala High Court while dismissing the petition held that when a duly constituted Medical Board opines that stage of pregnancy is such that it may result in live baby and that foetal abnormalities diagnosed are not lethal, in absence of any threat to life or health of a mother, reproductive choice of mother which is facet of fundamental right guaranteed to her u/Art. 21 of the Constitution, will have to give way to right of unborn child.

In *Hetalben Maheshbhai vs State of Gujarat*[25] the Gujarat High Court allowed a petition for termination of a ten-week pregnancy of a minor raped victim. Reliance was placed upon *Sarmishtha Chakaraborty vs Union of India*[26] and the case of *Manjuban Knazar*[27] and also *Ms. Z vs State of Bihar.*[28] Permission was granted as continuation of pregnancy would constitute a grave injury to mental health of minor victim as well as bearing and rearing of child in womb would create a great mental agony to her for her entire life and invite many other socio-economic problems.

Dr. Debashish Ghosh vs State of Odisha & Anr.[29] is an interesting case where the doctor who had terminated the six-week pregnancy of a rape victim was enlarged on bail.

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21 Supra note 19

22 SLP Civil-5334/2009

23 Supra note 21

24 2021 AIR (Kerala) 231

25 2021 Cri.L.J 3606

26 (2018) 13 SCC 339

27 Janak Ramsang Kanzariya (minor) through Manjuben Knazar vs State of Gujarat 2011 Cri.L.J 1306

28 (2018) 11 SCC 572

29 2021 (1) OJR 439

The Odisha High Court observed that the pregnancy resulted from alleged rape. The resultant anguish caused by such pregnancy is presumably a grave injury to the victim's mental health. There is always a presumption in this regard. The termination of pregnancy was conducted in the CHC maintained and established by the government being one of the places prescribed under law. The report of the Board of Doctors found that the then petitioner had acted in good faith and was thus on the right side of the Golam's Test. In *Maniram vs State of Rajasthan*[30] the Rajasthan High Court declined to grant permission for termination of a 23 weeks 4 days pregnancy of a rape victim aged 13 years as no case of abnormality of the foetus was found. It was held that if termination was allowed at such an advanced stage, it would infringe the right to life of the foetus and threaten the life of the victim.

Mansi through her mother & Natural Guardian-Krishna vs State of Haryana & Others[31]– The MTP Act, 1971 prohibited termination of pregnancy beyond 20 weeks. The period was extended upto 24 weeks by the MTP (Amendment) Act 2021 (passed on 25.03.2021) for certain categories of women including rape victims. The petitioner was falling in purview of the new provision. Therefore, a direction was issued to the Medical Board, PGIMS Rohtak by the Punjab & Haryana High Court, requiring it to analyse whether there was any risk to life of petitioner-a minor rape victim, in carrying out the termination and if there was no such risk then to carry out the procedure on the petitioner.

In *Nisha & Others vs U.T.Chandigarh & Others*[32]a couple sought authorisation for terminating the pregnancy as there were complications like neuro problems in the foetus due to a defective spine and spinal cord. Doctors refused termination as foetus was 22 weeks and 5 days. The Punjab & Haryana High Court observed that there was risk of child being born with physical and mental abnormalities, which may aid to the agony and pain of the parents. The pregnancy being slightly above the prescribed period (of 20 weeks), the termination was allowed on the recommendation of the Medical Board.

In *Smt. Prembai vs State of Madhya Pradesh & Others*[33]the M.P. High Court permitted termination of pregnancy of a mentally challenged rape victim holding that not allowing termination would amount to compelling the victim to continue to bear such pregnancy which would be violative of her bodily integrity and aggravate her mental trauma besides having a devastating effect on her health including psychological and mental aspects. The Hon'ble Supreme Court in a recent judgment titled as *"X vs The Principal Secretary, Health & Family Welfare Department"*[34] passed an ad-interim order allowing unmarried woman to terminate pregnancy of 24 weeks arising out of a consensual relationship. It was held that the Parliamentary intent was to cover unmarried women

30 2020 (3) Cri.L.R (Raj) 1102

31 2021 (2) RCR (Civil) 625

32 2020 (4) PLR 431

33 2021 (3) Jab.L.J 475

34 2022 LiveLaw (SC) 621

also as after the 2021 amendment, the word *"married woman"* had been substituted with *"any woman"* and *"husband"* with *"partner"*. It was further held that the intent was clearly not to confine the beneficial provisions of the MTP Act only to a situation involving a matrimonial relationship. There was no basis to deny unmarried women the right to medically terminate pregnancy, with the same choice as was available to other categories of women. Denying an unmarried woman, the right to a safe abortion violates her personal autonomy and freedom. A woman's right to reproductive choice is an inseparable part of her personal liberty under Article 21 of the Constitution.

The judgments above are all based upon the right over one's body. However, the question of personal freedom is negated where State support for giving birth is absent in raising such children. "Free choice" thus does not truly exist much to the chagrin of the feminists and the question of disability adds to the existing conundrum. 'Choice' as a right is not freely within reach, but only realisable with a multitude of other conditions. Even the medical professionals often do not provide clear and sufficient information to facilitate complete freedom of choice—an informed choice.

MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

These cases gave rise to issues pertaining to abortion after twenty weeks of pregnancy and to the question of giving birth to and beginning up a child knowing it to be suffering from incurable defects. Several writ petitions seeking permission for abortion beyond twenty weeks of pregnancy were filed because they were the outcome of rape or had foetal abnormalities. Gynaecologists usually report those congenital abnormalitiesthat show up after twenty weeks and such pregnancy could not be terminated under the MTP Act, 1971. So, a Bill to amend the Act was drafted giving rise to the MTP (Amendment) Act, 2021.

The amended Act provides some much-desired relief to rape survivors, victims of incest, minors, differently abled etc. It focusses on increasing the time limit for abortion from twenty weeks to twenty-four weeks for the above-mentioned classes of women. As of now, it is only the opinion of one provider which is required upto 20 weeks and of two providers upto gestation period of 20 - 24 weeks. The higher gestation limit is inapplicable to cases involving considerable foetal abnormalities which have actually been diagnosed by a duly constituted Medical Board. To immediately save the life of a pregnant woman even the approval of one doctor would suffice.

Failure of contraceptive method or device permits termination of pregnancy upto twenty weeks. The Act now includes unmarried women also. It also provides for penal provisions for a medical practitioner who discloses to a legally unauthorised person the identity details of a pregnant woman who has undergone a procedure for untimely termination of her pregnancy.

DRAWBACKS

While the MTP (Amendment) Act, 2021 is definitely a step in the right direction, it does have many lacunae. First of all, it permits termination of pregnancy after 24 weeks only on the diagnosis of a Medical Board that there are substantial foetal

abnormalities. Meaning thereby that pregnancies due to rape which are beyond twenty-four weeks can only get permission as before through Writ Petitions. Also, there is no time limit fixed for the decision of the Medical Board. Categories of women who can terminate pregnancy between twenty to twenty-four weeks are not specified and are to be notified by the government. There is thus no uniformity. The Act does not clearly cover transgenders who may conceive with the aid of medical intervention or otherwise. There is shortage of medical practitioners in our country and very often abortions are carried out by nurses, mid-wives, *dais*, family members or self. These persons are not covered under the Act. The aspect of "viability of foetus" (period from which foetus is capable of living outside the womb-usually from twenty-eight weeks but can be as early as twenty-four weeks) conflicting with late termination of pregnancy has also not been considered. Lastly, a liberal abortion law may also promote female foeticide.

CONCLUSION

In India the abortion legislation has not yielded the desired results despite the fact that it was one of the forerunners in attempting to legalise abortion. The existent law and policy reforms (in India in particular and in the world over generally) though not radical are still a significant step in the direction of improving the health of women and their right to safe and accessible abortion care. The way forward would be to ensure enhancement of facilities making safe abortion services available and accessible. The creation of qualified service providers which includes mid-level providers as well as facilities especially in rural areas; ensuring quality abortion care; simplifying procedures to create facilities having proper infra-structure and qualified staff and linking research, technology and good clinical practices. Above all raising public awareness and removing taboos attached to abortion, besides providing support system based upon the needs of women would improve the scenario.

India needs to liberalise it's abortion laws as laws relating to abolition of abortion are outrightly violative of the right to life of a woman as well as her privacy and dignity. Abortion needs to be made legally permits in order to ensure protection of women rights and the women themselves. Maternal health must be the prime objective, so also protection of the unborn child once it has become a viable entity. Quality, comprehensive and accessible reproductive and sexual health care for all is the need of the hour.

"There is no freedom, no equality, no full human dignity and personhood possible for women until they assert and demand control over their own bodies and reproductive process...The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned."

Betty Friedan

Magnitude of Unlicensed Guns Manufactured in India

*Dr. Sukdeo Ingale**

ABSTRACT

India is known for the strictest gun laws in the world. Though Indian law allows citizens to own and carry guns, but it is not a constitutional right. Getting a gun license in India is a difficult task and that can take years. The gun licensing regime in India is regulated by the Arms Act, 1959.The magnitude of unlicensed firearms is rapidly increasing and three of the nation's most economically depressed states, Uttar Pradesh, Bihar and Jharkhand, account for two-thirds of the nation's incidents, and an increasing number of firearms are popping up in these Indian cities. The problems in the field of illegal manufacturing of fire arms need to be tackled with a combination of public involvement and firm legal measures so that a person who seeks a helping hand from the concerned Institutions should not feel victimized in order to secure justice for all.

Keywords: *Gun Violence, Manufacturing of Unlicensed Guns, Unlicensed Guns, Victims of Murder by Firearms.*

INTRODUCTION

The stringent system has given birth to a thriving illegal weapons market which has resulted in - "India is home to roughly 40 million civilian-owned firearms…Of these only 6.3 million (just over 15 per cent) are licensed. Around 90 percent of firearm-related murders are committed using unlicensed guns."[1] About demand for license, Additional Commissioner of Police, Delhi (Licensing) Madhup Tewari says the demand for gun licenses has not seen a 'quantum jump' in recent years and that the number licenses issued every year has remained "static", averaging between 900-1000 per year.[2] According to one more study[3] the number of registered guns in India reportedly

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1 International Action Network, "Armed Violence in India: Two New Issue briefs", *available at:* http://www.smallarmssurvey.org/about-us/highlights/highlight-iava-issue-brief-1-2.html (Visited on March, 11, 2022).

2 Pallavi Polanki, "Ponty Shooting: Guns, like mobiles, are now integral to India" *Firstpost*, November 22, 2012.

3 Sankar Sen, "The 'Have Gun, will Shoot' Mind", *The Pioneer*, June 11, 2014.

is 63,00,000. Though unlawfully held guns cannot be counted, in India, they are estimated to be 3,37,00,000. According to a former Director General of Police, Uttar Pradesh, there are more firearms, both licensed and unlicensed, with individuals in Moradabad district than in the whole of the UK or Japan.

For getting a gun licence it is mandatory to complete all the formalities of issuing a licence to an applicant within 80 days. But the authorities keep applications pending for years, citing some reason or the other. The application form is long and complicated, requiring the services of a lawyer, and an array of documents, from a medical certificate to police verification. Above all, the authorities have to be fully satisfied with the credentials of the licence seeker. Locals, however, allege that huge bribes must be paid before a licence is issued. "The criminals get them easily by greasing the palms of officials but those who are genuinely in need are made to wait for years and years," says Bibhuti Narayan Singh, a farmer who wants a gun licence as he fears a threat to his life from Maoists.[4] In India, obtaining a gun licence is indeed a cumbersome, time-consuming process.

After Independence, the Indian government provided licences to 37 manufacturers to make guns under its supervision. During the China-India war in 1962, Munger's gun factories supplied the much sought-after .410-bore Muscut (single barrel model) guns to the defence forces. "The craftsmanship of the Munger gunsmiths was unparalleled in the country. Subsequently, some of these workers were shifted to other places, including Kanpur in Uttar Pradesh and Rewa in Madhya Pradesh, where gun manufacturing units were set up," says Mahadeo Sharma, owner of Venus Gun House. But with the passage of time, the legal manufacturing of 'Made in Munger' guns has slowly given way to illegal factories where 'Made in U.S.' and 'Made in Italy' are produced almost in assembly line fashion. These are fine replicas of international models such as Smith & Wesson, Webley & Scott, and Beretta.[5]

Recently every state has digitised the arms licence information under the National Database of Arms Licenses stared from 2015. Following this, every arms licence has a unique identification number, and in case the information relating to the licence is not digitised by the stipulated time, it would become invalid.[6]

VICTIMS OF MURDER BY FIREARMS IN INDIA AND THE USA

There are 40 million illegal small arms in circulation in India, accounting for more than half the 75 million illegal small arms currently in circulation globally.[7] Today,

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4 Amarnath Tewary, "The Changing Face of Munger's Gun Trade", *The Hindu*, December 16, 2017.

5 *Ibid*.

6 *Infra* note 30.

7 Business and Human Rights International Center, Amnesty, Oxfam & IANSA launch intl. *Campaign to Regulate Global Arms Trade,* October 9, 2003 *available at:* https://www.business-humanrights.org/en/amnesty-oxfam-iansa-launch-intl-campaign-to-regulate-global-arms-trade (Visited on March 01, 2022).

India is second only to the U.S. in the proportion of civilians who own guns, and the number is growing.[8] There are only 3 guns for every 100 people in India, compared with 89 guns per 100 Americans, the world leaders, according to gunpolicy.org.[9] However, the research shows that India remains a far less violent society than the U.S., at 2.78 homicides per 100,000 people, compared with 4.96 Americans per 100,000. Indian gun lovers remain convinced, however, that the country needs more firearms given its low police-to-population ratio, among the world's worst.[10] The United Nation's Office on Drugs and Crime also shows that gun crime in India is relatively low with 7.6% of all murders in 2009 committed with guns as compared to, say, Mexico, where gun crime accounts for 54.6% of all crimes. Gun violence was 9% of the 241,986 crimes that were reported from India in 2010.[11]

According to the National Crime Records Bureau,[12] gun-related deaths increased from 3,063 to 3,775 between 2010 and 2016. But only 8.52 percent of the victims in 2016 in India were killed by licensed guns. The rest were killed by illegal weapons, largely prevalent in India. The average percentage of victims killed by licensed firearms during 2012 to 2016 is 10.06% only.

Victims of Murder by Fire Arms during 2012 to 2016

	Licensed Guns	Unlicensed Guns	Total Deaths
2012	323 (8.54%)	3458	3781
2013	324 (8.94%)	3297	3621
2014	540 (14.77%)	3115	3655
2015	356 (9.56%)	3366	3722
2016	322 (8.52%)	3453	3775
Average	10.06%		

After 2017 the NCRB has changed the structure of annual reports publishing "Crime in India" covering the crime statistics for the year and hence the data about the victims of murder by licensed and unlicensed fire arms is not available. On the other hand the data about the licensed and unlicensed fire arms used in commission of various crimes is available as follows-

8 Nilanjan Bhowmick, "At Gunpoint: India Tackles an Upsurge in Illegal Arms," *Time World*, November 28, 2012.

9 Mark Magnier, "Gun Culture Spreads in India," *Los Angeles Times*, February 20, 2012.

10 *Ibid*.

11 *Supra* note 8.

12 For details *see* http://ncrb.gov.in/.

Fire Arms used in Commission of Crimes during 2017 to 2020

	Licensed Guns	Unlicensed Guns
2017	419	35873
2018	337	38855
2019	310	44513
2020	395	44394

However, it has to be noted that an American is 12 times more likely to be killed by a firearm than is an Indian, according to an analysis by the group IndiaSpend, based on a database collated by Gun Policy, a global gun watch group.[13] Much like the U.S., India's gun violence follows socio-economic lines: Three of the nation's most economically depressed states, Uttar Pradesh, Bihar and Jharkhand, account for two-thirds of the nation's incidents, and an increasing number of firearms are popping up in these Indian cities. The statistics of the National Crime Record Bureau of India about number of victim murdered by firearms in these States is shown below.[14]

	2012	2013	2014	2015	2016
UP	1724 (45.60%)	1619 (44.71%)	1510 (41.31%)	1617 (43.44%)	1483 (39.28%)
Bihar	691 (18.28%)	755 (20.85%)	933 (25.53)	685 (18.40%)	959 (25.40%)
Jharkhand	207 (5.47%)	135 (3.73%)	89 (2.44%)	638 (17.14%)	792 (2098%)
Total Murders	3781	3621	3655	3722	3775

It has to be noted that this is statistics of 'murders' and it has not included other offences committed by using firearms which may include culpable homicides not amounting murders, hurt, grievous hurts, extortion, etc. Hence, the use of firearms for commission of crimes is many times more than the statistics given above.

MAGNITUDE OF MANUFACTURING OF FIREARMS IN INDIA

Today, in India, there are 97 privately owned gun-manufacturing units that have a licence from the Home Ministry. These are spread over States including Bihar, Uttar Pradesh, Madhya Pradesh, Jammu and Kashmir, Assam, Karnataka and Himachal Pradesh. The Munger Gun Manufacturing Units located in Fort area in the heart of Munger town includes 37 gun-manufacturing units at one place.[15]

State of Bihar

The state of Bihar is known for both legal and illegal arms factories and weapon shops. Specially, Munger district of Bihar has India's largest illegal arms cottage industry.[16]

13 Rama Lakshmi, "India Already had Some of the World's Strictest Gun Laws. Now it's Tightened Them", *The Washington Post,* August 01, 2016.

14 For details *see* http://ncrb.gov.in/.

15 *Supra* note 4.

16 Ranjit Bhushan, *Caste Bullets Ricochet*. .. , *Outlook,* vol.3, no.15, 9 April 1997, p.8.

There is a State-owned ordnance factory which makes weapons of various types and designs for licence holders. There are allegations that the workers from such factories provide expertise in making illegal weapons. Even after their retirement, the workers, with the acquired skill, go back to their native places and make arms and explosives illegally and sell it off. Even skilled persons train the unemployed ones so that they engage themselves in making arms and earn money. It resulted in a situation wherein 'mini-gun factories' are being started at the near-by places of Munger. It was also found that besides selling weapons, the traders rent out the arms for immediate and short-term use. The charge depends upon the urgency and usually varies from Rs 200 to more than few thousand rupees. This charge also depends on the quality of the weapon to be rented out.[17]

For over two centuries, Munger (Monghyr under the British Raj), located 210 km south-east of Patna on the southern bank of the Ganges, has been arming the subcontinent, both legally and illegally. Owning a gun has always been a part of the local culture, so much so that parts of Munger town are named after weapon components. "In Munger, it is easier to find a gun than a pen," says Manoj Sharma, owner of RK Gun House.[18]

On June 5, 1969, for "security reasons", the gun factories scattered all over Munger were shifted to one location, spread across 10 acres of land in Fort area. The production quota allotted by the government for Munger's manufacturing units is 12,500 guns a year. But not more than 2,000 are being manufactured here till today, says Sharma. "If this state of affairs continues, all of us will have to shut down our units," he says. "How will we survive when the demand is just for one or two guns in a month," asks Sharma.[19] "Munger-made illegal weapons look more sophisticated than the original ones made in the U.S. or Italy," says a policeman who has been raiding these illegal units for long. He further added, "... ... ... if given a chance, the Munger weapon workers would probably be able to make even rocket launchers and tanks. Such is their expertise and skill." In July 2013, the Delhi police seized 99 illegal pistols that had 'Made in U.S.', 'Made in Italy' and 'Only for Army Use' markings. Investigations revealed that all of them were from the illegal factories of Munger. The price list of the 'Made in Munger' catalogue goes something like this: a katta sells for ¹ 500; sophisticated revolvers and pistols appearing more original than international models such as Smith & Wesson or Beretta can be bought for ¹ 30,000 to ¹ 75,000; a 9mm or 7.65mm pistol (suspected to have been used in the murder of Kannada journalist Gauri Lankesh) can be bought for ¹ 25,000; and Insas rifles are available for a few lakhs.[20]

17 Jagat Ballav Pattanaik, *International Dispersal of Small Arms and its Impact on Political Violence in Contemporary South Asia*, (1997) (Unpublished Ph.D. Thesis, Jawaharlal Nehru University, Delhi *available at:* https://shodhganga.inflibnet.ac.in/bitstream/10603/16878/9/10_chapter%203.pdf (Visited on March 11, 2022).

18 *Supra* note 4.

19 *Ibid*.

20 *Id*.

State of Tamil Nadu

The state of Tamil Nadu is the cheapest place to buy arms such as the Ak-47.[21] The seeming transformation of the industrial city of Coimbatore into a major, weapon manufacturing base is a clear indication of the inroads of Tamil militants in Tamil Nadu. First evidence of this came in June 1989 when, with the state under President's rule, the security forces raided an arm manufacturing unit at Avarampalayam in Coimbatore, run by the activists of a breakaway faction of the Dravida Kazhagam who were staunch supporters of Tamil militant groups.[22]

The North–East India

In the north-eastern part of India many local arms bazaars are operating. Blackmarkets are particularly thriving in Dimapur of Nagaland, Shillong, Hojai town of Assam and Moreh. Earlier, Dimapur was serving as only .38 market but by 1987 much larger selection of weapons were available. The Hojai township, on the other hand, has been dominated by Muslim immigrants where arms bazaar reportedly coexist with a thriving perfume industry.[23] In recent times, the leading industrial city of Uttar Pradesh, Kanpur, is being flooded by arms manufactured in the factories of Pakistan. It is learnt that these weapons have been stocked in various godowns for weapons from which militants buy arms and - disperse it to other extremist groups.[24]

State of Madhya Pradesh

Security agencies estimate that some 200-300 families from every village in some parts of MP are involved in this illegal business, producing around 1,000 pistols every month in all, with each weapon costing Rs 8,000-10,000. Umerti, a village of 150 families to the south of Indore is considered the hub among all centres in Madhya Pradesh making illegal firearms. Umerti is on the border of Maharashtra and the Aniyar river divides the two states. Locals say that villagers swim across and take shelter in Maharashtra when the police launch a crackdown on their business.[25]

State of Rajasthan

In Bharatpur, located in the state of Rajasthan, the easy availability of weapons has had a role to play in every law and order situation here. Locals said that even a teenager can get a gun for just Rs 500.[26] BJP MLA Ramhet Jatav of Kishangarh Bas

21 Manimugdha S. Sharma, "How the Market for Illegal Weapons is booming in India", *The Economic Times,* November 25, 2012.

22 V. Padmanabban, "LITE: The Arms Base", *Frontline,* vol.8, 110.17, 17-30 August 1991, p.110.

23 Tara Kartha, *Role of Light Weapons in Militancy - The Case of Assam* (New Delhi, 1996), p. 9.

24 *India Speaks,* vol.3, No. IB, I May 1990, p.27.

25 Rahul Tripathi, "The Illegal Firearms Industry has moved from the badlands of Uttar Pradesh, Bihar and Madhya Pradesh" *India Today, October 09,* 2014.

26 Rajendra Sharma, "Easy-to-get Illegal Arms-Matter of Concern", *Times of India,* September 20, 2011.

constituency said in Alwar that if the people of the two sides did not have guns, there would have been no casualties. Illegal arms are made in almost 50 villages in Bharatpur and Alwar area in Rajasthan.[27]

Delhi: The Capital of India

"India is a land of rising gun violence. And this is especially true of a city like Delhi. Delhi/NCR has become a place where there is lot of black money and this is reflected in the rising property prices. Whether you buy a DDA flat in Vasant Kunj or a farmhouse in Chattarpur, the bulk of the payment is in black. This means a lot of ill-gotten money is changing hands. And it is people with black money who need the weapons. It is not people like you and me," says Binalakshmi Nepram, a leading anti-gun campaigner and secretary general of the Control Arms Foundation of India (CAFI).[28]

Explaining the fascination with guns, Nepram says, "People in India use guns as a status symbol. It is fine if it is kept safe but the problem is when it is taken out to settle personal scores, when children take it from parents and shoot their classmates dead, when quarrels over parking lots end in gun fights." As per a 2011 survey by CAFI, which was set up in New Delhi in 2004, 12 Indians are shot dead every day, taking the toll to almost 5000 a year. Painting a dire picture of gun culture in Delhi, Nepram further says: "Don't get into a fight on Delhi's streets, you never know what the person is carrying…In a country where 37 per cent of the MPs have a criminal background, a gun is considered an integral part of life, like a mobile phone is." [29]

State of Punjab

In Punjab, one in every 18 families has an arms licence. It lags far behind Uttar Pradesh that has issued 11.17 lakh licences—a state much bigger in size and in terms of population. However, Punjab is well ahead of the No.3 on the list, Madhya Pradesh that has 2.75 lakh arms licences, and neighbouring Rajasthan (1.67 lakh) and Haryana (1.12 lakh). Sources in Punjab's Home Department say the number of arms licensees has now touched the five lakh mark in the state, up from 3.75 lakh in 2012. The border district of Gurdaspur has the highest number of licences (35,793), followed by Bathinda (32,452), Ludhiana (26,362), Jalandhar (24,365) and Patiala (24,309). [30]

CONCLUSION

In India, the cumbersome gun licensing process and the gradual demise of the legal gun manufacturing industry has spawned innumerable illegal factories in Munger, and over the years, the entire district has become a hub for illegal weapons

27 *Ibid*.

28 *Supra* note 2.

29 *Ibid*.

30 Harpreet Bajwa, "Punjab Goes Great Guns," *Indian Express*, October 3, 2015.

manufacturing in the country. In villages such as Bardah, Baisar, Daulatpur, and Bara-Maksaspur, gun-making is a cottage industry. The production of country-made pistols, revolvers, guns, rifles, and even sophisticated weapons like carbines has given livelihoods to thousands of people, who toil in makeshift factories in dingy alleys by the banks of the Ganges. "From katta (country-made single shot pistol) to Kalashnikov, you can get any type of weapon in the illegal gun markets of Munger, provided you have the connections," Kumar says.[31]

The manufacturing and use of guns is increasing day by day in India. The smuggling of arms from Pakistan poses another problem. In Pakistan, a large number of authorities can grant weapons and licences even for the possession of automatic weapons. There is a thriving clandestine arms trade across the border. Many of the weapons are 'Dera made'. Dera is a bordering town in western Punjab where the manufacture of arms has become a cottage industry of sorts. It results in confiscation of a large number of firearms. One of the innovative initiatives taken in Bihar to deal with such situation is appreciable here. At present, more than 60,000 illegal firearms, stored in police stations across Bihar, are lined up to be melted and made into farming or agricultural tools. Before a gun can be melted down, there is plenty of paperwork to ensure legality of the process which starts after Court orders and under supervision of executive magistrates. "The seized illegal weapons in store at police stations are of no use once the case is over. They stink like dead bodies," Mr. Abhayanand, Director General of police, Bihar State said in an interview. Bihar police seizes about 60,000 weapons every year.[32] This may prevent illegal "come back" of such weapons in the society.

31 *Supra* note 4.

32 Amarnath Tewary, "In Bihar, Turning Guns into Farm Tools," *The New York Times*, November 17, 2011.

Democracy in India: Changing Contours

Dr. Surender Singh*

ABSTRACT

Presently, democracy described as 'Swaraj' because after achieving this we can not only participate in our political system, but also became the part of our decision making process. India got 'Swaraj' on 15th August, 1947 and it has been recognized as the largest democracy in the world. In this year we are celebrating 'Azadi Ka Amrit Mahotsav' on the occasion of 75th years of India's independence from colonial rulers. Unlike many newly independent countries in Asia, Africa and Latin America, where democracy was frequently eclipsed, or not allowed to foster roots at all, India has remained a lively democracy since its inception as an Independent state in the world. The legacy of the Indian Freedom Movement is one of the main reasons for this vibrancy of Indian democracy. Another role played by the ruling as well as opposition parties and various social organizations like Rashtriya Swayamsevk Sangh (RSS) in post independent period is also very vital to strengthening democratic values in the society. As far as democracy is concerned, it is not just an assurance of adult franchise; but creating environment for participation in the democratic process. Now, India's democratic system have crossed seventy four years and it has survived despite many countries have surrendered themselves to dictatorship and military rules not only in our neighbourhood, but also in the other parts of the globe. The success and failure of democracy means a lot for the future of democracy not only in India, but in other countries of the world. After getting the freedom in August 1947, India had chosen the Parliamentary democratic system for governance. In fact, India had no option than to choose it, because of freedom movements and socio-political awakening all over the world. The Constitution had illustrated India a parliamentary democratic republic, in which the Prime Minister is the head of government and President is the head of state. It means the government is based on federal structure, while the word is not used in the Constitution itself. Article 1 of Indian Constitution described "India is a union of States". It is clear that India is union not a federal structure of state. But one thing is very pertinent that our constitution has adopted the democratic system, which has not only

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affected the British system, but also influenced the constitutions of different countries of the world like USA, Canada, Germany, Japan, South Africa etc. In the present study an efforts has been made to analyse the working of Indian democratic system from independence to present. The policies of present Modi's government and its comparison with previous governments are the main thrust of this analysis. Which factors are responsible to weaken and strengthening our democratic system? What are the political social and economic implications of democracy for the society? The present analysis also examines the role of personality in Indian politics and focused on the various issues that have been arising to take time and issues between the Judiciary and Executive. Is merely participated in politics can addresses the problems of society? Besides, the role of youth, women and marginalized sections of the society in the politics are also the part of this study. It also analyses why these sections of the society are reluctant to political participation and what can be done to make them vigorous partners in India's democratic system. It is very significant to note that the success of democracy depends mainly on patriotic, progressive and honest people. Thus, these and others related questions are the main thrust of this study.

Key Words: *Indian Democracy, Swaraj, Azadi Ka Amrit Mahotsav, Rashtriya Swayamsevk Sangh, Jawaharlal Nehru and Narendra Modi.*

INTRODUCTION

Democracy is not just an assurance of adult franchise; but it also creates environment for the people to participate in democratic process. India is biggest democracy in the world. Now, India's democratic system have crossed seventy four years and it has survived despite many countries have surrendered themselves to dictatorship and military rules not only in our neighbours, but also in the other parts of the world. The success and failure of democracy means a lot for the future of democracy not only in India, but in other countries as well on the globe. Democracy is a guarantee of adult franchise and it also helps to create an environment for the people to participate in the political process and use their political rights, which has provided by the constitution to everyone. Has India been successful in this regard? As Chakrabarty described Indian democracy in an very sharp manner that,

> "It is difficult to arrive at a conclusive answer because of the apparent paradox one confronts when conceptualizing Indian democracy: on the one hand, popular zeal, which reaches the level of hysteria at times during the elections, almost evaporates once the politicians take over political authority and thus hardly functions as the custodian of both the democratic process and its value system. What is probably more alarming, on the other, is the gradual erosion of the institutions that are critical for democracy in its classical liberal sense. The perversion of the electoral system that fails to neutralize the forces challenging its very existence highlights a major lacuna in the political arrangement forced on India drawing on feudal instincts and primordial loyalties. So, democracy, a western concept, has failed to evolve in India, in its true form. Or, since the form of democracy is linked largely to the socio- economic compulsions of the day, India is likely to redefine its nature and contour since its socio-economic

environment is entirely dissimilar to that of the west. Nonetheless, India is perhaps the only example showing that it is possible to maintain, sustain and strengthen a functioning democracy in a very poor country despite enormous diversity in terms of language, religion, culture and ethnicity" (Chakrabarty, 54).

HISTORICAL DEVELOPMENT OF INDIAN DEMOCRACY

India got '*Aazadi / Swaraj*' on 15th August, 1947 and it has been recognized as the largest democracy in the world. Unlike many newly independent countries in Asia, Africa and Latin America, where democracy was frequently eclipsed, or not allowed to strike roots at all, India has remained a lively democracy since their inception as an Independent state in the world. The legacy of the Indian Freedom Movement is one of the main reasons for this vibrancy of Indian democracy. It has witnessed mass participation in the many political agitations. Even before the freedom movement took shape in India, Lord Ripon the British ruler took steps to educate Indians for self-government and this was the main reason, he has known as Father of Local self-government in India. Later on, in the Government of India Act 1919, Indians were granted limited autonomy and introduced the concept of 'diarchy' or dual government. Under the Government of India Act 1935, elections were held and Indian National Congress formed governments in the majority of the provinces (Banerjee, 58). The adoption of the new Constitution of India on 26th November, 1949 and the declaration of India as a Republic on 26th January, 1950 signed the age of Universal Adult Suffrage in India. By 'suffrage' is meant the right to vote and by 'Universal Adult Suffrage' is meant that an adult person is entitled to vote without any consideration of wealth, class, religion, race, or gender (Banerjee, 58).

A democratic type of government is run by the elected representatives of the ordinary people. Democratic government is based on the concept of welfare-state and ensures good opportunity for the overall growth and welfare of its people. So far as Indian democracy is concerned, it has based on peaceful coexistence of different thoughts and principles. The democratic trial of India is innovative not only in terms of expression, but also in substance. Political institutions that clutch the strength of democracy are continually restructured in view of the constantly changing socio-economic milieu within the larger universal pattern of liberal democracies. Political participation in India though parliamentary elections that were held in first two decades after independence, have based on a single issue referendum i.e. 'historical role of congress in India's freedom' that could appeal to a large section of the electorate irrespective of class, caste and creed' (Vanaik, 93). The Congress victory is attributed to its strategic resort to populist or plebiscitary politics in terms of electoral and mobilizational strategies. The Lok Sabha elections held so far since 1971 have been decided not by a plethora of promises made in election pledges, but by a single slogan that appeared decisive at a particular point in time because of peculiar historical circumstances (Vanaik, 93). "In 1971 it was G*aribi hatao*, in 1977 Emergency *hatao*, in 1980 Janata *hatao*, in 1984 *Desh bachhao*, which acquired a new majoritarian connotation

following the assassination of Indira Gandhi in 1984; in 1989 the campaign Corruption *hatao*, which had a two-thirds majority in the lower house of the Indian parliament in the 1984 election" (Chakrabarty, 55). In 1991 the campaign *Rajiv tera ye balidan yaad karega Hindustan*; in 1996 the campaign Sabko dekha bari-bari, abki bari Atal Behari; in 2004 the campaign *Bharat* udeye; in 2014 the campaign Ache din aayenge and '*Abki baar Modi Sarkar*' slogans have played very vital role in the elections. After seeing the entire history of Indian parliamentary democracy, one obvious outcome of the plebiscitary strategies deployed by Congress and now a day *Bhartiya Janta Party* (BJP) to sustain its political hegemony has been a long term tendency towards regionalization of 'oppositional' politics. The regional dimensions of this politics were seen in the growing consolidation of ethnic movements for self rule or autonomy and the formation of new political parties with a complete regional agenda. In this perspective it is very pertinent that "Congress was also divided into splinter groups in the regions for its inability to accommodate the new interests that gained salience at local level in a particular historical juncture" (Chakrabarty, 55).

What is, however, alarming in India's successful experience of democracy, "the rising tide of violence particularly during and after elections, which is probably a result of criminalization of politics a phenomenon undermining democratic practices and consolidating muscle power in politics" (Chakrabarty, 55). Recently the state sponsored violence in West Bengal after the assembly election in 2021 is the best example to understand the political phenomenon of political parties in our democratic system. Violence in the form of communal riots is an age-old phenomenon, which shaped India's fate during the 1947 transfer of power. The 1952 first general election held smoothly because of the mass excitement following the attainment of independence from foreign rulers. "Voters exercised their franchise enthusiastically, because there was a new awakening among the rural and urban women, there was a new consciousness of equality among the backward and the poor, who asserted their newly acquired right in large numbers" (Guha, The Statesman). Presently the situation is totally different, because the desire of all the political parties wants to capture power by any means, fair or foul of any cost.

FACTORS AFFECTING/ INFLUENCING INDIAN DEMOCRACY

Presently, India is considered as biggest democracy and most significant democratic country in the world. There are approximately 91.97 crore eligible voters in India and it has second most expensive elections after the United States in the world. The size of electorate in India has voted in 2019 to elect their representatives for 17th Lok Sabha, is as big as the combined electorates of 36 democracies in the world. For example, Tamil Nadu's electorate, which is 5.89 crore, is comparable to that of Turkey's 5.93 crore. Uttar Pradesh's 14.43 crore is nearly as big as Brazil's 14.73 crore (Ramani and Radhakrishnan). The electorate increased at an average rate of 11.2% every year since 1952 after the first general election was held. One more remarkable pattern is the number of Lok Sabha constituencies and polling stations. The number of constituencies has increased from 401 in 1952 to 543 in 2019, an increase of 35% seats (Ramani and Radhakrishnan). With an enhance in the number of seats, the number

of polling stations too have gone up from 1.96 lakh in 1952 to 10.35 lakh in 2019 a five-fold increase (The Economic Times). The year 2022 is celebrating *'Aazadi ka Amrit Mahotsav'* to commemorated the 75th years of India's independence. Various factors have strengthened our democracy and played very vital role in its working. Following are the main issues of Indian democracy, which are continuously affecting our political system from Nehru to present government.

I. ROLE OF PERSONALITY IN INDIAN DEMOCRACY

Personality in Indian politics has played a vital role in strengthening our democratic values. After getting independence from colonel rule the role of leaders of congress and opposition parties was very important, because they were much aware about this fact that if we sustain our political system for a long time then we will follow some basic rules of the democracy like equal participation, free and fair election, remove poverty and illiteracy, communal harmony etc. In this entire process the role played by the Jawaharlal Nehru is beyond doubt. After the assassination of M.K. Gandhi and the death of Sardar Patel, there was no one to compete with Nehru in stature. He was unquestionably the India's tallest leader from the day of independence and all he needed to do if anyone opposed and challenge him was to threaten to resign from the council of ministers. He generally got his way. But it doesn't mean, he was a power-hungry dictator, rather he preferred to resign than to compel his ideas. He was certainly a democrat and a leader so wary of the risks of autocracy that he not only authored many articles, but also warning Indians of the dangers of giving dictatorial temptations (Kothari, 1203). As Prime Minister "he watchfully nurtured democratic institutions, paying careful deference to the country's ceremonial Presidency, writing regular letters to the Chief Ministers of India's states explaining his policies, subjecting himself to cross-examination in Parliament by a fractious opposition and taking care not to interfere with the judiciary" (Tharoor, The Asian Age). Undoubted he was a towering figure in national politics and on the international stage, the reflective Nehru had not only written numerous books and given countless speeches, but also in his conduct as a Prime Minister developed and articulated a worldview that personified the aspirations of his generation. Moreover "Nehru was never tempted by the argument to which so many fellow heroes of the anti-colonial struggle in other developing countries succumbed that dictatorship was the only way for them to forge unity and direct development. By his speeches, his exhortations and above all by his own personal example, Jawaharlal imparted to the institutions and processes of democracy a dignity that placed it above challenge from would-be tyrants" (Tharoor, The Asian Age). Presently some critics, had blamed that Nehru was grooming his daughter to succeed him, but there is no evidence whatsoever that such a thought crossed his mind. In an interview in 1961 on the issue of succession he directly said that "I am not trying to start a dynasty. I am not capable of ruling from the grave. How terrible it would be if I, after all I have said about the processes of democratic government, were to attempt to handpick a successor. The best I can do for India is to help our people as a whole to generate new leadership as it may be needed" (Tharoor, The Asian Age). Thus, the towering personality of J.L. Nehru after the

death of equally towering personality of Sardar Patel gave almost dictatorial status to Pandit Nehru. Inspite of democratic behaviour of Nehru Indian politics became personality orientated. With the result after Nehru era Prime Ministerial post became personality orientated. This personality volt influenced all most all political parties' particularly regional parties. This personality oriented political parties system has resulted into familial politics, which has further eclipsed the ideological basis of political system. Providing BJP accuses other's political parties for familial politics and it seems that this very basis BJP is getting public support. It seems young and educated voter is not favouring this familial politics, which is sign of monarchical values. In a democratic system monarchical and aristocratic values can never prevail. Infact we have ignored the warning of Dr. B.R. Ambadker in this regard as he rightly pointed out that,

> "We must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not 'to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institution'. There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel O'Connel, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity, and no nation can be grateful at the cost of its liberty. This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in politics of any other country in the world. Bhakti in religion may be a road to salvation of the soul. But in politics Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship" (Constituent Assembly Debate, 8-9).

II. ROLE OF WOMEN IN INDIAN POLITICS

The Constitution of India has brought the women legal equality on every sphere of life social, economic and political. Constitutional provisions allowed the women to leave their relative calm of the domestic sphere to enter in the male dominated political sphere; but the involvement of women in politics has been very low. However in every election, we have seen positive growth in the number of women Members of Parliament (MPs). In 17th Lok Sabha 78 women has been elected in 2019, which is highest since 1952. At the national-level, the 2019 Lok Sabha elections saw an increase in representation of women and 14% of women MPs have elected for Lower House of the Parliament, but the situation at the state-level are not much appealing, where just only 9% women elected to legislative assemblies. In recent times participation of women in Indian Parliament has increased corresponding to only their increased numerical strength, but also due to their statues in Indian politics as Meera Kumar and Sumitra Mahajan became speaker in Lok Sabha; Sonia Gandhi as Chairperson of United Progressive Alliances influenced parliamentary debates along with decision

making process of the government during 2005-2014. Sushma Swaraj known for her ability and oratory skills, first not only influenced parliamentary discussions than as first woman Foreign Minister decide government policies. In present Lok Sabha, Smriti Irani as minister and as active member, Mahua Moitra as firebrand opposition members is used to get limelight in Parliament. Nirmala Sitaraman, first independent women Finance Minister is credited to decide the fiscal policies of present government. These are few example of influential participation of women in Indian Parliament in recent times; otherwise participation of women in Indian Parliament is manifold.

Table No. I: Women MP's in Lok Sabha 1952-2019

Sr. No.	Year of Lok Sabha Election	Number of MP'sin Lok Sabha	Number of Women MP's in Lok Sabha	Percentage Women of MP's in Lok Sabha
1	1952	489	24	4.9
2	1957	494	24	4.8
3	1962	494	37	7.4
4	1967	520	33	6.3
5	1971	518	28	5.4
6	1977	542	21	3.8
7	1980	542	32	5.9
8	1984	533	45	8.4
9	1989	545	28	5.1
10	1991	545	42	7.7
11	1996	545	41	7.5
12	1998	545	44	8.0
13	1999	545	52	9.5
14	2004	543	52	9.5
15	2009	543	64	11.7
16	2014	543	68	12.5
17	2019	543	78	14.3

(*Source*:- https://loksabha.nic.in/Members/womenar.aspx?lsno=16&tab=0)

Table No. II: Women MP's in Rajya Sabha 1952-2022

Year ofRajya Sabha Election	Number of Women MP's in Rajya Sabha	Percentage Women of MP's in Rajya Sabha	Year ofRajya Sabha Election	Number of Women MP's in RajyaSabha	Percentage Women of MP's in RajyaSabha
1952	15	6.9	1988	25	10.6
1954	17	7.8	1990	24	10.3
1956	20	8.6	1992	17	7.2
1958	22	9.5	1994	20	8.3
1960	24	10.2	1996	19	7.8
1962	18	7.2	1998	19	7.7
1964	21	8.9	2000	22	9
1966	23	9.8	2002	25	10.2
1968	22	9.6	2004	28	11.4
1970	14	5.8	2006	25	10.2
1972	18	7.4	2008	24	9.8
1974	18	7.5	2010	27	11
1976	24	10.1	2012	26	10.6
1978	25	10.2	2014	31	12.7
1980	29	12	2016	27	11
1982	24	10.1	2018	28	11.4
1984	24	10.3	2020	25	10.2
1986	28	11.5	2022	29	12.2

(Source:- https://thewire.in/women/women-parliament-lok-sabha-rajya-sabha-politica-parties & https://rajyasabha.nic.in/rsnew/member_site/women.aspx)

However, representation consequently influence of women in Indian Parliament is not satisfactory. Reservation of women in Parliament has become mirage. Each and every political party is not giving tickets to women in the name of winning ability, which is myth as winning strike rate of women is high in comparison to men. There is a great need of women representation in the Parliament for dignified, developing democracy of India. Thus, the participation of women is very crucial as a demand of simple justice as well as an essential condition for human existence. This can be achieved not just by increasing the numbers but by ensuring that women leaders perceive the problems and effectively resolve the issues. The acceptance of their own equality and confidence in their ability will go a long way in altering the political scenario. Presently women role in politics are increasing very strongly and influencely. The recent victory of BJP in Uttar Pradesh and Uttrakhand is due to this phenomenon. BJP has adopted many women centric welfare policies like, Tipple Talaq, Women Helpline Scheme, UJJAWALA scheme, NIRBHAYA, SWADHAR Greh, Rajya Mahila Samman, Women Helpline scheme and most popular Beti Bachao Beti Padhao are case in point to strengthen women role in the society. One thing is very pertinent that after 2014 there are many things happened at regional and central level that motivated women and their participation are increasing in politics. It is a positive development, because today's women voter is tomorrow leaders. Due to this government policies women participation in politics not only increasing, but society also accepted their role at large.

III. ROLE OF YOUTH IN INDIAN POLITICS

Some political analysts are of the view that youths in India are not participating in politics to the desired extent. The role of youth in politics can be distinguished between nonstudent youth and student youth. "For the student youth, the pressure of career and the desire for prestigious jobs make them impervious to an ideology which requires understanding and action. The non- student youth are so much preoccupied with making a living that for them also ideology based political action is not possible" (Damle). One more thing seems to be very pertinent at presently that youth have opted to compromise rather than fighting with injustice, inequalities and discriminations. They have channelized their energies in the self-survival process rather than in building the nation. Politics now a day is associated with unfair power games, therefore, a large number of the youth avoid it. In broadest term, political actions are the process of social change being guided by a political kind of social realities. Defiantly young people want to change in the system but they feel their voices are bound to get lost in the political rhetoric. That is why they prefer to opt out rather than be a part of the same structure. Many political observers would be agreeing with these assessments, but all observers, however do not agree with these views that youth are politically apathetic. In India lakhs of Panchayats and Municipalities are there in rural and urban areas, where several lakhs young men and women are serving as office bearers in various capacities like Sarpanch, Panch, Chairperson, Mayor, Municipal Councilor etc. and majority of them are below the age of 40 years. Thus, this allegation is away from fact that youth are apathetic to politics. If the young people are uninterested about politics it is mainly because of the system's weakness for political institutions, the closed door functioning of political bodies and the special status given to politicians (Natarajan, Times of India). These are the negative issues and breed disgust between ordinary people.

In perspective of political participation, we will consider the people who are below the age of 40 years as 'youth'. About Indian politicians someone have very sharply analyzed, "when we see a person of above 50 years, who wear a white *Kurta* and sometime flashing a *Gandhin Topi* comes to describe the average politician of the world's largest democracy, the country with the world's largest youth population, one can wisdom that something is wrong. In spite of being one of the world's youngest democracies, the percentage of the young members of Parliament in India is just 12% which is not only a drawback to the representativeness of the democracy but also a major contributor to the negativity that comes to surround our country's politics" (Tewari). That is why Ramachandra Guha a well known Indian historian, argues that the country is only "fifty per cent a democracy, holding viable elections, but falling short when it comes to the functioning of politicians and political institutions" (Guha). Since pre- independence period, Indian youth has played very vital role in the country's political process by participating in social and reform movements. After the independent the youth continues to participate in local community campaigns, protests and petitions by using the social and mass media platforms through internet as paths to express their political opinions. Unfortunately present Indian political

scenario is full of with nepotism, caste politics, criminalization of politics and politics of criminals, rampant corruption, lack of accountability and indifference towards people's needs pervading the political system, politics as a career has lost appeal amid the youngsters. Therefore, most of our potential human resources have chosen the way to go abroad for higher education, job security, higher standard of living and settling their eternally.

Youth can change the system through their politics by actively pursuing it and by giving meaning to the dynamics of their cause. In our country there are some formal students wings of political parties like NSUI, SFI, and ABVP have totally dedicated to the young people participation in politics. However, we have few young politicians, they have not been allowed to work independently and most of them like Sachin Pilot, Varun Gandhi, Jyotiraditiya Sindhia, Akhilesh Yadav, Tejashwi Yadav, Dushyant Chautala, Aditya Thackeray, Deepender Singh Hooda, Vikramaditya Singh, Abhishek Banerjee etc. are from influential political families of the country. In last two decades the number of youth in Lok Sabha is also not very impressive in comparison with initial decades after independence. It was happened as the impact of Indian freedom struggle and Jawaharlal Nehru vision regarding democracy and socialist approach.

Table No. III

The Presence of Young MP's in Lower House of Parliament 1952-2019 Years (Lok Sabha)

Sr. No.	Year of Lok SabhaElection	Number of MP's in Lok Sabha	Number of MP's below the age of 40 years
1	1952	489	140
2	1957	494	164
3	1962	494	109
4	1967	520	127
5	1971	518	106
6	1977	542	105
7	1980	542	117
8	1984	533	112
9	1989	545	93
10	1991	545	105
11	1996	545	102
12	1998	545	65
13	1999	545	78
14	2004	543	61
15	2009	543	81
16	2014	543	71
17	2019	543	64

In below mentioned Table-III, we find that the number of young MPs in the lower house of Indian Parliament Lok Sabha has gone down continuously. It has clearly

shows that the youth participation in Lok Sabha declined continuously. In last two decades the number of youth in Lok Sabha is also not very impressive in comparison with initial decades after independence. It was happened as the impact of Indian freedom struggle and Jawaharlal Nehru vision regarding democracy and socialist approach, which have influenced the mind of youth to participate in politics.

But, the last decade of twentieth century and first decade of twenty first century has witnessed paradigmatic shift in global politics. The start of globalization, privatization and liberalization based market economy in India have totally changed Nehru envisaged socialistic pattern of society. Now ideology and political issues become irrelevant and economics issues became more relevant. As a result, politics instigate to be seen as a power game to achieve their selfish interests of any cost. This had a harmful impact on the political options of the youth. That is why, youths became more career conscious, more self-centered and thought less about joining the politics and serving the nation.

IV. SECULARISM AND COMMUNALISM IN INDIAN POLITICS

Secularism and Communalism are twin siblings of independent India, as independent secular India had to accept division of country on communal basis. To ensure secular credential to religious minorities constitution makers gave fundamental right of 'Cultural and Educational Rights' along with fundamental rights of 'Equality and Religious Freedom'. However politically these fundamental rights have been used and misused with the aim of creating vote- bank on communal basis, resulting into deep communal bias, distinction, and settlement socially, leading to communal riots. In the name of secularism so-called apparent policy was adopted by major political parties bearing *Jan Sangh* present day BJP. Emergence of BJP vis-à- vis decline of so-called secular parties at present is the result of 'Law of Diminishing Returns' and Third Principle of Newton Law', while the emergence of so-called *Hindutva* seems to be direct reaction against 'appeasement politics for minorities by so-called secular political parties'. Similarly 'politics of minority vote-bank' now working on diminishing returns as it is consolidating emerging majority vote-bank to large extant.

Tolerance, which is backbone of secularism, has lost the ground to intolerance, which is backbone of communalism. In this process we are losing our '*Swarajya*'. Dr. Radhakrishnan speaking in the midnight session of the Constituent Assembly on 14-15 August, 1947 had rightly observed that as "…I have no doubt that, the future of this land will be as great as its once glorious past.

Sarvabhut disahamatmanam
Sarvabhutanicatmani
Sampasyam atmayayivai
Saarwajyam
Adhigachti

Swaraj is the development of that kind of tolerant attitude, which seen in brother man the face divine. Intolerance has been the greatest enemy of our progress. Tolerance

of one another's views, thoughts and beliefs is the only remedy that we can possibly adopt" (Constituent Assembly Debate, 979). But, are we adopting tolerance or increasingly lining towards intolerance? It is a big question which should be addressed immediately otherwise it might be too late to correct.

V. RELATIONSHIP BETWEEN JUDICIARY AND GOVERNMENT

Irrespective of form of government, a constitutional democracy can be judged on the basis of working of Judiciary vis-à-vis its relations with the government. Indian constitution envisages an independent judiciary, which is not only interpreter of the constitution and law but also defender of the constitution through dispenser of the justice. An independent judiciary needs neither cordial nor confrontational relations with the government; it needs only smooth relations based upon check and balance principle. An overview in this regard shows by and large Indian judiciary had smooth relations with occasional strained and bit confrontational too relations. While various laws including constitutional amendments have been declared null and void by the judiciary; at the same Parliament has also nullified various judgments through legislations and constitutional amendments. Executive abuses have been checked, controlled, and prevented by the judiciary. Though on many occasions strained relations between them have developed due to various reasons like appointment of judges, supersession of judges etc; yet majority of the time smooth and conciliate relations have prevailed. Independent judiciary depends ultimately on the conduct of the judges. We are fortunate having neither plaint nor adverse judges. Independent judiciary, in real terms, is enjoying the confidence of the people.

VI. RELATIONSHIP BETWEEN GOVERNMENT AND BUREAUCRACY

Bureaucracy is a link between the government and the people in a democratic polity. The government formulate policies and got implemented these policies through the bureaucracy. The government and the bureaucracy are two sides of same coin. Though the government as political institution is supposed to be boss of bureaucracy as administrative institutions, yet there is always possibility of bureaucratic dictate over the government because of its specialist knowledge. The role of bureaucracy is day by day increasing. It is very true that more the welfare schemes more the role of bureaucracy; more the responsive government more the responsible bureaucracy. Underline the relationship and role of administration, Prime-Minister Shree Narendra Modi has rightly observed that-

> "Bureaucrats have committed to three goals. The first goal is that there should be a change in the life of the common people. Their life should be made easy and they should be able to feel this ease. The common people should not have to struggle in their dealings with the government. Benefits and services should be available without hassle. Secondly, the PM noted that it was imperative that things should be done in the global context. 'If we do not follow the global activities, it will be difficult to ascertain our priorities and focus areas'. Thirdly, he said, 'Wherever we are in the system, our prime responsibility is

> the unity and integrity of the country. There cannot be any compromise on this. Even local decisions should be measured against this touchstone'" (The Tribune, 14).

VII. ROLE OF NGOS & SOCIAL ORGANIZATIONS

Fundamental rights to freedom provides right to form or join any association. While social service is an essential ingredient of our culture, increasing awareness regarding social, economic, human, national, international issues have given impetus to NGO's and social organizations supported by not only Indians, NRI's and international organizations also. Thousand of organizations at grass root level are doing wonderful job to achieve the goal of welfare state, integrated state and community apolitically. However, hundreds of organizations have implicit political agenda also.

The oldest, since 1925, and largest social organization in our country is *Rashtriya Swayamsevk Sangh,* whose core philosophy is of Hindu culture and nationalism. In every sphere of national life we will find RSS at the frontline be it natural disasters or national crisis. It is much abused as well as praised organization politically also. It has emerged as a supportive organization to BJP from the day of its inception in national politics. It has worked as a political nursery to BJP. After the independence, the focus of the congress shifted to wielding the rein of power, resulted it became disconnected from the people. In this environment of congress domination, BJP honed its party machinery with a greater focus on engagement with the people and RSS has provided her political base in the society through their cadre and helped her to fight the then dominant party (Yadav & Patnaik, 232).

Thus, in the history of our democratic republic well known scholar and political expert Yogandra Yadav described three distinct phases and said Indian democracy was very much a top-down affair, where 'an invitation by the Indian elite to ordinary voters to join them in playing a new game according to their rules'. He further described that,

> "The Nehruvian phase is the first phase of Indian democracy is widely seen, and rightly so, as a period of consolidation…The second phase of Indian democracy, described by Yadav as 'coming of age', began in 1967, in which year the Congress began to lose its hold in many states that it previously had a firm grip of…The third phase of Indian democracy began in the late 1980s, with the emergence of the 'three Ms' – *Mandal, Mandir, and Market*…This third phase saw a further deepening of the democratic process through the vigorous participation of subaltern groups. There, the poor were more apathetic than the rich when it came to casting their vote; whereas here it was the reverse, with Adivasis, Dalits and Muslims in villages and small towns more likely to exercise their franchise than wealthy upper-caste Hindus in the cities" (Yadav, 2020).

CHALLENGES TO INDIAN DEMOCRACY

This is a true fact that India is a democratic country and faced many challenges on various fronts. There is no doubt presently youth are the largest voters age group in the country. It is a common phenomenon that future of a democratic country becomes beautiful by active participation of all sections of the society. But in India largest group of voters are not actively participate in democratic process. Following are the main challenges to Indian politics.

- First, present Indian politics has dominated by veteran and familial leaders and only a few young people are in politics. Due to this familism, casteism and nepotism have taken the place of honesty and capabilities and intelligent person is out from system.
- Second, corruption in politics becomes a common phenomenon and the way the stories of corruption of politicians are coming out every day; the indifference towards politics is increasing among the voters of our country.
- Third, political atmosphere of the country is worsening day by day and true politicians have been replaced by people, who are greedy for wealth, hegemony and power.
- Fourth, every person wants to live a delightful life and touch the heights. Intelligent and most capable people of India want to settle abroad rather than contribute to social life of India.
- Fifth, criminalization of Indian politics is the biggest challenges to Indian democracy. Due to this people thought that why they are wasting their time. They choose the other ways for a happy and peaceful life, rather than to fighting with criminals.
- Sixth, things like unemployment and role of money in system are also badly affected the political scenario of our country. The role of bribes to get a ticket in election is also not appealing to the voters.
- One more factor hindering political participation among the voters is the lack of quality political education. This is very true fact that people's engagement in elections as voters only and established politicians never bothered about their participation.
- Another, political parties also given the high emphasis to those politicians and candidates put on their experience and political knowledge. In such a situation, common man may be led to believe they have nothing to contribute to society as decision makers and policy planners.
- Moreover, challenges to Indian democracy are communalism and low participation in political activities in our country due to weak democratic culture. We have recorded many times very low turnout in elections.

THE WAY FORWARD

Now, we are celebrating 75th Anniversary year of India's independence in terms of '*Aazadi ka Amrit Mahotsav*', but we found that participation of youth, women and marginalize sections of the society in political activities is lower than normal. Now time has come for a complete change in the system and the participation of common man should be increased to a great extent. Election Commission of India, governments, educational institutions, corporate sector, and NGOs will play very important role in this regard. Following steps should be taken by the authorities for active and equal participation of each and everyone.

- First of all, ECI will reduce the voting age from 18 years to 16 years. The government decision regarding "National Voters Day" is a welcome step. On this day, new voters will be felicitated and given a badge containing the message "Proud to be a voter-Ready to Vote. Voters will also take the following pledge; that "We, the citizens of India, having faith in democracy, hereby pledge to uphold the democratic traditions of our country and the dignity of free, fair, and peaceful elections and to vote in every election fearlessly and without being influenced by considerations of religion, race, caste, community, language, or any inducement" (Election Commission of India).
- Secondly, politics need to be open up to youth and women leaders. Given a chance they would be ready to change the political condition of the country in a better way. The dissatisfaction shown by the youngsters towards the cases of rape, female rights and politics of reservation is the best examples of their awareness regarding problems facing our country.
- Thirdly, the ECI will try to introduce online voting in elections. First of all it will introduce in local bodies elections. This is a new procedure and need of hour, and it will help to increase the participation in democratic process.
- Fourthly, the higher education institutions can also play a very vital role to increase participation and strengthen of our democracy. Regular awareness campaigns should be undertaken, because these campaigns will be essential to convey the massages to the voters that every vote counts and all citizens have a duty to protect and strengthen of our democracy.
- Beside, corporate houses and voluntary organizations will also play a very important role for politically mobilization of the youth. The effort of Tata Tea has been very remarkable in this perspective, when they have started the "JaaGo Re! One Billion Votes" campaign mainly targeted to the youth (Research Foundation for Governance in India).
- Furthermore, political education is must for awareness of youth, women and marginalised section of the society. As we have seen many times voters are confused lot. Such education should be based on theoretical and practical aspect of our democracy.

- Another, political participation of the all the sections needs to be expanded beyond the casting of a vote. Various steps should be taken in this perspective i.e. political awareness campaigns in schools, colleges and universities, skill training to younger politicians and community development programmes. Like 'National Youth Parliament' a 'Women Parliament' will also be organised in disciplined manner.

CONCLUSION

Thus, the Indian democracy is a supreme power in the hands of whole society. The aim of our democracy is the common welfare of its people. It has not only provided the guarantee of popular control, popular responsibility, universal suffrage, but also government remains accountable to its people. If we want our democracy to stay alive, we should be much more cautious and youth should be much more educated to understand the importance of democratic values and political ethics. The role of youth and women becomes more vital in compression to other sections of the society. Therefore, we must be enlightening the masses so that they may be in a position to emphasize their democracy in the real sense of the expression. In the last one decade, India has witnessed tremendous 'political awakening' of its voters. The increasing concern over national issues among youth has translated strongly into political action as thousands of young people had taken to the streets in 2011 to protest against corruption, in 2012 to protest against rape and farmer's agitation in 2021. Despite the encouraging signs of massive participation in above movements, politics in India remains dominated by veterans. Youth and women have fighting and will be fight for their identity in politics. The rapid changes in social and economic sphere have deeply affected the life of voters in everywhere. Thus, the emergence of Aam Aadmi Party has provided an opportunity as well as a platform to the common voters to use their potentiality in politics. The words of Father of the Nation still very much relevant presently as he described the Swaraj thus, "Swaraj was an attempt to regain not just freedom but also control of the self-our self-respect, self-responsibility and the capacities for self-realization from institutions of dehumanization. In his vision, politics was not a means to power but an act of service" (Yadav & Patnaik, 2).

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Correlation of Selected Technical Skills with Playing Ability among Sub-junior Level Soccer Players

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ABSTRACT

Soccer is at top of all competitive sports throughout the globe. The game keeps changing rapidly in recent times because of the players' improved physical fitness, motor fitness, and technical and tactical approach. Successful performance in soccer hence requires an enormous number of capacities and one of them is technique.

The soccer players who want to be the best always must have the strongest technique. Technique refers to the connection and synchronization a player demonstrates with the ball and portrays the performance of a single action in seclusion from the game, e.g., a shot or a pass. Among various technical skills, the more frequently used ones are passing, shooting, dribbling, and juggling. But which technical skill is more important and more associated with the playing ability in the sub-junior level soccer players is yet to be known. The purpose of this study is to find out the correlation between these technical skills with the playing ability of sub-junior-level football players.

The subjects selected for this study were 175 soccer players in the age group between 12 and 13 years belonging to the coastal area of Thiruvananthapuram, Kerala. They have experience playing soccer for three to four years. J. H. A Van Rossum and D. Wijbenga Test and Five Point Rating Scale were used to assess the technical level of the subjects and were administered according to the exact procedure of the tests.

Goal kicking for Accuracy, Dribbling, Juggling, and Ground passing for Accuracy were the selected technical skills. Playing ability was assessed by coaches' rating on 10 points scale. Players were asked to play the normal game and three coaches were asked to rate the performance of each player.The average of the three scores was taken as the score for the playing ability of each player.

Descriptive statistics and Pearson's correlation coefficients were applied to establish the relationships among the variables measured. Data were analyzed using SPSS (Statistical

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Package for Social Science) version 15.0. The level of significance was fixed at 0.05.

There is correlation exists between the selected technical skills and the playing ability of sub-junior soccer players. Hence, the result of the study reveals that juggling, dribbling, passing, and shooting have a significant correlation with playing ability. Among the selected independent variables shooting and passing have a higher correlation followed by juggling and dribbling. Shooting, passing, and juggling is having a positive correlation, and dribbling is having negative correlation as the less time taken to complete the dribbling shows the better performance.

Key Words: *Soccer, technical skills, playing ability.*

INTRODUCTION

Soccer is at top of all competitive sports throughout the globe. The game keeps changing rapidly in recent times because of the players' improved physical fitness, motor fitness, and technical and tactical approach. Successful performance in soccer hence requires an enormous number of capacities and one of them is technique. Football is classified as an invasion game featuring a ball therefore, it is well-accepted that technical performance is important for players and teams to achieve success. Technical proficiency is particularly important in the development of young football players. The most needed technical skills are passing, shooting, dribbling, and ball control.

The soccer players who want to be the best always must have the strongest technique (Huijeng et al., 2010)6. According to Christopher (2005)[4], video recording of players performing technical skills such as passing, shooting, and heading can be used to evaluate the technique, provide feedback and help design relevant practice sessions. And this helps coaches and players to re-process their coaching and training process. In soccer, like the other coaching components, the technical skills of players play a vital role in the effective execution of the game. Sam S (2010)[13] strengthened this as, soccer techniques are one of the main components of soccer; fitness, tactic, and psychology. The actual execution of a movement is always in the realm of technique. From this, we can comprehend that soccer techniques are the tools to play the game that we apply using the mind and the physical body.

Technique refers to the connection and synchronization a player demonstrates with the ball and portrays the performance of a single action in seclusion from the game, e.g., a shot or a pass. Technical practice entails players working in isolation on the various aspects of the game ranging from shooting, heading, dribbling, and goalkeeping. Here, decision- making in coordinating with other team members is limited as the focus is on how one could perform the technique or required action. Practicing these techniques in remoteness from the game or game-type circumstances is uncreative for gifted players but appropriate for beginners to the game. The mark of an experienced player is smooth, proficient motion, and the aptitude to elegantly switch between diverse soccer techniques and moves. Among various technical skills, the more frequently used ones are passing, shooting, dribbling, and juggling. But which technical skill is more important and more associated with the playing ability in the sub-junior level soccer players is yet to be known. The purpose of this study is to find

out the correlation between these technical skills with the playing ability of sub-junior-level football players.

METHODOLOGY

The subjects selected for this study were 175 soccer players in the age group between 12 and 13 years belonging to the coastal area of Thiruvananthapuram, Kerala. They have experience playing soccer for three to four years.

J. H. A Van Rossum and D. Wijbenga Test and Five Point Rating Scale were used to assess the technical level of the subjects and were administered according to the exact procedure of the tests. The description of the test items is detailed below.

Goal kicking for Accuracy: The test constructed by J. H. A Van Rossum published by SAI was adapted to measure kicking accuracy with the instep of the foot. The goal was divided into three equal parts with the help of a rope tied vertically: right, middle, and left part. The stationary ball was kicked five times with the preferred foot into the predetermined part of the goal from outside the penalty area (distance to the goal: 16.5m). Out of five attempts, two were kicked into the right part of the goal, two into the left part of the goal, and one into the middle part of the goal. The kicks were performed in the above-said sequence. The ball must cross the goal line in the air with desired speed and force in the kick. Each kick was evaluated out of three points and a maximum of 15 points were awarded for the five kicks depending upon the accuracy and speed of the ball entering the goal.

Dribbling: The purpose of this test was to measure the dribbling ability with speed, agility, and ball control of the subject in terms of time taken by him. A starting line was marked and nine cones were placed in a straight line at a distance of 1.5 meters one after the other. At the signal "GO", the player was asked to dribble the ball around the cone in a zig-zag fashion and returned in the same manner to the starting line. The subject was free to choose either of the two feet to dribble the ball. The score of each subject was the time taken to complete the distance measured to the tenth of a second. The subject was given two chances and the average of the two trials was recorded as the score.

Juggling: This test was administrated to measure the ball control of the subjects. The subjects were asked to juggle the ball as many times as they can by using all parts of the body, except hands/arms. For each ball contact, one point was awarded. Each subject was given two trials. The average of two trials was recorded for the score awarding up to a maximum of 100 points.

Ground passing for Accuracy: As per the test conducted by Van Rossum, a five-meter-long starting line was drawn and two cones (1.5 meters apart) were placed 20 meters away from the starting line. The subject was asked to pass the stationary ball from on or behind the starting line. The ball has to be passed between the two cones. The ball must not rise from the ground. Each pass was evaluated out of three points and a maximum of 15 points were awarded to the subjects for five passes based on the accuracy and speed of the ball crossing the two cones.

Playing Ability: Playing ability was assessed by coaches' rating on 10 points scale. Players were asked to play the normal game and three coaches were asked to rate the performance of each player. The average of the three scores was taken as the score for the playing ability of each player.

Descriptive statistics and Pearson's correlation coefficients were applied to establish the relationships among the variables measured. Data were analyzed using SPSS (Statistical Package for Social Science) version 15.0. The level of significance was fixed at 0.05.

RESULTS

The descriptive statistics for selected technical skills and playing ability of the players are presented in the table below.

Table 1: Mean and Standard Deviation of Selected Technical skills and Playing ability of Sub-junior level Soccer Players

	Mean	Std. Deviation	N
Juggling	55.7029	16.21702	175
Dribbling	22.8363	2.42958	175
Passing	8.0400	2.57387	175
Shooting	7.8629	2.53562	175
Playing Ability	5.1063	1.24343	175

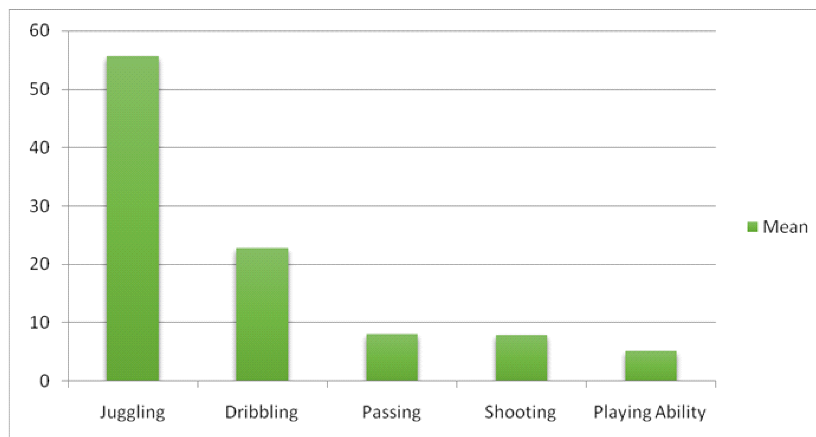

Figure I: Mean Technical skills and Playing ability of Sub-junior level Soccer Players

Table 2: Correlation Matrix of Selected Technical skills with Playing ability among Sub-junior level Soccer Players

		Juggling	Dribbling	Passing	Shooting	PlayingAbility
Juggling	Pearson Correlation	1	-.642**	.286**	.484**	.469**
	Sig. (2-tailed)		<.001	<.001	<.001	<.001
	N		175	175	175	175
Dribbling	Pearson Correlation		1	-.346**	-.547**	-.453**
	Sig. (2-tailed)			<.001	<.001	<.001
	N			175	175	175
Passing	Pearson Correlation			1	.604**	.618**
	Sig. (2-tailed)				<.001	<.001
	N				175	175
Shooting	Pearson Correlation				1	.690**
	Sig. (2-tailed)					<.001
	N					175
PlayingAbility	Pearson Correlation					1
	Sig. (2-tailed)					
	N					

**. Correlation is significant at the 0.01 level (2-tailed).

It is evident from the above table 2 that there iscorrelation exists between the selected technical skills and the playing ability of sub-junior soccer players. Hence, the result of the study reveals that juggling, dribbling, passing, and shooting havea significant correlation with playing ability. Among the selected independent variables shooting and passing havea higher correlation followed by juggling and dribbling. Shooting, passing, and juggling is having a positive correlation, and dribbling is having negative correlation as the less time taken to complete the dribbling shows the better performance.

In football games,there are four basic techniques- dribbling, passing, controlling, and shooting the ball into the opponent's goal. From the point of view of an attacker, the goal of football is to shoot at the goal. Among the basic techniques above, the most important technique is kicking the ball (shooting). Kicking the ball can be done with a ball at rest, the ball rolling or the ball floating in the air. However, the main purpose of kicking the ball (shooting) is to put the ball into the opponent's goal, and to achieve that goal the ability to kick the goal is very instrumental (Ridwan, 2019)[11]. A player must be able to kick well and on the desired target(Bettega et al., 2018)[3]. The game of football is to enter the ball into the opponent's goal as much as possible and defend the goal itself from being broken in to obtain victory (Thoriq Al Mundiri, M., and Widodo, 2019) [14]. Scoring goals and winning the game is the aim of soccer. Soccer players at the initial stages of playing wish to score goals and they think that

those who are scoring goals are appreciated by everyone. Hence, they tend to concentrate more on shooting practice and try to score more goals at the sub-junior level.

This may be the reason for shooting havingthehighest correlation with the playing ability of soccer players at the sub-junior level.

Passing in soccer involves giving the ball to a teammate (Bate, 1996)[2]. Passing is the most important soccer skill, and soccer players must be acquired it consciously and individually (Hargreaves, 1990)[5]. Bad passing destroys a team, but good passing builds team confidence and momentum. Largely a matter of teamwork is good passing. Good communication between teammates and mobility of players helps purify passing (Russell et al., 2010) [12]. Passing is an art and largely the art of doing simple things quickly and well (Ali and Williams, 2009[1]; Impellizzeri et al., 2008)[7].Sam (2010)[13] explained also that passing technique is the core of the soccer game; it allows a team to keep possession of the ball, set up attacks, change the direction of play, counter-attack, and provide a decisive or final pass. Crosses are a type of short or long pass, usually leading to a shot. At the early stage, the players' coaches concentrate more on teaching passing techniques more time as it is the basic technique to play the game. Players who can give accurate and timely passes to theirteammates are essential for the team and they are very well and quickly identified while they are playing the game. This may be the reason for the high correlation between the passing technique and the playing ability of soccer players at the sub-junior level.

Juggling happens to be one of the much-needed skills that professional soccer players should possess. Juggling a soccer ball has been a popular trend in the soccer world. Juggling a soccer ball is very important and helpful for every player. If one wants to go to the highest levels of this sport as a professional, he has to grow the desire for juggling.Aerial control of the ball is a good technique for a soccer player. While controlling the ball on the ground seems quite an easy task, it isn't the same as controlling it when it's in the air. If you ask any professional player out there, they will tell you that one of the hardest things in play is to control a soccer ball when it's on the air, especially during a competitive match. It's for this reason that juggling plays an important role in developing aerial control. Soccer players at the sub-junior level focus on developing juggling skills so that they could become better players in the future and hence a positive correlation is seen between juggling skills and playing ability in them.

One of the basic techniques in playing soccer is dribbling. Dribbling is a technique to move the ball using one's feet from one place to another to achieve the goal of holding a counterattack, passing the opponent, luring the opponent, adjusting the tempo of the game, and scoring goals against the opponent's goal effectively and efficiently. In essence, each player is required to be able to do dribbling. Dribbling speed is considered critical to the outcome of the game, with elite soccer players performing 150–250 brief intense actions during a game (Mohr, Krustrup, and Bangsbo, 2003)[9]. Therefore, the ability to sprint and dribble at high speed is essential for performance in soccer. Previous research has indicated that better players distinguish themselves by their running speed while dribbling the ball (Malina et al., 2005[8];

Reilly et al., 2000[10]; Vaeyens et al., 2006)[15]. There is a significant correlation between the dribbling and playing ability of sub-junior level soccer players, but the correlation is not much higher than the other technical skills as the players do not have that much experience to control the ball and execute dribbling skills at this age group.

Proficiency in dribbling skill will be achieved in soccer players as their training age and match experiences increases.

CONCLUSION

From the present study, it is concluded that there is correlation exists between the selected technical skills and playing ability of sub-junior soccer players, and among them shooting and passing havea higher correlation with playing ability followed by juggling and dribbling.

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Biodiversity Governance to Address the Problem of Biopiracy and Bio Smuggling by Protecting the Rights of Indigenous People

Dr. Zubair Ahmed Khan & Shireen Singh***

ABSTRACT

Millions of varied, intermingled, complex species of plants, animals, genetic resources, and genes. These resources are called biological resources and they are the foundation of life on earth.There is an interrelationship between humans and these biological resources and owing to this dependence, there has been significant growth over time in the biodiversity governance mechanismsto address the concerns of biodiversity, one such instrument is the Convention of Biological Diversity (CBD).Indigenous communities are the inheritors of unique cultures and traditions and possess the raw knowledge of our biological resources. There have been several matters of biopiracy including the Neem case, the Basmati rice case and the infamous turmeric case wherein the bio-resources and the traditional knowledge(TK) of localcommunities living in India were the subject matter of misappropriation leaving a blot on the rich cultural and traditional treasure which Indian indigenous communities possess. This paper intends to revisit the biodiversity governance instruments adopted to address the issues of biopiracy and bio smuggling. The research paper also focuses on the developments undertaken for the protection of biodiversity in India by maintaining a balance between consumerism and the rights of indigenous people in India.

Keywords: *Biodiversity, Biopiracy, Traditional Knowledge, Indigenous Communities.*

I. INTRODUCTION: SETTLING THE CONTEXT

Biodiversityrefers to the diversification of living organisms and includes everything that lives in nature, plants, trees, insects, fishes, animals and even micro-organisms. Many varieties of species are found in biodiversity, one is genetic diversity which is the variety of genes, the other is species diversity which is the abundance of species

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and the other is ecosystem diversity which is a wide term containing a variety of ecosystems, ecological diversity contains communities of plants, animals, micro-organisms and the soil, water and air and the interdependence on each other. Biodiversity includes interdependence, and unique relationships of species of the earth with each other, it does not reflect only one kind but a variety of forms of any species of plants or animals which share a cohesive relationship. Biodiversity means the harmonisation and cooperation of different plants and animals and micro-organisms; however, their relationship is not just related to cooperation, there exists also competition for the limited resources that are found in the raw dense areas filled with biodiversity. Many plants and their properties are used for making useful products which are generic medicines. Normally, biodiversity diverse places are used for the preparation of drugs also. Local communities living in rich biodiversity areas are often aware of the properties of these raw plants and using their knowledge, these people prepare many valuable products. It is said that they have known this for years. It is often said that their cultural diversity matches their biological diversity they tend to have a warm bond with the biodiversity.

The customary knowledge & know-how of indigenous communities are often termed Traditional Knowledge(TK). TK refers to local knowledge inherited and possessed by indigenous communities in diverse forms like traditional medicine, art, folklore, know-how about the protection and conservation of natural resources and living beings, etc. Such knowledge is deeply rooted in their customs, usages and their cultural heritage over the period from generation to generation. The traditional knowledge possessed by the indigenous people is the result of their connection with the local biodiversity in which they reside. Sometimes, these indigenous communities are also responsible for discovering, protecting, and preserving biodiversity, including medicinal plants and other forest products. The indigenous communities establish an emotional relationship with these biodiversity products and therefore, traditional knowledge has a crucial role in the lives of the indigenous communities.

II. RIGHTS OF INDIGENOUS PEOPLE: UNDERSTANDING THROUGH A LENS

Indigenous people can be defined as tribal or local communities living in the vicinity of natural resources. They are sometimes referred to as the tribal people or nature people as they reside in the garb of forest lands or hills etc. Indigenous people belong to a specific area or region. If we go by the literal meaning of the term 'indigenous' it means being born in or grown or occurring naturally in a particular region or environment. Indigenous typically refers to inborn. So, indigenous people are the ethnic groups belonging to a specific region and their ethnicity. They are considered to be the 'inheritors' or 'cultivators' of the ethnicity they belong to. Since the indigenous people are innate to their specific regions, they carry some moral and ancestral ties attached to their region. They represent distinct social and cultural values enshrined in those historical links from the area or region they have inhabited from. They carry distinct cultural, economic, and political cultures. They usually remain within their communities. Indigenous communities are quite side-lined however, they do possess a decent proportion across the world and there are also many multi-

linguistic ethnic communities.[1] Since local people live in the ethnicity of the natural resources, they have immense respect and knowledge of the natural resources. In a wider context, indigenous people and traditional knowledge are gained through raw observations and first-hand understanding of any phenomenon. Indigenous people are most closely tied to ecological resources and they possess the knowledge which they receive after using or conserving the biological resources, that knowledge is termed 'traditional Knowledge'.

Traditional knowledge is also called ecological knowledge. It represents the folklore, dancing and art forms, medicinal forms, and lifestyles of the indigenous communities. All the experiences and knowledge of the indigenous people contribute to forming traditional knowledge. It is used in producing many products including health care, pharmaceuticals, skincare, clothing and textiles products which brings revenue to the people dealing with such marketable products,[2] however, this sometimes leads to commercial exploitation and biopiracy of traditional knowledge. Biopiracy is something which can be interpreted as the misappropriation of indigenous knowledge & natural resources from local or aboriginal communities' knowledge from the traditional, local and indigenous communities.[3] Biopiracy occurs when traditional knowledge is exploited to make products without taking permission from the holders of such knowledge and without even sharing profits with them. Many researchers patent their inventions based on the traditional knowledge derived from the indigenous communities disregarding the protection and compensation to be given to the indigenous communities.[4] There are innumerable hardships faced by the indigenous people.

Protecting indigenous intellectual property from unwarranted commercial exploitation is a concern for all. Globally, different initiatives were taken to acknowledge and safeguard the indigenous communities and their rights over their property.

Universal Declaration on Rights of Indigenous Peoples (UNDRIP)

The UNDRIP adopted in 2007,specifically focuses on upholding the indigenous groups and protecting their rights.The main aim of the declaration wasalso to acknowledge the dignified life of indigenous communities. The declaration also provides treatment of indigenous stakeholders different from the general public. The declaration recognises indigenous peoples' contributions through their traditional knowledge and creates an incentive to incorporate indigenous peoples separate from the general public. It also includesthe basic feature of social impact assessment whereby prior informed

1 Amnesty International, "Indigenous Peoples", *available at*: https://www.amnesty.org/en/what-we-do/indigenous-peoples/(last visited on February 19, 2022).

2 Rukma lavania, "Traditional knowledge in India: A legislative Analysis",Winter Issue *ILI Law Review*97(2020).

3 C.L Akurugoda,"Biopiracy and its impact on biodiversity: A critical analysis with special reference to Sri Lanka", 2(3)*International Journal of Business, Economics and Law*49 (2013).

4 John Reid, "Biopiracy: The struggle for traditional knowledge rights", 34 *American Indian Law Review* 78 (2009-2010).

consent should be generally taken from indigenous communitiesfor accessing biological resources and such practice should be broadly accepted and followed.[5]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS was adopted by the WTO in 1994, it sets certain benchmarksfor therecognition and safekeeping of theIP of indigenous groups. The Agreementrefers that the preservation and safety of indigenous intellectual property being dependent upon states to adopt efficient national laws which provide safeguard to IP rights of local communities withinits area.[6]

III. INTERNATIONAL AND NATIONAL COMMITMENTS FOR THE CONSERVATION OF TRADITIONAL KNOWLEDGE

Biopiracy takes place when the natural (biological) resources and the TKmanaged or owned byindigenous communitiesareutilizedor taken without permission.[7]There have been litigations over traditional knowledge such as the 'Turmeric case' wherein two researchers based in the United States of America applied to the United States Patent Office to patent the use of turmeric as a natural antiseptic and a healer for wounds, the inventors found that by applying turmeric to the injury, the wound gets healed faster. They were granted the patent on the prior art, however later, the patent grant was challenged in the USA itself by the Council of Scientific and Industrial Research, stating that the use of turmeric on wounds is a very common practice in India for treating the injury and has been used over ages as a natural traditional medicine moreover it falls as a part of the public domain in India. due to all these challenges the patent application was re-examined and finally revoked.[8]Another incident was way back in 1997 when US Rice Tech Inc. a rice breeding firm was granted a patent on a rice form which were identical to the Basmati Rice grown in India and Pakistan. The company would take a strand of the basmati rice and would claim that it has created a novel rice line. The patent was later challenged and subsequently struck down by the United States Patent Office after facing outrage from a few NGOs and people worldwide.[9] However, all these cases suggest that the biopiracy of traditional knowledge takes place on a much wider scale and is a serious problem. After encountering cases of biopiracy of traditional knowledge there was a dire need to reconcile efforts to protect our biological resources and the traditional knowledge associated withthem, to preserve that, efforts at national and international levels have been taken up to address the issues.

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5 P. Croal, C. Tetreault, *et. al.*, "Respecting Indigenous Peoples and Traditional Indigenous Peoples and Traditional Knowledge", Special Publication Series No. 9*International Association for Impact Assessment* 1-3(2012).

6 *Ibid.*

7 *Supra* note 4.

8 *Supra* note 2 at 2.

9 *Ibid.*

On the international forefront, we have the Convention on Biological Diversity, also known as CBD.

The Convention on Biological Diversity (CBD)

The Convention on Biological Diversityis a global agreement signed at the United Nations Conference on Environment and Development in 1992and became operational in 1993. The purpose of the convention is to create and maintain biological resources. The task of the convention is to build a structure wherein the biodiversity shall be exploited beneficially and the genetic resources can be conserved.[10] The preamble of the convention encompasses the role of the states to conserve their biological resources and use them sustainably.[11] The states shall also consider the significance of the biological resources present for mankind The convention surpasses three-fold main objectives; firstly, it aims at conserving biological diversity, secondly, ensuring access to sustainable use of biological diversity and thirdly ensuring appropriate sharing of benefits from biodiversity.[12]The convention ensures the protection and sustainable use of natural (biological) resources and adopts measures for theconsumption of these biological resources in a way that has minimal adverse impacts on biological diversity. The convention also ensures the traditional and conventional use of biological resources by the core antique cultural practices which areappropriate with thestandards of sustainable uses.[13]

The Nagoya Protocol (Protocol for Access and Benefit SharingSystems)

This protocol is considered the child of the CBD. The protocol has the unique feature of specific reference to accessibility to biological resources and genes and the fair principle of benefit sharing on appropriation or commercialization of natural resources. It also covers the requirement of a formal procedure that needs to be adopted by every ratifying country in providing accessibility of natural sources the TK associated with it and the existence ofbenefit sharing among indigenous communitiesor to domestic state biodiversity bodies.[14]

The national commitment we have to the protection the biological resources is the Biological Diversity Act, of 2002.

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10 Srividya Raghavan, "India's Attempt to Reconcile Diversity and Intellectual Property Issues", 5*Indian Journal of Intellectual Property Law* 2 (2012).

11 Convention on Biological Diversity, 1992, *available at*: https://www.cbd.int/convention/text/(last visited on February 22, 2022).

12 *Id*. art. 1.

13 *Id*. art. 10.

14 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilizationto the Convention on Biological Diversity, *available at*: https://www.cbd.int/abs/about/#objective (last visited on February 22, 2022).

The Biodiversity Act, 2002

It is prime legislation at the domestic level framed concerning biodiversity, the act provides for broad preservation of biological resources, viable utility of associated TK, and fair process of benefit sharing through commercial exploitation of biological resources. India had been an active participant in the Convention onBiodiversity held in 1992 and the aims and objectives of this are adopted keeping in mind the objectives of the Convention on Biodiversity. The act focuses on the sustainable use of biological diversity in a manner that they do not decline the biodiversity present and should account for the judicious use of biological resources. The act calls for establishing hierarchical authorities such as the national levels,state levels and biodiversity management committees. The national biodiversity authority has been established to implement the Biological Diversity Act of 2002. The authority has been entrusted with regulatory, advisory and facilitative functions for the preservation, viable utility of natural resources, and reasonable benefit sharing coming throughthe commercial utilization of natural resources.

The National Biodiversity Authority has also been granted the responsibility of granting approvals to any application that wants to usea biological resource for research or for any commercial utilisation of those biological resources.[15] A State biodiversity board also has been established to deal with issues of conservation, sustainable use,and equitable sharing of benefits from theusage of biological resources at national levels. Biodiversity management committees (BMCs) have been established under section 41 of the Act. The BMCs mustbe established by a local body in the state to stimulate and boost conservation, sustainable use and documentation of biological diversity that must include the preservation of habitats, conservation of land, folk varieties, and cultivators etc. As per data, there are 271794 BMCs in the State and 276690 BMCs in Union Territories. The main task of BMC is to prepare the People's Biodiversity Register (PBR). The register must contain detailed particulars and statistics on the availableness and knowledge of local biological resources and their traditional knowledge. the roles and responsibilities of BMCsare to provide for the conservation of those resources, preserve the traditional knowledge associated with them, andspread biodiversity education and awareness about biodiversity.[16]

IV. NATURE OF TRADITIONAL KNOWLEDGE

Since time immemorial, indigenous knowledge and traditional herbs have been used for different purposes for indigenous communities. For a considerable period, traditional knowledgewent oral and undocumented. Time and again, oral enriched knowledge and natural resources of indigenous communities were misappropriated for commercial interest. Somehow, we cannot ignorethe role of the Traditional Knowledge Digital

15 National Biodiversity Authority, *available at*: http://nbaindia.org/content/22/2/1/aboutnba.html (last visited on April 2, 2022).

16 Biodiversity Management Committees, *available at*: http://nbaindia.org/text/14/BiodiversityManagementCommittees.html (last visited on April 2, 2022).

Library (TKDL) in creating a strong repository base of all traditional knowledge, and traditional medicines and institutionalising the application of the patent system in matters of TK. Over the period, it was found that TKDL entered various professional arrangements *vis-a-vis* memorandum of understanding with different foreign patent offices across the world. In any way, it helps TKDL in filing third-party objections over diverse patent applications associated with Indian TK at various foreign patent offices. Such a mechanism is a major success for TKDL for the conservation and preservation of TK.

It was commonly observed that Traditional medicines and remedies have always been trustworthy for treating diseases for ages. The existing pandemic phase was the most fatal disease witnessed by mankind which cost uncountable deaths. The world was in a dreadful state for nearly two years and until the launch of vaccines, the situation was even worse. India has always been home toa variety of medicinal herbs with magical healing properties. Even during the Covid-19 times, before the vaccines, these medicinal herbs were the only natural cure available to humans. The attention to natural medicinal herbs and products increased considerably during the Covid-19 period. It would not be wrong to say that nearly 70-80% of the population relied on these herbs and products. These herbal products are natural herbs and plants possessing innumerable health benefits such as it boosts the immunity of the body. It would not be wrong to say that traditional knowledge plays a crucial role in developing the use of these medicinal herbs, they can also be referred to as traditional medicines and the use of the traditional medicines has been in practice for over the years.

The methods adopted while using these herbs for combating serious diseaseshave resulted from empirical testing conducted on humans for years now. Traditional medicines are a vital part of traditional knowledge,[17] it can be said that traditional medicines were developed by the local and indigenous communities and were developed by the primitive societies as the knowledge possessed by them about plants and other herbs. Traditional medicines are made using many components together to share their natural and organic properties for therapeutic benefits, for example applying turmeric on wounds is considered to be an antiseptic traditional medicine for healing. During Covid 19 outbreak, natural herbs like turmeric, cinnamon, *tinospora cordifolia* (Giloy), ginger, and black pepper were used as a traditional medicine to boost immunity. These herbs and plants were being used for centuries to treat disease and other health problems.

V. ANALYSIS OF THE BIODIVERSITY AMENDMENT BILL 2021: POLICIES AND CHALLENGES

The Biodiversity Act 2002 is the sole legislation that seeks to protect the national wealth of India including flora, fauna and also the traditional knowledge associated with those biological resources. The Act is important not only because it protects

17 Olukunle Ola, "The Role of Traditional Knowledge in the COVID-19 Battle", SSRN Electronic Journal, available at: https://ssrn.com/abstract=3649053 (last visited on February 27, 2022).

biological resources but also for putting forth a mechanism for the sustainable use and equitable sharing of benefits of these resources.

Policies under the Biodiversity Amendment Bill

The Biological Diversity Amendment Bill was tabled in 2021, which aims to make scientific research easy for traditional medicines. The bill is ambitious and tries to bring out a lot of desired changes. The bill proposes to expand theprocess for access and benefit-sharing of biological resources with the local communities and make mechanisms forthe safetyof bio-resources. The bill states that no one may access biological resources and the associated TK without notifying the state biodiversity boards, but local residents, communities, biodiversity growers and cultivators, vaids, hakims, and Ayush practitioners who have been using indigenous medicines are exempt from this requirement.The bill has relaxed the criteria for Ayush practitioners from the scope of this section.[18]

First and foremost, the bill reduces the pressure on wild medicinal plants though encouraging the cultivation of medicinal plants. They are no longer required to intimate the biodiversity boards for accessing the biological resources or the TK associated with them. The bill however tries to facilitate a fast-track research process regarding biological resources, simplification, making provisions for fast-tracking of the application process, laying out policies for bringing out more foreign investments in biological resources, promoting commercial utilisation,[19] however,the foreign investors need to invest in an Indian company doing research in the biological resource.The amendment has been made over the concerns raised by Ayush medicine practitioners for simplifying the process of retrieving access to biological resources. The demand to bring out changes has been made promptly from the medicine, seed and other bio-based industries. The government is aiming for more foreign investments in the country by focusing on the consumption of biological resources and promoting patenting and commercial utilisation of biological resources without prejudicing the national interests. The bill affirms the role and responsibilities of the three tiers established under the Biological Diversity Act 2002. However, certain challenges are being faced by the amendment bill after the bill has been proposed.

Challenges to the Bill

Even though the Bill is an ambitious one with clear objectives, there are still concerns and doubts expressed by a few environmentalists. In the entire scheme of implementation of the Convention on Biological Diversity and Nagoya Protocols,

18 Comments to the joint committee of parliament on the Biological Diversity (Amendment) Bill, 2021, *available at*:https://vidhilegalpolicy.in/research/comments-to-the-joint-committee-on-parliament-on-the-biological-diversity-amendment-bill-2021/(last visited on April 16, 2022).

19 Jayashree Nandi, "Why legal experts are concerned about the Biological Diversity Amendment Bill 2021", *Hindustan Times* December 17, 2021, *available at*: https://www.hindustantimes.com/india-news/why-legal-experts-are-concerned-about-the-biological-diversity-amendment-bill-2021-101639759979049.html(last visited on April 16, 2022).

the focus of the bill has shifted from the preservation and sustainability of natural biological resources towards patenting and commercial processes. Secondly, the local communities are being neglected through the provisions of this bill. As discussed, above, the Ayush medicine growers and researchers have argued for relaxing the criteria for compliance procedures under the Biodiversity Act, 2002. They are no longer required to take prior approvals from the institutions established under the act, and they are no longer mandated to pay royalties to the local communities for the same. This means that there is dilution of the mandatory provisions through this bill. Another challenge is that the bill will open the doors for even more cases of biopiracy which is a serious threat to our biological ecosystem. Originally the Biodiversity Act mandated that individuals or corporate bodies take permission from the National Biodiversity Authority for accessing biological resources that were not registered in India, but the amendment bill includes that only foreign-controlled companies are not required to take approvals from the National biodiversity authority and other authorities established under the act.[20]

VI. CONCLUSION AND SUGGESTIONS

India is home to multifarious biological resources enriched with enormous qualities and varieties beneficial to mankind. Hence, protection and conservation area must. However, being in the technology-driven and fast environment, this becomes quite difficult as the demand for results is more than actual potential for work. The problem of biopiracy (which is an attempt to kind of steal our natural biological resources, and attempting to pirate them for one's own benefit) is alarming and there have been attempts as discussed in the paper that talks about conservation, preservation and using the resources sustainably, even if the resources are conserved, what is important is the fair and equal distribution where the biological diversity act plays an important role. The provisions mentioned in the Biological Diversity Act are quite precise and clear but even though changes have been suggested through the Biological Diversity (Amendment) Bill, the bill is exhaustive and tries to widens the scope of dealing with the biological resources. The most notable concern is the complete alteration in the penalties under the Act, this would give open access to the biopiracy as there is the complete absence of any yardstick to combat such cases. In this regard, there should be someto regulate and combat biopiracy. It is also significant to provide legal sanctity to the People's Biodiversity Register so that efficient conservation of bio-resources and associated TK could be provided and also prevents possible fraudulent usage of the register. At it is also important to formulate *sui-generis* laws for the safeguarding the TK where the TK register could be used for documentation of details of TK resources.

20 Flavia Lopes, "Biodiversity Act Amendments Shift Focus from Conservation to Commercial Exploitation: Experts", *IndiaSpend* February 10, 2022, *available at*: https://www.indiaspend.com/earthcheck/biodiversity-act-amendments-shift-focus-from-conservation-to-commercial-exploitation-experts-802693(last visited on April 16, 2022).

Human Rights: A Global Challenge for Teacher Education

*Dr. G. Madhukar**

INTRODUCTION

Education is a never ending process of inner growth and development. Education is holistic in character. Education is just like an artist who moulds the raw materials of child into a better, pure and noble person. it makes our life progressive, cultured and civilized. in fact, education is a desired modification of human behaviour. it is also considered as an important instrument of social mobility, equality and empowerment both at the individual and collective levels. Education is a power which imbibes the values of tolerance, solidarity and cooperation. Human rights education is education about human rights and for human rights which focused on imparting knowledge of human rights, developing skills necessary to exercise these rights and right attitude and values to protect other's rights, therefore, it requires participation of all human beings of all age groups from all walks of life.

Human rights education develops essential human qualities and accord respect and protection to the inherent dignity and worth of each human being. The all –round development of individual's personality and universal peace and harmony can be promoted through suitable human rights education. Human rights education works best woven into the fabric of existing curriculum-its a way of thinking about the world, not just subject matter to cover.

Human rights education has been incorporated in the school curriculum in several ways. The basic approach to human rights education in schools is to integrate into various subjects and not treat it as a separate area of study. it is also requires multidisciplinary approach .The integration of various curricular concerns such as literacy, family system, neighbourhood education, environmental education, consumer education, tourism education, aids education, human rights education, legal literacy, peace education, population education, migration education, global education and safety education are making a case for separate place in school curriculum. The best approach would to integrate these ideas and concepts, after a careful analysis of the

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existing areas of learning. Appropriate strategies for this integration may be suitably carved out in the detailed subject curricula.

The thirst of the core' curriculum' is reflected in the textbooks of various subjects prepared at the national level by the NCERT and prescribed for undifferentiated curriculum of schools at various stages of school education. The major components related to human values, rights and duties are reflected in the subjects of social sciences, science and languages in the school syllabus and text books based on them.

The human rights consciousness that the Magna Carta generated in 1215 A.D England provoked the human conscience in the western countries and was manifested in the American, French and Russian Revolutions laid down the fundamental rights of citizens very firmly and effectively. The twentieth century saw two most devastating wars in the human history and taught the mankind dire consequence of the holocausts and the transgression of human rights. Hence, the United Nations made a firm commitment for protection of human rights and maintenance of peace and security in the world as enunciated in the Charter of the UNO. On the 1948, the Universal Declaration of Human rights proclaimed an elaborate list of human rights, which was endorsed by most of the countries. It influenced the constitution and jurisprudence in most of the countries. Subsequently, the declaration was reiterated in the International congress on Human rights at Techran in 1968, International Congress in Vienna in 1978,an International seminar on the teaching of Human Rights at Geneva in 1988,and the UN to declare the UN Decade for Human Rights Education from 1995 to 2004. Out of the 100 clauses in the programme of Action, four are directly related to Education and Training.

HUMAN RIGHTS IN INDIAN CONTEXT

The term "human rights" is comparatively recent but the idea of human rights is as old as the history of human civilization. The new phrase" Human Rights" was adopted only in the present century from the expression previously known as "Natural Rights" or "Rights of Men". Human rights is a twentieth century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man

The Indian history is warranted by the fact that human rights jurisprudence has always occupied a place of prime importance in India's rich legacy of historical tradition and culture. This is evident in the prevalence of different cultures, traditions, faith in India. The truth is that what the West has discovered about human rights now, India had embedded the same in its deep-rooted traditions since time immemorial.

The philosophy of human rights in the modern sense has taken shape in India during the course of British rule. The Indian National Congress, which was in the vanguard of freedom was truly an attempt of the Indians to secure basic human rights for all the people with the result that the promulgation of the Constitution by the people of India in January 1950 ushered in the heroic development of the philosophy of human rights in India. It would be gleaned from the study that ancient Hindu civilization perennially contributed a lot to the origin of what is now known as the human

rights movement. The historical account of ancient Bharat proves it beyond doubt that the Human Rights were as much visible in the ancient Hindu and Islamic Civilizations as in the European Christian Civilizations. Ashoka Prophet Mohammad and Akbar cannot be excluded from the genealogy of Human Rights.

The concept of human rights is to be ingrained in our Indian civilization-in its relation, literature, philosophy and other human activities. The constitution of India also incorporated most of the human rights under fundamental rights, viz. Right to equality before Law(Article-18),Right to freedom of Speech and Expression(Article-19),Right to assemble peacefully(Article-24) and prohibition of employment of children in Hazardous occupations(article-24)that can be mentioned as relevant to the issue. Besides the chapter directive principles of state policy requires the Government, Central and states to promote and protect the rights of the most vulnerable sections of our society and gives direction to the policy and programmes of government for improving the standard of living and quality of for all its citizens.

The above provisions have influenced the laws and regulations, criminal proceedings and other legal matters .The Government of India is also set up various national institutions for promotion and protection of the interests of the most vulnerable sections of the society. These are the national commission for scheduled castes and scheduled tribes, national commission for women and the Minorities commission and so on. These Commission have reviewed the socio economic conditions of these groups and related government policies. These will ensure improvement of the status of these sections in the society and progressively implement more development programmes to strengthen these national institutions. The national policy commission and the law commission have also made much contribution to the law and order system of the country for protection of the rights and freedom of all the Citizens .the national human rights commission has been established to deal with institution of human rights in different parts of the country. Such a commission is independent of the government seeks to the country irrespective of caste and creed.

The National Human Rights Commission has been established to deal with institutions of human rights in different parts of the country. Such a commission is independent of the government and seeks to give justice to every citizen of the country irrespective of caste and creed as per the un declaration .10th December is being observed as the human rights day in most of the educational institutions for bringing about awareness regarding human rights.

It was rightly observed that protection from power and protection against power are the basic principles of a civilized society and laid stress on protecting children from all kinds of exploitations and institutions of human rights have been active in organizing regional and national conferences for bringing about adequate awareness among the people about human rights.

TEACHER EDUCATION FOR HUMAN RIGHTS

The national council of teacher education (NCTE) has been working for making human rights education a part and parcel of teacher education. it has developed a learning

module on human rights and national values which was released by Justice Ranganatha Mishra at New Delhi on march 11,1996.on the same day a national programme for key resources persons in human rights education was launched where about forty participants from across the country part. The NCTE has also published a book entitled human rights and Indian values by justice M.R. Joshi in90s (revisededition1994) and made attempts to introduce human rights education in Curriculum for teacher education .with the help of the NCTE, various. Teacher education college/institutes have been organizing seminars and workshops on human rights education.

The University of Bombay introduced the one-year post graduate diploma in human rights education in 1996-97.The Asian Institute of Human Rights Education,Bhopal provided incentives to students and teachers for outstanding work in human rights education. The NCTE also emphasized the competency –based and commitment oriented teacher education for quality school education, which included commitment to basic that are mostly related to human rights education. Besides the NCTE has produced audio and video Cassettes relating to human rights education.

Teacher Role in Human Rights Education:

- The former UN secretary General U. Tant aptly said "establishment of human rights provided the foundation upon which rests the political structure of human freedom the achievement of human freedom generates the will as well as the capacity for economic and social progress the attaining of economic and social progress provides the basis for true international peace". hence teachers are to be given adequate knowledge and skills for human rights education so that they can make their students not only conscious of their rights but also their duties for enabling others to enjoy their rights .it is essential not only for maintaining peace and harmony in one's family, region, state and the country, but also for ensuring happiness and security in the world.

The Universal Declaration of Human Rights, 1948 (Article-26) states:

- ❖ Everyone has the right to education. The education shall be free at least in the elementary and fundamental stages. elementary education shall be compulsory technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit
- ❖ Education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedom. It is to promote understanding, tolerance and friendship among all Nations racial and religious groups and further the actives of the United Nations for the maintenance of peace.
- ❖ Parents have a prior right to choose the kind of education that shall be given to their children.
- ➢ The above provisions express the UNO's concern for "Education as human rights" and Education about human rights". This means the national education

system may be designed, developed and implemented in such a manner that the students can acquire knowledge and practice them in their day-to –day lives. the national policy on education (1986)and the revised NPE (1992) have laid down a national Curriculum and ensured that the common core elements are related mostly to human rights education

- These elements would cut across sub areas and be designed to promote values such as our common cultural heritage, egalitarianism, democracies, secularism, equality of sexes, protection of the environment, removal of social barriers, observance of the small family norms and inculcation of the scientific temper.
- The NCTE has rightly observed (1996)"all teachers should be trained to identify curricular elements in the syllabus of their classes where human rights education can be brought in they should then be trained to developed practical activities, teaching aids and materials." the teacher educators should design, develop, accept and evaluate teacher training in human rights to help teachers to develop and utilize suitable methods, media and materials in the area. The main task of the teacher educator should be to sensitize all teachers irrespective of their subjects and classes they are reaching in human rights education hence it is necessary to organize practical activity and participant in social situations both inside and outside the class. The methods like role-play, project work and buzz session would be useful for the purpose. Teachers are also expected to conduct some action research in different aspects of human rights education.

CONCLUSION

Human Rights concept is an emerging one and assuming a global phenomenon, it should be taken as a challenge to the mankind. Hence multi-pronged attempts need to be taken for making human rights education a fact and not a fiction in our life. Human rights are to be realized in all walks of life. All men, women and children should live with respect and dignity, so that peace and security can be promoted in our society there is a large number of age old wrong traditions and practices which are to be removed for making human rights a success. Since education is a potent instrument for bringing about desired changes in the society and teachers are to play a crucial role in this noble venture, human rights can be achieved and sustained mostly through education and training.

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Role of Regulatory Authorities in Consumer Protection with Reference to E-commerce and Product Liability

Dr. Mudassir Nazir*

ABSTRACT

In the midst of cyberspace, this paper traces the imprints of communication and information technology development. In this context, it discusses the importance of E-Commerce in the Indian economy's online sector. It emphasizes the establishment of a new setting for Indian trade, namely, E-Commerce, which has now been swallowed by the Indian economy in the twenty-first century. It then goes on to explain e-Commerce, including its core structure, many forms, classifications, and features, as well as its influence on Indian advertising and consumer entry into a borderless market. The goal of this research is to present a clear and comprehensive image of the new E-Market experience in online purchasing and its influence on customer behaviour. The main goal here is to present an overview of the evolving aspects of Indian trade.

Every businessman's golden rule is that there is only one boss: the customer, who has the power to dismiss everyone in the firm simply by spending his money elsewhere. Customers are the most valuable assets of any firm, whether real or digital. All company actions circle around the consumer, just as the planet has around the Sun. The notion of consumer protection had long connections in Indian civilization's fertile soils. Indian law encompasses a wide range of consumer protection laws in physical economic interactions. The Internet, on the other hand, has ushered in a new 'E-Revolution,' wherein the role of business interactions has evolved into something far more refined and sophisticated.

The focus of this paper shifts from "E-Consumerism to dangers to E-Consumerism in practice". Consumer Protection is sketched in this work. The main point here is to emphasize risks to consumer rights in an internet environment, which might be referred to as "Old Fraudulent activities in Modern Bottles." It represents the challenges in putting the notion of 'E-Consumerism' into practice in online buying. It demonstrates how regulatory agencies handle consumer concerns.

Keywords: *E-Commerce, E-Revolution, E-Consumerism, Consumer Protection.*

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INTRODUCTION

The beginning of Information and Communications Technologies (ICT) has had an effect on every aspect of human life, including that of the buying and marketing of products and services. Exchange of data and digital money transfer are examples of information systems financial activities, which have evolved into e-commerce with use of the World Wide Web. Because of the quick adoption of "internet-enabled facilities". The "commercialization of online activities" has provided a diverse variety of possibilities for economic and commercial operations throughout the world, as well as a quality option.

To be more explicit, it is proposed that a precise and adequate set of well-defined and well-executed legislative framework for consumer interests in e-commerce exchanges be adopted in order to provide consumers with a sense of trustworthiness and self-confidence in e-commerce trades. This will aid society, particularly consumers, in understanding and appreciating adequate consumer protection legislation from the perspective of customer protection and e-commerce growth.[1]

As a result, e-commerce transactions are common. Consumers and enterprises can enter into contracts via the internet for the global exchange of commodities and services without regard for physical borders on a continuous basis Without a doubt, these characteristics are assisting in the massive expansion of at the same time, there are certain restrictions to e-commerce on a worldwide scale too.[2] On the one hand, e-commerce offers a slew of benefits in the form: reduced cost, economy, larger corporate profits, lower client cost, and fast and comparable shopping, information market, and etc, but it has also presented certain obstacles in the aspect of information exchange, threats to intellectual property, and so on.[3] Data privacy, security, and integrity, as well as a lack of consumer loyalty, are all issues that need to be addressed and the prospect of consumer rights being violated in a variety of ways.

While there are various issues with completing e-commerce activities, the protection of consumers is vital. This is because if the issue of consumer protection also isn't adequately addressed through an appropriate system, it might harm genuine competition and the constant flow of right facts in the industry, as well as contribute to consumer fraudulent activity in e-commerce transactions. As nothing more than a consequence, we've decided to look into and assess the legal implications of the junction of consumer protection laws and e-commerce.[4]

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1 Raj Kumar Singh, E-commerce in India: Opportunities and challenges, Proceedings of 10th international conference on digital strategies for organizational success. 2019.

2 Khosla, Madhurima, and Harish Kumar, Growth of e-commerce in India: An analytical review of literature, 19.6, JR of Business and Management (IOSR-JBM),91-95, 2017.

3 Aggarwal, Sukhdev, Praveen Aggarwal and Sanjay Lohia, Commentary on the Consumer Protection Act, 1986, The Bright Law House, Delhi, 1999.

4 Nougarahiya, Shrey, Gaurav Shetty, and DheerajMandloi., 6.03, A review of e–commerce in india: The past, present, and the future." Research Review International Journal of Multidisciplinary, 12-22 (2021)

E-COMMERCE IS A NEW WAY OF DOING BUSINESS

As a result of increasing electrical, technical, and scientific breakthroughs, innovations have diffused fast in the new global economy during the last two decades.

The internationalization of the marketplace, business, and means of reaching the market via national and international communication superhighways has given the idea of trade or commerce a whole new meaning. Electronic commerce-related technologies have ushered in a difference in the way companies do business.[5] The E-Commerce blueprint encompasses the entire range of business procedures which are being redefined and improved as a result of trying to leverage the Internet and related technologies to achieve success. The term "e-commerce" refers to the use of the Internet to link key stakeholders.

It might be anything from creating a website to establishing an integrated value stream that markets it operates, sellers, and customers to collaborate in real time.[6] To put it another way, e-Commerce is the web-enabling of current company processes so that they may conduct transactions on the Internet. It expands opportunities for clients all over the globe, increasing productivity, boosts profitability, and enhances customer service.[7]

"The purchasing and selling of products and services through the Internet is known as e-Commerce". Because information is the heart of every business, it aids in the operation of conventional commerce through innovative means of exchanging and possessing information. It's all about using breakthrough new technologies to increase operating performance and retain or expand a competitive edge.

THE IMPORTANCE OF CONSUMER PROTECTION AND THE NEED FOR IT

Consumer protection refers to safeguarding customers from a variety of unfair commercial practices in order to prevent exploitation and to monitor different company operations that may jeopardize their rights and interests in competitive marketplaces. Business organizations, it goes without saying, are more structured, more knowledgeable, and have a stronger hold on customers while performing commercial transactions. Because of their favorable position, they may easily abuse customers.[8]

The Court of Special Appeal of Maryland held in "Consumer Protection Division v. Luskin's, Inc. that the most vulnerable victims of commercial organizations must be protected, and that consumers must be shielded through sufficient consumer protection

5 Grabner-Kraeuter, Sonja, "The Role of Consumers' Trust in Online-Shopping", Journal of Business Ethics (Springer), Vol. 39, No. ½, pp. 43-50.

6 Aggarwal, V.K., Consumer Protection in India, Deep & Deep Publications, New Delhi, 1989.

7 Kalia, Prateek, Navdeep Kaur, and Tejinderpal Singh, E-Commerce in India: evolution and revolution of online retail." Mobile commerce: Concepts, methodologies, tools, and applications. IGI Global, 736-758, (2018).

8 Agarwal, Subash, "Applicability of Consumer Protection Act to Banking Sector", The Chartered Accountant, February, 2005, pp. 991-995.

mechanisms to enforce their rights in commercial transactions and protect them from commercialization at the end of business organizations".[9] Many businessmen exploit customers by providing poorer quality items at greater rates in order to maximize profits and revenues. They engage in unfair trading methods including such adulteration, hoarding, black-marketing, and so on in order to make excessive profits. This approach not only deprives customers of obtaining good value for their money, but it also harms the environment.[10]

As a result, while consumers are seen as the monarchs of the marketplace in the modern day, consumer trust remains a shaky idea since consumers remain the most disadvantaged part of the population and are at a deficit owing to the lack of protection of their rights. As a result, consumer protection is required for a number of reasons, including:

> The Maryland Court of Special Appellant argued in "Consumer Protection Division v. Luskin's, Inc." [11]because even the most vulnerable survivors of business corporations should be guarded, and that customers must be sheltered by adequate product liability processes to stand up for their rights in business deals and to defend them from commercial exploitation in the extreme.[12]

Ensuring commercial organizations' social and ethical duty, raising awareness, ensuring customer happiness, guaranteeing social justice, upholding the trusteeship concept, supporting the growth and survival of businesses. As a result, the "Consumer Protection Mechanism" is critical not only in the struggle to safeguard "consumers' rights" in the emerging "global market", but also in ensuring corporate organizations' social, ethical, and professional responsibilities in the context of healthy company growth and success.

CONSUMER PROTECTION AND E-COMMERCE: A CATCH

The manner society, especially corporate companies and consumers in particular, engages with businesses has been drastically impacted by information and communications technology. Technology has transformed business and trade transactions with the emergence of e-transactions. Computers and e-commerce over the Internet have propelled business transactions to unprecedented heights on a global scale in today's globe.[13] The effect of advancement in technologies and the humongous

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9 Gupta, Aamod, "Year of Electronic Commerce Awaits the e-Laws", Lawyers Collective, Vol. 14, December, 1999, pp. 22-29.

10 Belwal, Rakesh, Rahima Al Shibli, and Shweta Belwal, Consumer protection and electronic commerce in the Sultanate of Oman, Journal of Information, Communication and Ethics in Society (2020).

11 Vittal, N., Information Technology: India's Tomorrow, Manas Publications, New Delhi, 2003.

12 Lee, JH Jennifer, 73, Consumer Protection in the New Economy: Privacy Cases in E-Commerce Transactions or Social Media Activities." CONSUMER FIN. LQ REP, (2019).

13 Bhattacharya, Pranab Kumar, "Legal Framework of Electronic Commerce: A Study With Special Reference to Information Technology Act 2000"

assimilation of e-commerce activities has caught the imagination of individual consumers, business owners, government agencies, and international groups not just as a means to facilitate business expansion, and also as an implies of posing a multiplicity of risks and dangers to multiple aspects of personal and society best interest, including such data security and consumer rights.[14]

The importance of developing a set of regulations to solve e-commerce concerns in order to appropriately defend consumer protections has been emphasized as a response to the issues raised by e-commerce. It also provided the motivation for a barrier defence and corresponding system to promote the creation of e with a hurdle protection and corresponding arrangement for having completed e-commerce financial transactions on the one side, and also to encounter consumer protection requirements on the other, in light of the innovative incidence of e-commerce.[15]

CONSUMER PROTECTION AND PRODUCT LIABILITY RISKS IN E-COMMERCE

Without a doubt, e-commerce has given customers remuneration and comfort in the market for purchasing and promoting brands and service providers, but it has also represented a danger to consumers by affecting the probability of flagrant violations of their fundamental rights and liberties through e-commerce gateways.

E-commerce has provided customers with compensation and convenience in the industry for acquiring and encouraging brand products and providers, but it has also posed a risk to consumers by increasing the likelihood of blatant violations of their foundational freedoms and privileges via e-commerce portals.[16]

As other activities revolve around him, the consumer is the central focus of the country's economic cycle. In a competitive economy, the customer determines whether a firm succeeds or fails by purchasing or refusing to purchase a product.[17] Consumer focus is a critical component of marketing. Marketing strategies should indeed be based on customer demands and attempt to achieve organizational objectives through consumer happiness and well-being, according to the contemporary marketing idea.The following are the primary benefits and advantages that e-commerce provides to firms and consumers:

a) increasing international access and selection;

b) intense competition and customer satisfaction;

14 Fibrianti, Nurul, Consumer Protection in Electronic Transactions, 12.4, International Journal of Business, Economics and Law, 67-69,(2017).

15 Kwilinski, Aleksy, E-Commerce: Concept and Legal Regulation in Modern Economic Conditions, Journal of Legal, 22, Ethical and Regulatory Issues, 1-6, (2019).

16 Kalia, Prateek, Navdeep Kaur, and Tejinderpal Singh, E-Commerce in India: evolution and revolution of online retail." Mobile commerce: Concepts, methodologies, tools, and applications. IGI Global, 736-758, (2018).

17 Bahtt, Gopal R., "Consumerism: Concept and its Need in Our Era", Indian Journal of Marketing, Vol. V, June-August, 1985, pp. 3-11.

c) order execution and personalized products and services;
d) discarding of intermediaries and inventory levels;
e) improved performance and reduced prices;
f) great possibilities and product introductions, and so forth.

However, it has provoked a torrent of consumer concerns about the violation of their fundamental human rights, that have since been recognized internationally.[18]

THE NECESSITY FOR LEGAL PROTECTION TO PROTECT CONSUMERS IN E-COMMERCE TRANSACTIONS

In the previous section, we started to look at how, whilst also e-commerce provides significant convenience to the customers in the implementation of contractual arrangements, it also poses a threat to consumer protection. This insufficient e-commerce response to consumer rights may affect the customers desire for and willingness to engage in e-commerce transactions, posing a risk to the effectiveness of e commercial activity. To manage concerns about consumer rights in e-commerce transactions, a distinct and appropriate set of laws and regulations is necessary, which will not only overcome the issue of product safety in e-commerce, but will also strengthen consumer rights.[19]

To meet the need for consumer rights in e-commerce, globally recognized consumer rights standards in electronically enabled contractual relationships must be safeguarded by efficient and appropriate regulatory structures and legal principles.[20]

Consumers' willingness for and tendency to participate in e-commerce activities may well be impacted by this weak e-commerce responding to customer protection, posing a danger to the sustainability of online business.[21] To address consumer rights issues in e-commerce activities, a different and suitable set of rules and regulations is required, which would not only address the issue of e-commerce quality management, but also boost consumer safety.

Recognized internationally fair-trading standards in technologically facilitated economic transactions must be preserved by efficient and adequate various regulations and constitutional precedents to address the requirement for consumer interests in e-commerce.

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18 Chawla, Neelam, and Basanta Kumar, E-commerce and consumer protection in India: The emerging trend, Journal of Business Ethics, 1-24, (2021)

19 Ayilyath, Manoranjan, Consumer Protection in E-Commerce Transactions in India–Need for Reforms, (2020).

20 Datta, Subhasis, "E –Commerce: An Overview in the Indian Context", Chartered Secretary, Vol. 31, December, 2001, pp. 1546-1548.

21 Chaudhari, P. T., "E-Commerce-Indian Scenario", The Indian Journal of Commerce, Vol. 56, No. 1, January-March, 2003, pp. 113-114.

For the greater welfare of society, several studies have underlined the significance of combining the benefits and downsides of each system.[22]

Consumer protections and other regulatory regimes must not only preserve consumer welfare, but also encourage customers to engage in e-commerce transactions without the prospect of rejecting important consumer rights. As per Sahoo and Chatterjee (2009), unethical or misleading seller marketing tactics and conduct in e-commerce operations (e-commerce) will not only breach basic consumer protection laws, but also stifle the industry's growth. In view of all this, it may be argued that, when examined through the prism of consumer interests and e-commerce development, the regulatory form of the ecommerce industry will encourage the modification of consumer rights legislative requirements for usage in cyberspace.[23]

E-COMMERCE AND CONSUMER PROTECTION: AN INDIAN REGULATORY ASPECT

In the framework of legislation, different parts of Indian law addressed consumer protection and e-commerce. However, e-commerce and consumer privacy were considered as two ends of the same face in the realm of marketplace business and finance. Contrary to this we have had the "Consumer Protection Act, 1986", which ensures the protection of essential consumer rights and provides a method for enforcing those rights as well as seeking redress in a specific and dedicated discussion board system, and provides a mechanism for enforcing those rights as well as claiming redress in a specific and focused manner. The "Information Technology Act, 2000, and also elements in other laws and regulations such as the Indian constitution, 1950, Article 38, Indian Contract Act 1872, Indian Penal Code, 1860, and Indian Penal Code, 1860".[24]

To address the obstacles posed by customers in conducting e-commerce transactions, laws such as the "Consumer Protection Act of 1963 and the Indian Telegraph Act of 1885" were enacted.

CONSUMER PROTECTION ACT: E-COMMERCE AND THE BASIC PRODUCT LAW

Although the Indian Parliament passed the "Consumer Protection Act, 1986" with the intent to "provide for better safeguarding the interests of consumers so for that mission to create provided for the regulation of consumer municipalities and other law enforcement agencies for the settling of consumers' disagreements and for associated with standard therewith," it has been criticized for providing the needed consumer

22 Mann, Yogendra Nath, and Kavindra Nath Mann, E-Retailing Laws and Regulations in India: E-Commerce in India–Legal Perspectives, Internet Taxation and E-Retailing Law in the Global Context. IGI Global, 8-20, (2018)

23 Consumer Protection Act, 1986

24 *Ibid at* 22.

protection to individuals in commercial transactions. To engage and preserve the rights of consumers in India on a par with international standards.[25]

On the one extreme, the information technology era has made it possible to easy and rapid trade agreements on digital portals; on the other side, it has aspects such as societal challenges to the protection of various customer rights, such as deceptive service and product descriptions in a totally detached contract, privacy and security of customers' data, forms of intellectual property and brand concerns, standard form of contractual difficulties, and so on.[26]

Despite the fact that the Consumer Protection Act of 1986 established a consumer court system to improve the development and preservation of consumers' rights, the implementation system has the following weaknesses: a) Businesses seldom pay attention to consumer courts, and their findings, judgments, and court orders are usually disregarded. As a consequence, most consumer cases go on endlessly, with no end in sight. b) Companies usually do not implement the decision, and as a result, the processes for carrying out the judgment take a very long time than the procedure for addressing the complaint after it is filed. c) Consumer courts, just like every other judicial institution in the country, are not known for their lack of corruption.

Lastly, "the Consumer Protection Act of 1986 lacks provisions that specifically address the consumer protection issues that arise in e-commerce transactions. In its broad as well as all use, it instead provides consumer protection protections".

A TERSE ANALYSIS OF THE INFORMATION TECHNOLOGY ACT OF 2000 AND CONSUMER PROTECTION

We have seen in earlier interpretation that some aspects in an e-commerce transaction arouse consumer concerns about consumer rights in the execution of business contracts using electronic mechanisms. These e-commerce consumer protection problems and the status of their corresponding legal requirements can be described as follows:

1) The Information Technology Act of 2000 (hereafter referred to as the IT Act, 2000) was enacted with the goal of making e-commerce transactions easier.
2) "To address and overcome all challenges that may obstruct the practice of e-commerce transactions, but the requirements of the IT Act, 2000 do not primarily provide for consumer rights in e-commerce transactions, though it does have a few provisions that represent a consumer-centric approach to protecting consumers' rights in e-commerce".[27]

25 Ganesh, S., "Electronic Commerce : Application in India", in S.B. Verma (edited), Information Technology and Management, Deep and Deep Publications Pvt. Ltd., New Delhi, 2005, p. 110-117

26 Khushalchand, Bora Chandan, A Critical Study of Consumers Protection with Special Reference to E Commerce in India, (2018)

27 Verma, SwaliaBihari, "The True Picture of E-Commerce'', in S. B. Verma (edited), Information Technology and Management, Deep & Deep Publications Pvt. Ltd., New Delhi, 2005.

3) Protection from the negative effects of highly competitive markets, such as with the marketing of the identical item at different prices: The IT Act of 2000 contains no provision prohibiting e-commerce businesses from providing the same items at different prices. As a consequence, e-commerce companies may establish their own prices for many of the same products they sell to customers. This might be a severe infringement of consumer protection in the e-commerce industry.[28]
4) Product delivery to the proper spot and also at the right time: This phrase is also absent from the IT Act of 2000, and it will only be enforced through contractual remedies, which are generally in the shape of "contractual terms," which are potentially destructive to consumer protection.
5) Payment methods that are not secure: The IT Act of 2000 has no provisions for compensation for damages arising of unsecure payment methods.
6) Risk of invasions of privacy and lack of privacy (data privacy violation): While the IT Act of 2000 includes special clauses to handle the problem of team losing of personal private information disclosed by clients in e-commerce transactions, the IT Act of 2000 does not contain special clauses to handle the problem of loss of individual protection of personal information divulged by customers in e-commerce exchanges.[29]

CONCLUSION

One side, "Section 4 of the Consumer Protection Act of 1986 (Consumer Protection Councils), Section 66A of the IT (Amendment) Act of 2008 (Hacking), and Section 72A of the (Privacy and Confidentiality of Information)" start debating and address consumer rights issues in e-commerce exchanges, but these regulations are mildly distributed and nonfigurative.

Consumer protection regulations regulating e-commerce transactions really aren't specifically oriented or geared at guaranteeing efficient customer security in these activities. As a result, Indian clients do not even have adequate protection for their consumers rights and access to e-commerce transactions. Consumers' desire to participate in e-commerce activities may deteriorate if these issues are not adequately addressed.

It has been noticed that abuses of e-consumer rights (consumers who use the Internet), a product of technical advancement in the twentieth century, have grown to pandemic proportions and have become unmanageable in the twenty-first century. One of the features of internet scams is that, unlike traditional crimes, they are global and anonymous. Considering the character of the crime and the lack of an adequate regulatory framework to tackle it, investigations frequently end in a void. Under the

28 The Information and Technology Act, 2000

29 Barkatullah, Abdul Halim, Does self-regulation provide legal protection and security to e-commerce consumers?, 30, Electronic Commerce Research and Applications, 94-101, (2018)

guise of information technology, the exploitation of consumerrights has evolved from a puddle to a massive iceberg. Regrettably, law enactments in India are now drafting tough regulations to address such technical concerns.

"The quickest and fundamental shift in day-to-day existence that the human species has ever encountered is the flame spreading of consumerism over the planet". Materialism is on the rise, owing to technological advancements. Optical disk recorders, electronic content, desktop computers, and mobile phones have all become part of Indians' ordinary activities. There has been a trend away from society, spirituality, and morality or towards competitiveness, consumerism, and detachment. As a result, cyber-consumer protection is gathering steam across the world. It is past time for legal enactments to recognize the rights of internet customers.

It's possible that this will have a detrimental influence on the expansion of e-commerce operations.

SUGGESTIONS FOR THE FUTURE

In light of the aforementioned findings, the following initiatives are made in order to provide a suitable and effective regulatory framework for consumer rights in e-commerce at both the regional and worldwide levels:

1) Novel consumer protection rules and procedures are required in light of internationally recognized consumer protection principles in order to provide effective protection for consumers in e-commerce operations and to stimulate e-commerce activities in our country.
2) That simply upholding rights of consumers in legislation is inadequate; in order for them to be meaningful, there is a compelling need to engage in educating consumers and rigorous application at all levels.
3) It is proposed that e-commerce exchanges acknowledge a right to a flash of insight ("warming up") before really concluding the agreement (buyers would have to be notified 'a priori' of the contractual terms suggested by the provider, who would have had to maintain these conditions for a time period); this will enable the customers to assess promotional offers and carefully investigate the service contract before giving their authorization.
4) A right of withdrawal, which is the right to withdraw from a contract without penalty or explanation during a "cooling-off" period that may exist unless the transaction was signed before the customer has acquired the contract's whole terms of service.

Status of Transgender Persons in India

Smt. Latha A. Sardar* & Dr. Aarti Tyagi**

"The struggle isn't just about being straight or gay or transgender—it's a human struggle."

— Boy George

ABSTRACT

The history is evidence of the transition in the position of transgender in society. The position was protected for some time and sometimes the law itself has not provided protection. The shift in the position of transgender has come to the mainstream when the judiciary pounced the judgment in favour of transgender and declared them as the Third gender. The position in history during ancient times, the medieval times and the British period have been marginalized. In the past transgender has been considered a disorder but proven wrong by medical science. In the past transgender has been called various other names and has been categorized into some other subgroups. The parliament and many states have passed legislation for the protection of the rights of transgender in society. Legislative efforts and judicial decisions play an important role only when society involves a change in itself. Many transgender individuals have achieved a good position in society. Now the transgender community has been provided protection but society must change according to the latest laws, rules and regulations.

Keywords: *Transgender, Transgender status, Third gender.*

1. INTRODUCTION

The gender of a person and the sex of a person are two different phenomena and perspectives of the same human being. The sex of the person depends upon various other factors like chromosomes, and sex hormones, and the gender of a person depends upon societal perspective. Transgender is different from the traditional concept of being male and female (gender identity) which is bifurcated according to male and female genetics. The male and female are called Cis gender, Non-gender or Binary

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gender but in the case of Transgender the genetics are varied among one another, some have male genetics but have symptoms of women, and some have female genetics but have male symptoms and feelings. In the British era, it was realized that they were not belonging to society; they are not part of society and not even human beings. The reason behind such a mentality is that the transgender was born because of a mental disorder. From ancient times gender identity and sexual orientation plays important roles in recognizing any individual. In India sexual identity of transgender given a place in government rules and legislation. The status of transgender thereby has changed during the last decade.

2. OBJECTIVE OF STUDY

- To study the history of transgender in India
- To have a brief understanding of the role of legislature and judiciary in interpreting the existing provisions and in enacting new provisions for the benefit of transgender.
- To understand the present status of transgender.

3. DEFINITION OF TRANSGENDER

These are some definitions helping in understanding the names for third gender persons in India.

Transgender: of relating to or being a person, whose identity differs from the sex the person had or was identified as having at birth, especially of relating to or being a person, whose gender identity is opposite to the sex of the person had or was identified as having at birth[1]

The Transgender Persons Act 2019 defines Transgender.[2] According to the Act, a transgender is a person whose gender does not match with the gender assigned to that person at birth and includes a trans man or trans woman, whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy, the person with the intersex variations, genderqueer and a person having such socio-cultural identities as Kinner, Hijra, Aravani and Jogta[3]

Cisgender – describes individuals whose gender identity or expression aligns with the sex assigned to them at birth.

Gender – denotes the public (and usually legally recognized) lived role as boy or girl, man, or woman. Biological factors combined with social and psychological factors contribute to gender development.

1 Merriam-Webster. (n.d.). Transgender. In *Merriam-Webster.com dictionary*. Retrieved December 22, 2021, from https://www.merriam-webster.com/dictionary/transgender

2 Se 2(K) of transgender persons act 2019

3 The Transgender Persons (Protection of Rights) Act, 2019.

Gender identity[4] – is a category of social identity and refers to an individual's identification as male, female or, occasionally, some category other than male or female. It is one's deeply held core sense of being male, female, some of both or neither and does not always correspond to biological sex

Transgender – refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their gender at birth. (Note: The term transgendered is not generally used)

4. DISORDER OF GENDER IDENTITY AND EPIDEMIOLOGY

Over the few years, epidemiology means are used to understand the causes of some diseases. For example, during the 1980s HIV/ aids disease was heading very fast. To understand the behaviour pattern, surveys and the collection of data were used as a part of the study. It was also observed that the main reason for reading about HIV/ AIDS was a man having sex with a man[5] but, epidemiological methods have never been used to understand the gender identity disorder (GID) of transgender. Transgender takes birth not because of mental disorder. But it is observed that medical help through counselling can improve the mental condition of transgender. Trans people feel a disconnect when they identified themselves as transgender people and feel that society won't accept them as they are transgender, this stage is called gender dysphoria, which can be removed from society by following two approaches. The first approach is the enactment of legislation to change the mindset of society. And the second approach is through self-help from and among transgender. The legislative growth at the international level has been achieved by World Professional Association for Transgender Health (WPATH) by guiding to help and assistance to Trans sexually transgender people[6]

5. HISTORY OF TRANSGENDER

Transgender People were silent and an integral part of society for decades together. Yet the transgender was respectfully appearing on a few occasions occasionally. History is evident in the existence of Tran's people. The spiritual and religious holy book of Hindus Ramayana is evident about transgender existence. Lord Rama while leaving for the forest for fourteen years instructed his disciples that all males and females have to go back and lead a happy life but the crowd included transgender people also. According to the instructions of lord Rama, all males and females went back to their homes but the transgender people were waiting till Rama comes back from the

4 American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders: DSM-5. Arlington, VA: American Psychiatric Publishing; 2013.

5 Zucker, K. J., & Lawrence, A. A. (2009). Epidemiology of gender identity disorder: Recommendations for the standards of care of The World Professional Association for Transgender Health. International Journal of Transgenderism, 11(1), 8-18.

6 Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus (2016) Mental health and gender dysphoria: A review of the literature, International Review of Psychiatry, 28:1,44-57, DOI: 10.3109/09540261.2015.1115753

forest when asked by Rama transgender disciples said that Lord Rama has given instructions for men and women and had not given instructions for them. They said that they neither belong to men nor women. At that moment Lord Rama gave them the power to bless people. During the period of Mahabharata some 5000 BC years ago Arjuna was playing the role of the Brihanalla who was neither a man nor a woman. History is also evident about Srikandi being a daughter of King Dhrupad and helping to finish Mahabharata by becoming the reason for the death of Lord Bhishm on the bed of arrows[7]. A glimpse of transgender people can also be seen in Kama Sutra as Tritiya Prakriti. The Moghal period is not an exception to provide evidence about transgender people. During the Mogul period, transgender people played important role in protecting Mecca and Medina places which were holy places for the Muslim community. They occupied a good place in the Muslim empire and were very close to the king as they served as administrators, advisers, and ministerial persons[8].

6. CONSTITUTIONAL MANDATE FOR TRANSGENDER

The term transgender was coined in 1965[9] earlier they were known as Hijra Tritiya Prakriti, Kothi, Arwani. The medical profession during 1965 called the group of people who does not confirm either male or female as a Third Gender group or transgender. The right to choose one's own identity falls under the Indian constitution[10]. Sexual minorities cannot be discriminated against in any field[11]. When invoked by any person freedom of expression is also covered under the Indian constitution[12]. Article 19(2) imposes certain restrictions on one's appearance and choice of dressing[13].

7. CAUSES FOR NON-RECOGNITION OF TRANSGENDER

In India transgender were forced to live in isolation. They have their customary practices they welcome a new member to their community when social exclusion, rejection from the family and for several other reasons. All these years they were neglected in society and kept away from social economic political participation. There

7 Carroll, Gilroy, 2002 – Carroll, L., Gilroy, P.J. (2002). Transgender issues in counsellor preparation. Counsellor Education & Supervision, 41(3), 233"242.

8 Transgender in India, Sribas Goswami, Sushweta Karmakar Series A Has been issued since 2010. ISSN 2219-8229 E-ISSN 2224-0136 2018, 9(2): 107-112 DOI: 10.13187/er.2018.2.107 www.erjournal.ru

9 Hirning, L. C. (1965). Sexual Hygiene and Pathology: A Manual for the Physician and the Professions. *JAMA*, *192*(5), 428-428.

10 Art 21 constitution

11 Articles 14, 15, 19, 21 of the Constitution of India. The petitioners submitted that Section 377 should only apply to non-consensual penile nonvaginal sex and penile-non-vaginal sex involving minors (Naz, supra note 6, p. 2.

12 Art 19 (1)(a) of Indian Constitution

13 Devor, 2004 – Devor, A.H. (2004). Witnessing and mirroring: A fourteen stage model of transsexual identity formation. Journal of Gay & Lesbian Psychotherapy, 8(3/4), 41"67.

are many reasons for their least development. They are poor economic conditions, Poor health conditions, low literacy, and higher mortality rates. Society has closed its doors to transgender people[14]. Society had become conservative in accepting transgender as the person among one of them. The result is they were put in the darkness and did not achieve higher positions in society[15]. The transgender data[16] provide an idea about their population. For centuries together they have not been recognized in India. It is because of this reason their important rights like the right to vote, right to identification by the government, right to education, and property right has not been recognized. It is recently that the rights of transgender through sexual identity have given status in society.[17] Now society has to accept the transgender community as part of society. It is teachers, students, neighbours, colleagues, health care staff; parents, care support people, and allow them to be a part of society.[18]

The census shows 4.88,00,00 transgender people in the year 2011.[19]

Table no. 1: Statistics of transgender Population in India 2011

States	Thousands
Uttar Pradesh	137
Andhra Pradesh	44
Maharashtra	41
Bihar	41
West Bengal	30
Madhya Pradesh	30
Tamil Nadu	22
Odisha	20
Karnataka	20

It was realized that most transgender has come from an average or middle-class background. They often face discrimination and harassment by civilians, police, media, medical establishment and other institutions of society[20]. The negative health conditions of transgender were the result of non-recognition of their sexual expressions, lack of

14 Transgender in India: Identified by Law Discriminated by the Society Goswami, S. (2018). Transgender in India: Identified by law discriminated by the society. *European Researcher. Series A*, (9-2), 107-112.

15 Nuttbrock et al., 2002 – Nuttbrock, L., Rosenblum, A, Bluenstein, R. (2002). Transgender identity affirmation and mental health. The International Journal of Transgenderism, 6(4).

16 https://www.census2011.co.in/transgender.php

17 NALSA case 2014

18 Pallavi Das, Higher Education of Transgenders in India: Opportunities and Challenges, International Journal of Research in Engineering, Science and Management Volume-2, Issue-2, February-2019, www.ijresm.com | ISSN (Online): 2581-5792

19 Supra note 18

20 Bhattacharya, Shamayeta; Ghosh, Debarchana (2020). Studying physical and mental health status among hijra, Kothi and transgender community in Kolkata, India. Social Science & Medicine, 265(), 113412–. doi: 10.1016/j.socscimed.2020.113412- Elsevier

medical facilities, denial of education,[21] rejection in employment, harassment at healthcare services, lack of trained medical practitioners and limited study on the transgender community which contributed to their worst condition[22]. Transgender is the umbrella term used to recognize LGBTQIA+ the sum of communities under it the acronym stands for lesbian, gay, bisexual, transgender, queer, intersex, a sexual.

8. ROLE OF GOVERNMENT IN THE DEVELOPMENT OF THE TRANSGENDER COMMUNITY

The preamble of the Indian constitution provides for the constitutional rights of the transgender person and states that Justice- is social, economic, political and equality of status. Art 14 of the Indian constitution provides for basic protection to transgender to get the right to equality. Art 15 prohibits discrimination on five major important grounds they are religion, race, caste sex or place of birth. Art 21 states about the right to life and personal liberty and art 23 prohibit forced labour and beggar. The constitution guarantees political and civil rights to a citizen of India. But the third gender has to struggle a battle to get it sanctioned by the government. Identification on the bases of religion, race, caste, sex and place of birth has been recognized by the government and is common in India but recognizing based on sex has a conservative method. Sexual identity is restricted to only males and females and has not identified the third gender as a separate entity of the society which can either be fit in male, female or as a separate group.

Section 377 of the Indian Penal Code 1860 banned sex in an unnatural way and against the order of nature. Which indirectly put restrictions on the expressions of individuals and the restricted relationship between two individuals between men with women? The section clearly says by determining that if the expressions are against the order of nature one can be punished.

The government of India enacted the Transgender Persons Protection Act 2019 to provide legislation for transgender which can protect against all kinds of discrimination. The appropriate government must take initiative to protect transgender people which includes medical help, economic support and efforts to rehabilitate from their condition[23]. For self-identification, welfare schemes for the benefit of transgender, equal opportunity in employment, and redressed mechanisms[24] were part of the act. The rules are also legislated and called Transgender Persons Protection rules 2020.

9. TRANSGENDER IN INDIA –JUDICIAL TREND

Section 377 of IPC 1860 focuses on the criminalization of sexual activity against the

21 Woodward, K., The Short Guide to gender, Jaipur: Rawat Publications, 2012.

22 Ibid

23 Guidelines For Garima Greh (Shelter Home for Transgenders) Social Defence Bureau Ministry of Social Justice and Empowerment Government of India 2020-2021.

24 Ministry of Social Justice and Empowerment Notification New Delhi, The 25th September, 2020

order of nature which is interpreted to criminalize same-sex sexual activities. In independent India rights of transgender people and the ruling on section 377[25] was discussed in several cases. Among them Naz foundation. Vs Government of NCT of Delhi case[26] and National Legal Services Authorities vs Union of India (NALSA)[27] cases are important. In the Naz Foundation case, the court held that articles 14, 15, 19 and 21 applied to the consensual sex act. The judgment has affected the right to privacy of transgender, Hijra, Kothi[28] and other sub-communities under transgender and other sex workers. In December 2013 court "reversed the decision in Suresh Kumar Koushal[29] by upholding the constitutional validity of section 377 and held that the ban on same-sex sexual activities against the normal order was held correct and the ban will operate on consensual as well as non-consensual sexual activities. This was criticized in national as well as international forums. Later many religious groups again challenged it on the ground that they were interested parties in the decision and the case affected their rights as well. In the NALSA case court reversed the decision from the Suresh Kaushal case[30] and held that the people who do not conform to either male or female are called the Third Gender apart from binary genders of society. The court held that Right to life include right to privacy and have all the basic human rights on the basis of sexual identity.

10. TRANSGENDER IN INDIA- PRESENT STATUS

In India through the NALSA judgment, it was made clear that transgender people have been recognized as the Third Gender. The rights of the Transgender Persons Protection Act 2019 have further strengthened their position in India. Transgender persons have received a National award for their contribution to society. Now transgender people are in all most all fields like police department, government sector, private sector, business field, social activists and the film industry. They are holding a good position in the government of India as well as in the state governments. The respective government were releasing various schemes for the welfare of transgender people.

Gender-affirmative technology has been made available in government hospitals. Sex reassignment surgeries can be availed by Tran's people free of cost in India. The state of Tamilnadu is the first state to form Transgender Welfare Board in 2008. Now the Kerala government has given financial assistance to transwomen and has come up with a transgender policy first ever in India which was a strong step towards the protection of transwomen in India. For the transgender community, a helpline is

25 Se 377 Indian Penal Code 1860.

26 Naz Foundation v. Government of NCT of Delhi and Others (2001) WP(C) 7455/2001.

27 2014 5 SCC 438

28 Kothi refers to an 'effeminate man' receptive in same-sex sexual activities

29 Suresh Kumar Koushal and Another v. Naz Foundation and Others (2014) 3 SCC 220 (2014) 1 SCC 1 (Supreme Court of India, 11 December 2013).

30 (2014) 1SCC 1

provided called MANASU. The state of Karnataka has provided with 1% reservation for the transgender community in government employment. The state of Chhattisgarh has come up with an action plan for the development of transgender, for about 3000 eunuchs in their state. The Chhattisgarh state provided free sex reassignment surgery for those who want to change their sex and transform to the sex of their choice. The state of Tripura has come up with a scheme to provide Rs 500 to transgender in their state. The state of west Bengal has a new recruitment process for Civil Police Volunteers Force (CPVF) and recruited transgender CPVF of their state.

The state of Karnataka has done a new scheme called Karnataka social security scheme Mythri Yojana 2013. Under this scheme from the age group of 18 years to 64 years monthly pension of Rs 500 will be given to a transgender individual in Karnataka. The scheme is available to those transgender individuals whose income is less than 12000 per annum in rural areas and transgender people whose income is less than 17000 in urban areas. Karnataka transgender policy 2017 is provided monitory and other welfare schemes for the transgender community.

11. LEGAL REFORMS FOR TRANSGENDER PERSONS

Transgender Persons faced a lot of harassment and discrimination in the field of education, health, employment etc the central government as well as the state government has to take initiatives to enact laws for the protection of transgender persons in emerging fields also like health, education, reservation, employments, family laws, adoptions, marriage, marital rights, the position of maintenance, inheritance, succession, rights against harassment are some of the areas where the law needs to settle.

Punishments must be given to Transgender persons if they are criminals under the law. In this regard, Transgender people are to be interpreted under the law as persons and gender must include all three gender in society simultaneously.

The population strength should be calculated through the census. The last census was conducted in the year 2011. Now the requirement of conducting a census arises not only to identify the total number of transgender persons but need to conduct a census to understand the sexual orientation among the other sub-sexual minorities.

12. CONCLUSION AND SUGGESTIONS

Various instances and case studies are available in the transgender community concerning remarkable achievements in various fields despite restrictions on them in India. They were famous in politics, entertainment, social activism, motivational speaking and so on. Some of them are Shabnam Bano was the first representation of the public position being transgender women in India. She was in a public position from 1998 to 2003. The other example of achievement in the transgender community is Kinner Madhu who was the mayor of Raigad in the State of Chhattisgarh. Laxmi is another example who is a good dancer and guru for the transgender community. The Judiciary and Legislature have set benchmarks for the development of the transgender community. Various schemes are part of government rules and regulations.

The government has to implement various schemes issued for the development of the transgender community and Tran's people have to respond to them for their self-analysis. History was a proven nightmare for Transgender persons. They have been rejected by society and law for centuries together. Human and legal rights have been denied such as the right to equality, the right to freedom of expression, the right to access government facilities, the right to health and many more. Some of the problems of transgender persons are

- They are not accepted by their family members as well as by society at large.
- They have to face health and hygiene problems in public places because no separate toilets have been constructed for them. They have to either adjust in the female or male toilets.
- The offences against transgender persons were more in number because legislation not provided any solutions. The Indian Penal Code 1860 under section 377 made them criminalized in India from the period of the British era.
- They were never given civil and political rights under the Indian constitution.

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NOTIFICATIONS

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ACTS

- The Transgender Persons (Protection of Rights) Act, 2019.

The Indian Prison and Apathy of Prisoners in 21st Century: A Reformative Approach

*Mr. Abhilash Aggarwal**

ABSTRACT

In the modern state, a prison system was established with the goal of reforming offenders in order to make them socially acceptable and rehabilitate them in society. The incarcerated are deprived of their right to freedom upon being confined within the four walls of prisons. The Prison Statistics of India (PSI) 2021 shows that the Indian prisons are overcrowded and in 17 states, the average prison population rose by 23% from 2019 to 2021. The increase in the percentage of undertrial prisoners was also a concern; it rose to 76% in December 2020 from 69% in December 2019. The prison management and administration have been exposed to major redundancies, and cases of corruption have received significant light in the past few years. This chapter shall discuss the procedural lapses in the Indian criminal justice system, the state of undertrial prisoners and exonerations. The objective of this research is to envision lapses in the prison system and anqlyze the inhuman acts such as unequal treatment of prisoners, overcrowding, prison violence, inhuman living conditions, inadequately trained personnel, staff shortages, poor budgetary allocation, mental and sexual abuse on prisoners, delayed legal aid, custodial torture and prison suicides. The author shall also discuss the future of the modern prison reformative standards to ensure detainees basic human rights and the duty of the state to develop a cognitive understanding of care.

Keywords: *Prison System, Human Rights, Sensitization, Rehabilitation, Undertrial Prisoners, Criminal Justice System.*

"They send you here for life and that's exactly what they take."

-The Shawshank Redemption (1994)

A. INTRODUCTION

A person who is a criminal need not always remain the same and nobody is born as a criminal. A criminal's behavior is influenced by various social, psychological and

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economic attributes that are often not cured by sympathetic understanding and scientific treatment.[1] The Indian constitution guarantees that persons on trial are presumed innocent unless proven guilty. However, while in custody, they are routinely subjected to violence in the jail and horrible living conditions, as well as psychological and physical abuse. Many people lose their jobs as well as their links to their families, neighborhoods, and communities. Furthermore, doing time in jail stigmatizes people both individually and as community members. Shame and disgrace might befall even their own families, relatives and communities. Even after being declared not guilty, undertrials face substantial job difficulties upon being released.[2] The report published in 2019, by *Commonwealth Human Rights Initiatives* (CHRI), commissioned by *Haryana State Legal Services Authority* (HSLSA), discovered that 47% of inmates interviewed were subjected to degrading and inhuman treatment, including torture, during police remand.

The *World Prison Population List* reports that there will be more than 11.5 million people relishing in prisons worldwide as per their report published in December 2021. The 13th edition of this list, which concluded in October 2021, was prepared after collecting data from 223 prisons worldwide. It is estimated that since the beginning of the 21st century, there has been a 24% rise in the prison population and a particularly high percentage increase of incarcerations has been reported in South America (200%) and South-East Asia (116%). The country with the highest prison population is the United States of America. In South Asia, India recorded the lowest rise in the *prison population rate* since 2000, i.e., 35%, but in comparison to other Asian countries, India recorded a rise in prison population of 76%.[3]

Section 3 of sub-section (1) of the Prisons Act, 1984 defines 'prison' as "*means any jail or place used permanently or temporarily under the general or special orders of a state government for the detention of prisoners and includes all lands and buildings but does not include any place for the confinement of prisoners who are exclusively in the custody of the police*". Similarly, "incarceration" can be defined as the act of confining a person in four walls or behind bars as punishment for an offense committed by limiting their right to liberty. The issue of procedural flaws affecting convictions due to a lack of proper investigation is not new. In 2016, *Justice M. Jaichandren* referred to the statistics of the Madras High Court, stating that nearly 80% to 90% of cases end in acquittal. Lack of application of mind during the course of investigation, failure to collect evidence at the right time for forensic tests and DNA testing were some of the major concerns raised by the President of the Board of Governors of the Tamil Nadu State

1 Dr. Krishna Pal Malik, *Penology, Victimology & Correctional Administration in India* 283 (Allahabad Law Agency, 2020).

2 Basant Rath, "Why We Need To Talk About The Condition Of India's Prisons", The Wire, Jul. 26, 2017, *available at:* https://thewire.in/uncategorised/india-prison-conditions. (last visited on Jan. 18, 2023)

3 Helen Fair and Roy Walmsley, *World Population List* (13th ed.), World Prison Brief, ICPR, London (2021), *available at:* https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf.

Judicial Academy's Regional Centre in one such programme organized on 'Investigation Skills for Police Officers'.[4] This chapter will discuss and elaborate on the atrocities committed against Indian prisoners. The author shall rely on factual data collected from verifiable authorities to establish a comprehensive reformative approach. In the later part of the chapter, judicial administration shall be briefly discussed with reliable suggestions as to how to improve the current prison administration in India and the state of prisoners living conditions in jails.

B. CLASSIFICATION OF PRISONERS IN INDIA

Initially, the classification of prisoners was unstructured and not dependent on clinical judgment, demonstrating a lack of accuracy and consistency. However, with improvements in research approaches to assessing prisoners, as well as the use of an actuarial professional judgment approach and regular reassessment, key individual factors can be identified, allowing the most appropriate factors for matching prisoners' interventions. "*The Handbook on the Classification of Prisoners, 2020*" defines classification of prisoners as "the *placement or allocation of prisoners to one of several custody or supervision levels in order to match the prisoners' individual risks and needs to correctional resources and the appropriate supervision regime*". It is required for both '*pre/under trial detainees*' and '*sentenced prisoners*'. Such classification depends upon the prison's policies and guidelines, infrastructure and availability of staff and resources.[5] It is possible that common stand-alone factors, like the crime for which a person has been accused or convicted, are not the best way to estimate the risk that a prisoner may pose in a prison setting or to the community. As a result, they are not suitable stand-alone determinants of classification, categorization and allocation decisions, necessitating the reliance on individualised assessments. According to the rules of the criminal justice system, a person who does not have a history of violent behaviour and who poses a low risk of engaging in violent behaviour in the future can be found guilty of a serious or grave crime. On the other hand, a prisoner with a long history of crime can be found guilty of a crime that does not involve physical violence in order to make their current sentence seem fair.[6]

The respective state prison manuals, as well as the Prisoner's Act of 1984, govern Indian prison administration. Section 28 of the Prisons Act and Rules 212 and 213 of the Jail Manual empower the Jail Superintendents with the '*right to segregate*' the convicted prisoners in separate cells and restrict their movement for the purpose of maintaining discipline in prison.[7] In India, the question of how prisoners should be

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4 "Procedural Lapses affecting conviction", The Hindu, Sept. 11, 2016, 12:00 A.M., *available at:* https://www.thehindu.com/news/cities/Coimbatore/%E2%80%98Procedural-lapses-affecting-conviction%E2%80%99/article14632992.ece/amp/. (last visited on Feb. 2, 2023)

5 Dr. Andrea Moser, "The Handbook on the Classification of Prisoners", UNODC, Vienna (2020), *available at:* https://www.unodc.org/documents/dohadeclaration/Prisons/HandBookPrisonerClassification/20-01921_Classification_of_Prisoners_Ebook.pdf. (last visited on Feb. 2, 2023)

6 *Ibid* at 3.

7 K. Valambal v. Government of Tamil Nadu LAWS(MAD) 1980-10-35.

categorized was first brought up at the Jail Conference of 1877. It was later settled in sections 27 and 28 of the Prisoner's Act of 1984. The *All-India Committee on Jail Reforms* (1980–83) made the recommendation to separate the '*mentally disturbed prisoners*' from other prisoners and put them in mental asylums for rehabilitation. The *Mulla Committee* also made several suggestions as to how to provide for physical and bodily needs, including the availability of food and water, clothing, bedding and other facilities, providing clean and hygienic accommodation and medical care for sick prisoners. The segregation of prisoners was suggested to be done into the following categories:[8]

- ***Under-trials***: A prisoner who is currently on trial in a court of law or imprisonment on remand while awaiting trial is said to be an under-trail prisoner. The 78th *Law Commission Report*, defined it as a person who is in remand or in judicial custody during investigation and hasn't been convicted or acquitted of any crime yet. The Table 1 gives the percentage of undertrial prisoners lavishing in jails for the respective periods as on 31st December, 2021.

Table 1

Time Period in Prison	Percentage
1 year or less	70.9%
1 to 2 years	13.2%
2 to 3 years	7.6%
5 years or more	2.7%

Source: Data from PSI Report (2021) for undertrial prisoners

- **Juvenile or Young Offenders:** The *Reformative Schools Act, 1897* introduced reformation of criminals below the age of 15 years to be sent to the Reformative Schools in pre-independence era.[9] In ***Dildar Singh* v. *State of Punjab***[10] the constitutional court guided the prison authorities to segregate male prisoners under the age of 21 years from other prisoners as well as those who have arrived at the age of puberty from those who have not. The *Juvenile Justice (Care and Protection of Children) Act, 2000* was enacted to provide 'special homes' for those under the age of 18 years for the 'children in conflict with law'. A separate criminal justice system has been created wherein the 'young offenders' has to be produced before a 'Juvenile Justice Board' and kept in observation until during the pendency of inquiry.[11]
- **Hardened Criminals/Habitual Offenders:** *The Habitual Offenders Act* of various states defines a habitual offender as "*any person who since his attaining the age*

8 Report of "All India Committee on Jail Reforms", Government of India Press, New Delhi (1983).

9 Girish Kathpalia, *Criminology and Prison Reforms* 186 (Lexis Nexis, 2014).

10 1994 (3) Recent CR 62 (P&H).

11 Dr. Krishna Pal Malik, *Penology, Victimology & Correctional Administration in India* 324 (Allahabad Law Agency, 2020).

of eighteen years, during any consecutive period of five years, has been sentenced on conviction on not less than three occasions to a substantive term of imprisonment for one or more of the scheduled offences committed on separate occasions, being offences which are not connected together as to form parts of the same transactions and such sentences has not been reversed in appeal or revision".[12] Justice *Krishna Iyer* while interpreting the constitutionality of the section 110 of the Criminal Procedure Code, 1973 which classifies an offender as 'Habitual/Wanted' for certain acts and grants the power to arrest said, that the, "*survival of this section derives its obedience to Article 21 of the Indian Constitution. This preventive section sanctions privative freedom, if incautiously proved by indolent judicial process, may do deeper injury*".[13]

- **Women:** The British Prison system of administration had no classification of prisoners on the basis of sex. However, it is known that in India this segregation was always kept in mind which reflects a systematic and well deliberative treatment of criminals under ancient Hindu Prison administration.[14]

Later, these suggestions were accepted and put into the prison manuals of different state governments. The classification was made upon the following principles: female *prisoners were* to be segregated in separate houses; *First-time offenders* are to be placed separately and not among habitual offenders and similarly *Convicted prisoners* will be kept apart from undertrial prisoners; juvenile prisoners will be kept apart from adult prisoners *and elderly prisoners* will be given special attention and kept apart. *Detenues are* to be kept in separate enclosures in prison. Prisoners imprisoned for default in payment of debt or other *civil offences* are to be kept separately from those convicted of criminal offences; those prisoners *suffering from any contagious disease* should be earmarked and isolated in separate blocks and *hardened criminals* are to be kept in high-security prisons or blocks.[15] Table 2 provides the classification of the kinds of prisoners kept in Indian prisons.

Table 2

Year	No. of Convicts	No. of Undertrial Prisoners	No. of Detenues	No. of other inmates	Total No. of Prisoners
2019	1,44,567	3,32,916	3,223	681	4,81,387
2020	1,12,589	3,71,848	3,590	484	4,88,511
2021	1,22,852	4,27,165	3,470	547	5,54,034

Source: Data from PSI Report (2021) till 31st December, 2021

12 The Bombay Habitual Offenders Act, 1959.

13 Gopalanachari v. State of Kerala, AIR 1981 SC 674.

14 Dr. R. Shamasastry, *Kautilya's Arthashastra* (Mysore Printing and Publication House, 1967).

15 "Classification of Prisoners", Kerala Prisons And Correctional Services, *available at:* https://keralaprisons.gov.in/classification.html#:~:text=Classification%20of%20Prisoners%201%20Female%20prisoners%20are% 20segregated,prisoners%20are%20separated%20from%20other%20prisoners.%20More%20items. (last visited on Feb. 2, 2023)

As per the PSI Report of 2021, the dominant share of the population consists of men, who account for 95.8% of the population that is less educated or uneducated, i.e., 25.2% are illiterate and 40.2% have not cleared beyond higher secondary schooling. Article 14 provides for equality before the law and reading the same with Article 15 obligates the state to provide equal treatment to those placed under similar circumstances. The question of the constitutionality of classifying prisoners into categories 'A', 'B' and 'C' on the basis of their '*social status, education or mode of living*' was taken into consideration by various courts. The Supreme Court noted the prevalence of such practices with a heavy hand and stated that the human rights of common prisoners are at a "discount" in our "Socialist Republic," where moneyed "B" Class convicts oppress the humbler inmates and nameless little men of "Category C.". Thus, equality before the law cannot co-exist with affluence, luxury and solicitude of prisoners.[16] Similarly, the Punjab and Haryana High Court, after considering various aspects of paragraph 576-A of the *Punjab Jail Manual*, classifying the prisoners into categories 'A', 'B' and 'C' held it to be *ultra vires* and *unconstitutional* with Article 14 and 15 clause (1) of the Indian Constitution.[17]

C. MISMANAGEMENT AND ACTS AGAINST HUMANITY IN PRISONS

Prisonisation is a general process of social inclusion of convicts and under trials in prison. As said by *Donald R. Taft* that, "*prisons are deliberately so planned as to provide unpleasant compulsory isolation from general society and are characterized with rigid discipline, provision of bare necessities, strict security arrangements and monotonous routine life*".[18] However, this approach seems to have changed towards reformation of a criminal and not deterrence for the crime committed by him/her. It is a compound effect of various infesting acts that have created a system of mismanagement and distrust among the inmates causing resentment towards the prison system and jail administration in the due course of time. Some of the vital causes which have led to failure of an affective prison system have been discussed below:

- ***Increased population of Under Trial Prisoners*:** In pre-trial processes, legal counsel often has limited access. Many impoverished people convicted of minor offences who are awaiting trial are imprisoned for long period of time because they are uninformed of their rights and unable to acquire legal representation. A lack of finance, a strong support network and limited access to attorneys from within the jail limit their ability to defend themselves in court. This is state of events continue to worsen despite the instructions issued by the Supreme Court stating that "*detainees have a fundamental right to a fair trial as part of their right to life and liberty*"[19]. The constraints imposed were relaxed by Section 436A of the Code of Criminal Procedure inserted in 2005, by virtue of which

16 Rakesh Kaushik v. B.L. Vig, AIR 1981 SC 1767.

17 Nihal Singh v. State of Punjab, 2000 Cri. L.J 3298.

18 Donald R. Taft and Ralph W. England Jr., *Criminology* (The Macmillan Company, New York City, 1964).

19 State of Andhra Pradesh v. Challa Ramakrishna Reddy & Ors. (2000) 5 SCC 712.

the undertrials might not spend years in prison. This section demanded the release on personal bail, with or without surety, of undertrial detainees who have served half of the maximum time they would have received if proven guilty of the offence they are accused of. This clause does not apply to anyone who may receive a death or life sentence. However, 39% of those charged with offences under the Indian Penal Code were not eligible for the death penalty or life in prison as per the PSI report (2014).[20]

- ***Overcrowding of Prisons:*** The country's capital, Delhi, has the most congested jails with a chronic scarcity of top supervisory professionals and prison guards. The prison occupancy rates as reported in 2021 stands at 130.2% as compared to 118% recorded in 2020. The *Annual India Justice Report (IJR)* read that 19 prisons out of 36 in States and Union Territories were overcrowded, the highest being in Uttarakhand (185%) followed by Rajasthan (100.2%). The Union Territories, Dadra & Nagar Haveli, Daman & Diu, Delhi and J&K had over 100% occupancy rates compared to the data of 2020.[21]
- S***hortage of Staff and Medical Facility:*** The overall vacancy in prisons decreased from 30.3% in December 2020 to 28% in December, 2021. Approximately 25% vacancy has been reported in the year 2021 in the prisons of Union Territories, with the highest recorded in the state of J&K. The Tihar Jail in Delhi is ranked third in terms of severe manpower shortage. The prison's labour recruitment falls around 50% short of its actual demand. Prisons in the states with the fewest guards, such as Uttar Pradesh, Bihar and Jharkhand, have more than 65% vacancies among jailers, prison guards and at supervisory levels. The *Modern Prison Manual, 2016* requires 1 doctor per 300 prisoners, on a national average and as per the data of 2020, 1 doctor served 832 prisoners. The IJR reported an overall decline in *medical staff* (including doctors, Lab Technicians, Pharmacists and Compounders) with a shortage of 48.2% qualified doctors in 2021 compared to 34% in 2020. The State of Goa, West Bengal and Karnataka have the most vacant positions, while 40% shortage of medical staff is reported in 14 other States.[22]
- ***Gangsterism and Violence in Prisons*:** Violence in prison between criminals and inter-gang violence are a way to show superiority over fellow inmates and create the existence of supremacy among all. Animosity develops sometimes from the pre-prison live and continues in the prison, also violent fights have been frequently witnessed on trivial issues like during food distribution, accessibility of toilets, place and direction of sleeping, insufficiency of supply of bare necessities (soap, oil, utensils, clothing etc.) leading to theft or any

20 *Supra* note 1. Basant Rath

21 Bismee Taskin, "8 in 10 prisoners in India await trail, majority of jails overcrowded, finds report", The Print, Sept. 13, 2022, 7:50 PM, *available at:* https://theprint.in/india/8-in-10-prisoners-in-india-await-trial-majority-of-jails-overcrowded-finds-report/1126972/ (last visited on Feb. 3,2023)

22 *Ibid.*

event organized in jail premises.[23] Prison overcrowding leads to rampant violence and other criminal activities within the prisons due to a shortage of skilled prison staff. In 2015, 32 convicts escaped in Punjab on different occasions, and 18 more in Rajasthan; in Maharashtra, 18 convicts managed to escape, while a death rate of four inmates per day was recorded in 2015. A total of 1,584 convicts died in jails, with 1,469 dying naturally and 115 dying due to unnatural causes. Two-thirds of the unnatural deaths (77) were purportedly suicides, while 11 other convicts, nine of whom were imprisoned in Delhi-area jails, were reportedly slain. Between 2001 and 2010, there were 12,727 reported fatalities in imprisonment.[24]

- ***Physical Torture and Sexual Abuse*****:** Physical assault is a common practice and even the fearless of all have witnessed the same at the hands of the fellow inmates. An editorial published in The Times of India in 2015, narrated the ordeals of prisoners of Tihar. The prisoners foretold in the interviews about how they were being looked upon by "sexual predators" in jails. Acts of "Sodomy" is a common practice committed by the hyper-masculine of all and sometimes the entire gang. Prisoners quoted that there are special ways of torture in Tihar which they say is "Colgate", "Band Baja" etc. The fear, humiliation, bouts of extreme anxiety are all encased upon as per the prison hierarchy of crimes and criminals.[25]
- ***Corruption and Maladministration:*** The corruption in prisons have been rampant, as can be observed from the suspension of former DG (Prisons) of Tihar Jail after extortion claim of INR 12.5 Crore as "Protection Money" made by conman Sukesh Chandrashekhar in December, 2022.[26] In October, 2021 the Delhi Prison Department suspended 28 jail officials after they were found to be in collusion with Unitech ex-promoters Sanjay and Ajay Chandra. The Apex Court also ordered the National Crime Branch to register criminal and corruption cases against them under Prevention of Corruption Act, 1988 and various section of Indian Penal Code, 1860.[27]

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23 *Supra* note 7 at 197. Girish Kathpalia

24 *Ibid.* Basant Rath

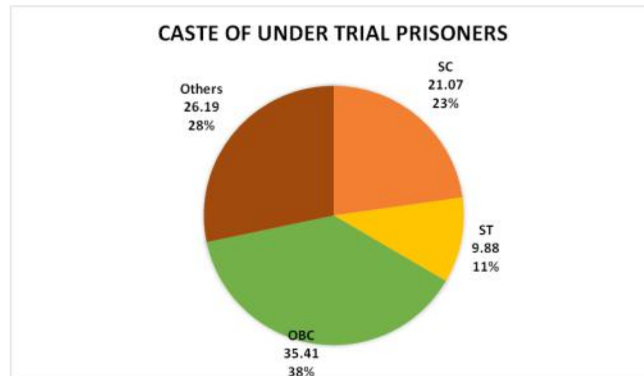
25 Raj Shekhar, "Rampant sexual abuse is a real nightmare in Tihar", The Times of India, Jun. 11, 2015, *available at:* http://timesofindia.indiatimes.com/articleshow/47621742.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

26 PTI, "Tihar Prisons DG Sandeep Goel suspended after conman Sukesh's allegations", Business Standards, Dec. 22, 2022, 1:50 PM, *available at:* https://www.business-standard.com/article/current-affairs/tihar-prisons-dg-sandeep-goel-suspended-after-conman-sukesh-s-allegations-122122200389_1.html (last visited on Feb. 3, 2023)

27 PTI, "Twenty eight Tihar Jail officials suspended for being complicit with imprisoned former promoters of Unitech", The Hindu, Oct. 14, 2021, 11:33 AM, *available at:* https://www.thehindu.com/news/cities/Delhi/twenty-eight-tihar-jail-officials-suspended-for-being-complicit-with-imprisoned-former-promoters-of-unitech/article36997772.ece (last visited on Feb. 3, 2023)

- ***Accusations of Religious Bias and Marginalized Castes:*** Three out of five undertrial prisoners across India belong to SC, ST and OBC communities (as shown in Chart 1). The marginalized castes made up the 66% majority of those imprisoned and undergoing trial. The data analysis of past five years from 2017-2020 suggests an increase of 48% of undertrial prisoners from marginalized castes.[28]

Chart 1



Source: Table 2.11 D of PSI (2021)

Accusations of Religious bias have been raised by many as across India, minorities are over represented in jails. The Muslim, Dalit and Tribals made upto 53% of all prisons in India in 2014. Upon studying the state of these communities, the human rights activist and lawyer *Colin Gonsalves* stated the 'poor economic conditions' of these three communities is the major cause of their presence in Indian prisons.[29] The Chart 2 signifies the data of representation upto 31st December, 2021. Some activist also state that over-representation of minorities is due to communalization of the police that prevails irrespective of political ideology.[30]

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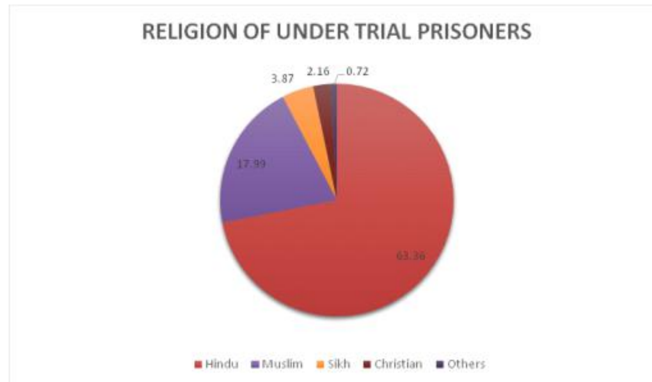
28 Rohini Roy, "Undertrial Prisoners in India: Why Are 66% From Marginalized Castes?", The Quint, Dec. 24, 2022, *available at:* https://www.thequint.com/news/law/indias-undertrial-prisoners-why-are-are-66-percent-from-marginalised-castes#read-more#read-more (last visited on Feb. 3, 2023)

29 Sobodh Verma, "Muslims, Dalits and Tribals make up 53% of all Prisoners in India", Time of India, Nov. 24, 2014, 4:52PM, *available at:* https://timesofindia.indiatimes.com/india/Muslims-dalits-and-tribals-make-up-53-of-all-prisoners-in-India/articleshow/45253329.cms (last visited on Feb. 6, 2023)

30 Christophe Jaffrelot and Maulik Saini, "Across India, minorities are overrepresented in jails", The Indian Express, Dec. 11, 2021, 7:00 AM, *available at:* https://indianexpress.com/article/opinion/columns/ncrb-data-on-religious-minorities-in-jail-7664868/ (last visited on Feb. 6, 2023).

Chart 2



Source: Table 2.11 C of PSI (2021)

D. PRISON REFORMS IN INDIA AND JUDICIAL PRONOUNCEMENTS

Sanctions and punishment have been the most important parts of the administration of justice. In the ancient era, the king's court enforced sanctions in the form of *fines, corporal punishment, imprisonment, banishment, branding, mutilation, skinning and capital punishment*. As people became more scientific in their thinking, deterrence and retribution were replaced by reformation as the main goals of punishment. The origin of prison administration in India is believed to have developed during the Vedic Period. The modern, reformative approach to jail administration started during the British era in 1835. The British ruled India with the goal of making it a police state. The real reforms happened after India got its independence, with the goal of making it a welfare state. [31] The *Montague Chelmsford Reforms Committee Report* made prison administration the subject of states and provinces.[32] In 1950, when the Constitution of India was being written, the same thing was agreed upon under Entry 4, List II, of the Seventh Schedule.

The year 1949 saw some major reforms upon the recommendations of the *Pakwasa Committee*. The report proposed using prisoners as "labor for road work" and "reducing prison sentences based on good behavior". The *psychiatric treatment system* was also implemented to constitute correctional homes. This was a big step towards prisoner's rehabilitation and reformation. A U.N. Expert on Correctional Reforms was invited to India in 1951. *Dr. W.C. Reckless* submitted his report titled "Jail Administration in India" in 1952, which advocated for the establishment of reformation centers and new prisons. *The Central Bureau of Correctional Services* was created in 1961 and renamed the *National Institute of Social Defence* in 1975. The 'Working Group on Prisons' submitted its report in 1973, establishing a research unit at the Headquarters of the Inspector General in each state and inculcating budgetary allocations in the Five-Year Plan.

31 A.S. Raj, "The Early History of Modern Prison System", 22(88) *Social Defence* 10,16 (1987).

32 Dr. L.P. Raju, "Historical Evolution of Prison System in India", 4(5) *IJAR* 298 (2014).

A revolutionary judgment by the constitutional bench was pronounced in 1980, whereby it accepted the majority of recommendations made by the *Mulla Committee* and preserved the basic human rights of prisoners by invoking Articles 14, 19 and 21 of the Constitution. The court considered serious issues such as "inhumane torture," "extortion of money from inmates and their visitors" by jail authorities, and "right to freedom and liberty against overseeing authority," which are guaranteed under Sections 30(2) and 56 of the Prisons Act. .[33]

A '*National Expert Committee on Women Prisoners*' was chaired by *Justice V.R. Krishna Iyer* which submitted its report on 1st June, 1987. The committee recommended recruiting more female officers in the police force to effectively deal with women prisoners and juveniles. The issue regarding 'health and preservation of human life' of prisoners was said to be of paramount importance to the state authorities and medical practitioners.[34] The '*Basic Principles for the Treatment of Prisoners*' adopted by the United Nations General Assembly Resolution 45/111 on 14th December, 1990 was accepted by India.Throughout the seven decades since independence, many judicial precedents have been established to ensure the basic human rights of prisoners. The constitutional courts have actively participated in this reformation process by guaranteeing certain fundamental rights such as, right of every prisoner to avail fundamental rights during detention[35]; right to live with human dignity[36]; right to healthcare and timely medical treatment[37]; right to speedy trial[38]; right to speedy justice of undertrial prisoners[39]; right to free legal aid[40]; right to receive copy of judgment (cost free)[41]; right against bar fritters[42]; right against handcuffing in public[43]; protection from custodial torture and maltreatment in prisons[44]; right to bail during pendency of appeal[45]; right to education[46]; right to reasonable wage for work[47]; right to mothers/pregnant prisoners and child of women prisoners[48]; right to be interviewed[49]; right to socialize with

33 Sunil Batra v. Delhi Administration, AIR 1980 SC 1579.

34 Parmannd Katara v. Union of India, AIR 1989 SC 2039.

35 Charles Sobaraj v. Superintendent, Central Jail Tihar, AIR 1978 SC 1514.

36 Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.

37 Rasikbhai Ramsingh Rana v. State of Gujrat (1999) 1 GLR 176.

38 A.R. Antulay v. R.S. Nayak, AIR 1984 SC 1630, Common Cause Society v. Union of India, AIR 1996 SC 1619.

39 Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360.

40 Sukdas v. Arunachal Pradesh, AIR 1986 SC 991.

41 M.H. Haskot v. State of Maharashtra (1978) 3 SCC 544.

42 Sunil Batra v. Delhi Administration, AIR 1980 SC 1579.

43 Sunil Gupta v. State of Madhya Pradesh (1990) 3 SCC 119.

44 Sheela Barse v. State of Maharashtra, AIR 1983 SC 378.

45 Raj Deo Sharma v. State of Bihar (1998) 7 SCC 507.

46 Mohammad Giasuddun v. State of Andhra Pradesh, AIR 1977 SC 1926.

47 In Re Prison Reforms Enhancement of Wages of Prisoners, AIR 1983 Ker. 261.

48 R.D. Upadhyay v. State of Andhra Pradesh, AIR 2006 SC 1946.

49 Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.

family[50]; right to clean accommodation and sanitation facility[51]; right to cohabitation with spouse[52]; right to compensation on miscarriage of justice[53] and right to leave and special leave[54].

CONCLUSION & SUGGESTIONS

According to World Prison Brief data, India currently has the sixth highest percentage of pre-trial detainees in the world. The Law Commission Report of 1979 stated unequivocally that jails are primarily intended to house convicts, not people on trial. Despite the efforts and guidelines issued by the then Supreme Court in numerous judgments, decongesting prisons is still a far-off goal. *Human Rights Watch* notes two main reasons for this: *firstly,* slow court proceedings, excessive duration of trial procedures, and denial of release of criminal defendants; and *secondly,* the inability of the inmate to furnish the bail bond. Corruption in prisons has been a problem for decades. If a professional gangster or white-collar criminal is willing to grease the official's hands, they are allowed to have mobile phones, drinks, and firearms on the jail premises. On the other hand, the state machinery can take away the basic human dignity of groups that are socially and economically on the outside. With so many criminal accusations made against them, it's easy to see why the department of prisons has long been a desired portfolio for some of India's political leaders. In the absence of a robust whistleblower protection act and structural changes to address the problems of overcrowding and understaffing, India's jails will continue to be nirvana for criminals with political connections and hell for socioeconomically disadvantaged undertrials.

Incarceration is typically a breeding ground for hardened criminal beliefs and identities due to the disruption it brings to a person's work, housing, and social support systems. Prisons that are safe, dignified and conducive to rehabilitation not only eliminate these components and the related societal costs, but also put convicts up for greater success after they are released. When prisons have a rehabilitative culture, both staff and inmates benefit, and there are fewer cases of people going back to prison. Toiny, in order to adequately rehabilitate and reintegrate offenders, every jail on the planet requires a correctional program. Correctional reform is an important topic that has attracted worldwide attention. Numerous programmes have been launched in India to improve the living circumstances of convicts in jails, but overall progress has been little. Correctional reforms have been changed in many ways to meet the needs of the criminal justice system right now. Significant advancements have been achieved in the correctional system across the world in order to preserve convicts rights and reform their maladaptive behaviour in order to effectively reintegrate them into society.

50 Francis Coralie v. Delhi Administration, AIR 1981 SC 746.

51 T.N. Mathur v. State of Uttar Pradesh, 1993 (Supp) 1 SCC 722.

52 Maharaja v. State of Tamil Nadu, SLP (Crl.) No. 2270 of 2008.

53 D.K. Basu v. State of West Bengal, AIR 1997 SC 610.

54 Sharad Keshav Mehta v. Union of Maharashtra, 1989 Cri. LJ 681.

Convicts get occupational skill training and these life skills programmes are frequently adjusted to meet the needs of the inmates. A few non-governmental organisations have also developed programmes like meditation, counselling and vipassana in India's primary jails in attempt to lessen negative emotions and lead offenders toward holistic growth. To fulfil the aim of rehabilitating convicts, correctional programmes in India rely heavily on the cooperation of nongovernmental organisations (NGOs). Their working in prisons may promote prison openness in addition to ensuring that jails comply with international law. The fundamental purpose of correctional facilities should be to give prisoners with a safe, secure, and abuse-free environment. Inmates can be more successfully rehabilitated if they are treated fairly in jail and their basic needs are met.

The Relationship of Freedom of Speech and Expression and Sedition in the Indian Legal System

Mr. Abhishek Dwivedy*

ABSTRACT

Freedom of speech and expression is regarded as mother of all liberties as it has been regarded as an essence of a free society. Almost every country in the world has elevated this freedom to a supreme status.Only the procedure provided by law can restrict the exercise of freedom of speech and expression. Sedition laws are one of the many limitations that can be imposed in the name of public order to limit free speech and expression. The significant rise in the number of sedition prosecutions has raised questions about the law's legitimacy as a justification for curtailing the right to freedom of speech and expression.

INTRODUCTION

The Father of the nation, Mahatma Gandhi once said "*Speech is silver, silence is gold,but the silence of the educated peoples in present day scenario, over an issue concerning the integrity & sovereignty of the nation is harmful for the nation indeed.*"[1] Also to quote George Washington *"If the freedom of speech is taken away, then dumb and silent, we may be led, like sheep to the slaughter."*[2]

Rights are considered to be the basic foundation of individual autonomy. They are supposed to serve as restraints on the authority of the state. They have been provided in democratic countries to safeguard individuals from unwarranted state involvement. Worldwide, history has seen a full perversion of rights and loss of liberties not just during British colonialism, but also under Adolph Hitler's ruthless regime, which established a ministry to unify Nazi control over all sectors of German cultural and intellectual life. Hitler nominated Joseph Goebbels as Reich Propaganda Minister in

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1 Vishal Saini, contemporary study of sedition law in India, AEGAEUM JOURNAL, ISSN NO: 0776-3808,(15/12/2022 at 12.03 p.m), http://aegaeum.com/gallery/agm.j-2655.106-f.pdf"

2 Lawtoact, https://lawtoact.com/what-happens-if-freedom-of-speech-is-taken-away/ (15/12/2022 at 01.47 p.m)

the Reich Ministry of Public Enlightenment and Propaganda. An implicit purpose was to give the perception to neighboring countries that the Nazi Party had the complete and enthusiastic support of the whole populace.It was in charge of the German news media, literature, visual arts, cinema, theatre, music, and radio. The historical ramifications of such a ministry, which attempted to disseminate Nazi ideology, are very well chronicled.[3]

"It is not required in a democracy for everybody to sing the same tune."[4] Freedom of speech and expression of one's opinion or thoughts is a fundamental right to which everybody is entitled to.The importance of freedom of speech and expression in a democratic society like India cannot be underestimated, especially given how the British suppressed all forms of speech and expressions on Indians in the past. The British used different tactics to restrict expression that caused emotions of enmity or ill will against the government constituted by law in India in order to tighten their control. The severe provision of sedition established in 1870 by inducting Section 124A to the Indian Penal Code, 1860 was one of these measures.[5]

George Orwell (1946) discussed the need of open communication in "Politics and the English Language." According to Orwell, many intellectual and political publications fail to explain ideas clearly. He underlined that employing words with apparent meaning inhibited not just communication but also clarity of ideas. Democracy, socialism, justice, and liberty were among the terms Orwell dismissed as essentially meaningless. He saw that each of these words had many interpretations which could not be reconciled, a linguistic feature that Orwell (1949) termed "doublethink."[6]

Free speech and expression are vitally essential in a democratic society. Voters in a democracy want to hear and debate a wide range of perspectives, and also have access to data and explanations, as well as opposing ideas, even if the transmitted opinions are politically, morally, or personally unacceptable to them. These points of view are rarely conveyed openly by media but are commonly communicated via literature, poetry, films, cartoons, and music.

Some have gone so far as to argue that democratic administration without strong freedom of expression is imperfect and should not be considered "democratic." According to Ronald Dworkin, democracy necessitates more than a commitment to elections and universal suffrage: complete free speech protection is a must for any democracy that earns the label, because governance cannot be really participatory without it.

Legitimate government requires the freedom to free expression. Laws and policies are not valid unless they are the outcome of a process which is democratic in nature,

3 AdvocateKhoj,https://www.advocatekhoj.com/library/lawreports/hatespeech/1.php?Title=Hate%20Speech&STitle=Background (17/12/2022 at 10.54 a.m)

4 S. Rangarajanv.P.Jagjivan Ram, 1989 SCC (2) 574

5 ShivaniLohiya, Law of Sedition 1(Universal Law Publishing, New Delhi, 2014).

6 Jesse Chanley, Sharon Chanley, What Does Freedom Mean? SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520619 (07/12/2022 at 02.00 a.m)

and it won't be considered democratic unless the government stops citizens from expressing their opinions on legitimate issues.

THE FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

To begin, the lack of constraints provides a basic answer to the question "what is freedom?" When an individual is free of external limitations, he or she is said to be free. An individual is free if he or she is not subject to external controls or coercion. Freedom also entails enhancing people's capacity to freely express oneself and achieve their potential. In this view, freedom is the situation that allows people to develop their creativity and skills.[7]

Free speech has long been a concept which has been present since a very long time.It was for the very first time used by the Greeks. They used the phrase "***Parrhesia***," which was similar to "***free speech***" or "***speaking truthfully***." This phrase was initially used in the 5th century B.C. Countries like England and France took a long time to consider this freedom as a fundamental right.[8]

The phrase "***free speech***" has the advantage of connoting the concept of an individual speaking in one of the most direct and personalized methods available to us, through the voice. "***Free expression***" is more correct in some aspects, but it still conveys the notion that what is conveyed is somehow subjective, when in many problematic situations in which authors and others are prohibited, the facts they are attempting to impart to a larger audience are not subjective. Speech and expression are two of the most common ways for people to interact and connect with one another. As a result, if something is taken away from a person, his life will be worthless.[9]

According to Justice Jagmohan Reddy in ***KesavanandaBharati v State of Kerala***[10]"*freedom of speech and expression' is considered a basic structure of the constitution. Therefore, the government cannot amend the constitution to deprive people of their freedom of speech and expression."*

Freedom of Speech and Expression is the cornerstone of any free and democratic society. The liberty to speak and express oneself is critical for a democratic society to function smoothly. Not just in India, but also across the world, the this freedom of speech and expression has been regarded as the most vital of all human rights. It is claimed that a person's right to free expression is born with them and dies with them. Enshrined in Article 19 1 (a) of the Indian Constitution, Right of Speech and Expression find its place as one of the most important rights in various places of the world, there are numerous countries who have incorporated this right into their laws, some of them are mentioned below:

7 NCERT, https://ncert.nic.in/textbook/pdf/keps102.pdf, (19/12/2022 at 10.02 p.m)

8 SubodhAsthana, Freedom of Speech and Expression, Ipleader, (22/12/2022 at 05.07 p.m) https://blog.ipleaders.in/freedom-speech-expression/

9 Ibid

10 AIR 1973 SC 1461.

- Article 19 of Universal Declaration of Human Rights states that everybody is entitled to the right to freedom of expression. The right of freedom of speech and expression is entitled to everyone. It further includes the freedom to express, search and share information and ideologies through various mediums.[11]
- Article 19 of International Covenant on Civil and Political Rights (ICCPR)on the matter states that this right should be given to everyone without any restriction i.e. the right to express. Further this article states that the freedom of expression of thoughts, ideas, etc. is provided to everyone and that this right includes the freedom to search for, obtain and share the information and ideas of all types everywhere. Whether it is orally, written or through any other medium.[12]
- Article 9of African Charter on Human and Peoples' Rights states that right to information belongs to every person. Also it further states that everyone has the right to speak or express themselves and to promote their opinion but there is one condition to it and that is the word spoken or the opinion promoted should be within the boundary of law.[13]
- Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms defines Right of Speech and Expression as Free expression is a right that has been provided to everyone. The freedom must include the right to have ones one believe and to freely express it everywhere without any restriction especially by government. This section does not forbid the licencing of broadcasting, television, or movie theatre operations.[14]
- Article 13 of American Convention on Human Rights states the freedom of thinking and speech belongs to everyone. This freedom involves the ability to freely seek out, acquire, and share knowledge and ideas of all kinds, across all boundaries, whether it be verbally, in writing, in print, visually, artistically, or by any other means.[15]
- The ASEAN Intergovernmental Commission on Human Rights (AICHR) was formally created by Association of Southeast Asian Nations Human Rights Declaration on October 23, 2009. The committee also approved a Human Rights Declaration, which includes the following guarantees of freedom of expression: Everyone has the right to freedom of expression that also includes the freedom

11 U.N, https://www.un.org/en/about-us/universal-declaration-of-human-rights, (19/12/2022 at 06.34 p.m)

12 OHCHR, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, (19/12/2022 at 07.26 p.m)

13 ACPR, https://www.achpr.org/legalinstruments/detail?id=49, (19/12/2022 at 08.03 p.m)

14 ECHR, https://www.echr.coe.int/documents/convention_eng.pdf (19/12/2022 at 11.32 a.m)

15 ACHR,https://minorityrights.org/law-and-legal-cases/american-convention-on-human-rights-achr-articles-1-12-13-16-22-and-27/ (19/12/2022 at 07.19 p.m)

16 ASEAN Human Rights Declaration, https://asean.org/asean-human-rights-declaration/ (19/12/2022 at 05.27 p.m)

to have an opinions without being subjected to any restrictions. But on October 23, 2009, during the 15th ASEAN Summit, the 10 members of the Association of Southeast Asian Nations (ASEAN) formally formed the ASEAN Intergovernmental Commission on Human Rights (AICHR).[16]

- **US Constitution 1st Amendment:** Congress is not allowed to pass legislation that restricts the press rights, assembly of people and ask the government for redress of grievances, or the freedom of speech.

Events pointing out the importance of Free Speech throughout History:

- **399BC:** Socrates, a philosopher, was imprisoned for rejecting to established state-recognized gods. He was accused of spreading anti-democratic ideas. He was convicted and sentenced to death. During his trial he explained the jury that: *"If you offered to let me off this time on condition I am not any longer to speak my mind... I should say to you, Men of Athens, I shall obey the Gods rather than you."*
- **1215:** The rebelling barons force King John's unwillingness to sign Magna Carta. It will subsequently be considered as the foundation of English liberty.
- **1689:** After James II is deposed and William and Mary are appointed as co-rulers, the Bill of Rights gives 'freedom of expression in Parliament.'
- **1776:** Sec. 12 of the Virginia Bill of Rights established freedom of press as an essential right in 1776.
- **1789:** 'The Declaration of the Rights of Man', a key text of the French Revolution, guarantees freedom of expression.
- **1791: '**The 1stAmendment' to the United States Bill of Rights provides 4 freedoms: *freedom of religion, freedom of speech, freedom of press, and the right to assemble.*
- **1859:** The article 'On Liberty' written by J.S. Mill advocates for tolerance and uniqueness. *"If any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility."*
- **1929**: Oliver Wendell Holmes, explains his view on free speech: *"The principle of free thought is not free thought for those who agree with us but freedom for the thought we hate."*
- **1948:** The UN General Assembly almost overwhelmingly adopts the Universal Declaration of Human Rights. It calls on member countries to enhance civil, human, economic, and social rights, as well as freedom of speech and expression and religion.

In a recent study conducted in various countries regarding the freedom of speech and expression, the U.S.Aof achieved the best score of 5.73. The second place was given to Poland which had a score of 5.66 and it was followed by Spain which had scored 5.62 and the United Kingdom with the score of 4.78.[17]

17 World Population Review, https://worldpopulationreview.com/country-rankings/countries-with-freedom-of-speech, (30/11/2022 at 10.19 p.m)

Although a lot of countries identify free speech as anelementary right and empower their citizens to openly express their beliefs and opinions, this is not always the case. North Korea, Burma, Turkmenistan, Equatorial Guinea, Libya, Eritrea, Cuba, Uzbekistan, Syria, and Belarus are among the countries that are most restricted in the world. Thevarious governments of the world perceive access to information and knowledge as a danger to their reign, thereby isolating citizens from it in these nations and to do so they limit the spreading of knowledge, the media is muted, and carefully controlled and restrictive laws, terror, and intimidation are used.[18]

In ***RomeshThaperv. State of Madras***,[19]PatanjaliSastri, *C. J.* obersved: *"Freedom of speech and expression of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the constitution may well have reflected with Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, what it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vigour of those yielding the proper fruits."*

In ***Mahesh Bhatt v. Union of India &Anr.,***[20] the Supreme Court held that *"the freedom of speech and expression is one of the pillars of the Constitution of India and indeed sustains its democratic structure. The freedom of speech and expression is a prominent constituent of democracy. A healthy democracy is sustained by informing and making aware the citizens of conflicting and differing points of view and any inroads into the freedom of speech and expression, and any rules made in the form of imposing curbs thereon would violate Article 19(1)(a) of the Constitution. Such curbs are not saved by Article 19(2) of the Constitution."*

Constitutional provisions regarding restriction of freedom of speech and expression:

The grounds for restriction of the Fundamental Rights of Speech are given in Art. 19(2) of the Indian Constitution:

"a)State Security; b) friendly relations with foreign States; c) public order; d) decency and morality; e) contempt of court; f) defamation; g) incitement of an offence and ; h) sovereignty and integrity of India."[21]

OFFENCE AGAINST THE STATE: SEDITION

The 'seditious libel' is essentially an outcome of factional politics. The offence of seditious libel was fundamentally devised to suppress critical expression towards the governing regime. Sedition was initially started for the purpose of protecting the King of monarchial England and the people of the parliament who at that time were largely unelected, against the harsh criticism of the citizen. The earliest instance of

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18 Ibid

19 AIR 1950 SC 124.

20 2008 (147) DLT 561.

21 INDIA CONST. art. 19(2). https://indiankanoon.org/doc/1218090/ (14/12/2022 at 11.34 a.m)

speech control measures began in the 13th century when the rulers in England reckoned the freedom of printing press and regarded the liberty as a threat to their legitimacy.[22]

Origins of sedition law in India can be traced back to the Wahabi movement. The regulation was advanced in 1870 in riposte to increasing Wahabi activities. The Wahabi movement and Revolt of 1857 steered towards anmovement wherein arm was used against the British regime. The British regime labelled the Wahabis as against the government and hence they carried out military operations against them.[23]

The purpose behind Thomas Babington Macaulay's introduction of sedition under clause 113 of the Draft I.P.C was to limit the increased activities of Indian revolutionaries against the British rulers. The original I.P.C of 1860 did not have a law against sedition.

Clause 113 of the draft code stated what would constitute the offence of sedition:

> "Whoever, by words, either spoken or intended to be read, or by signs, or by visible representation, attempts to excite feelings of disaffection to the Government established by law in the territories of the East India Company, among any class of people who live under that Government, shall be punished with banishment for life or for any other term from the territories of the East India Company, to which fine may be added, or with simple imprisonment for a term which may extend to three years, to which fine may be added, or with fine."[24]
>
> "Explanation-such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this Clause."[25]

The British administration modified the Indian Penal Code in 1870, inserting Sec 124A, in response to rising rebellion and unrest. As a result, we may argue that the Law of Sedition was born in India in 1870. In basic words, it refers to statements or speech that provokes people to revolt against a state's or monarch's rule.[26]

22 Vol. 12, No. 2, Roger B. Manning, The Origins of the Doctrine of Sedition, pp. 99-121, Albion: A Quarterly Journal Concerned with British Studies, (Summer, 1980),

23 HetalChavda, Autonomy Is As Autonomy Does – Law of Sedition in India, Vol-2, Issue-5, 2016, Imperial Journal of Interdisciplinary Research,Pg. 30, Pg. 30-31, (2016)

24 Chitranshul Sinha, The Great Repression: The Story of Sedition in India, pg no 37, Publisher, Penguin Viking, 19 August 2019

25 Ibid

26 Md Shah Minhajuddin, Critical Study On Sedition Laws In India,Legal Service India, http://www.legalserviceindia.com/legal/article-4929-critical-study-on-sedition-laws-in-india.html, (20/12/2022 at 07.37 a.m)

Sec 124A of The Indian Penal Code defines Sedition as *"Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government shall be punishable with Life Imprisonment".*[27]

Essentials to Constitute the Offence of Sedition:

To constitute an offense of sedition, the following criteria must be there[28]:

1. There must be an expression-
   - By words, either spoken or written.
   - By signs.
   - By visual representation.
2. Such expression is made to bring or attempt to bring hatred or contempt.
3. Such expression excites or attempts to excite disaffection towards the Government established by law in India.

Political dissent was the main target of Section 124A and it was used extensively to suppress it. *"Mr. Jogendra Chandra Bose was caught in the line of fire.Charged for sedition just because he criticized the Age of Consent Bill and brought forward its negative impact of Indian Scenario due to the Britishers.*[29] *The jury of the case decided that sedition under the Indian Law was milder than that in England. In England any overt act which in any sense directly and indirectly pointed out towards Sedition were panelized where as when it came to India only those acts were punished which were done with an intention to resist by force or an attempt to excite resistance by force."* Further in the case of *Queen Empress v. BalGangadharTilak,*[30]"*the major focus was on the interpretation of the word "disaffection" and words like including enmity,hatred, hostility,dislike, contempt and every form of negative act or omissions against the Government were included. When it come to doing or feeling anything bad against the government then the word disloyalty can most appropriately comprehend it. The court predominantly rejected thosepoint of view that, only acts that proposedrevolt or forced resistance with the Government to be part of the section. This particular incident lead to the amendment in 124A of IPC in 1989 where the explanation defining disaffection to include disloyalty and feelings of enmity were added."*

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27 Indian Penal Code, 1860 Sec. 124A,(India) https://indiankanoon.org/doc/1641007/ (19/12/2022 at 09.26 p.m)

28 Diva Rai, Sedition in India: mind blowing points you must know, Ipleader, https://blog.ipleaders.in/sedition-in-india/ (23/12/2022 at 04.25 p.m);AnkurGupta,Sedition,Dr Ram ManoharLohiya National Law University,Lucknow, http://www.rmlnlu.ac.in/webj/sedition.pdf, (23/12/2022 at 06.43 p.m)

29 Queen-Empress vs Jogendra Chunder Bose And Ors. (1892) ILR 19 Cal 35

30 (1917) 19 BOMLR 211

31 ILR (1898) 22 Bom 152.

Two landmark judgments were given after the case of Tilak i.e. *Queen Empress v. RamchandraNarayana*[31] and *Queen Empress v. Amba Prasad.*[32]"*In the former case*[33] *the court made an effort to explain the term 'attempt to excite feelings of disaffection to the Government' as an attempt to created or generate hatred against the government which has been established by law due to which the people or citizen tend to move further from the government and act against it. The court in the end also clarified that every act or every criticism against the government does not amount to disaffection condition being that the person is loyal by heart and is for the government established by law." "The same interpretation was done in the later case*[34] *where as the court held that it is not necessary that an actual act of war, mutiny or rebellion against the government was caused by this section."*

The British Government in India had decided and was now justifying the enlargement of the ambit of Sedition laws, but the court refused to call a speech made by Communist party of India and many trade unions and labor organization as illegal and seditious which the. Just because they were expressing their dissatisfaction against the government does not mean that it was Sedition. The Court said that such suppression will be against the freedom of speech and expression. Hence in *NiharenduDuttMajumdar v. the King Emperor*[35]"*the court went against the literal interpretation given to the section and held that sedition was connected to disturbing the public order and causing chaos and disturbance and hence until any speech does the same which amount to public disorder or the same is anticipated, it cannot be termed as Sedition."* But with no surprise this judgment was overruled in *King Emperor v. Sadasiv Narayan Bhalerao,*[36] *"where the liberal definition of 'public order' given in the abovementioned case was overruled and the literal definition given in the Tilak's case was upheld again."*

FREEDOM OF SPEECH AND EXPRESSION AND SEDITION: CONSTITUTIONAL VALIDITY

One of the most articulate and respected American justices, ***Justice Louis Brandeis***, stated the following in reference to the critical need of free speech in a constitutional democracy:***"We must never forget that unless speech is free for everybody, it is free for nobody; that unless it is free for error, it is not free for truth, and that the only limitations which may safely be placed upon it are those which forbid slander, obscenity and incitement to a crime."***[37]*Democracy is fundamentally founded on free and open speech, as this is the only means of correcting operations of the government in a democratic system of governance.*[38] *If democracy is government for the people, of the people and by the people, it is*

32 (1898) ILR 20 All 55

33 Supra note 28

34 Supra note 29

35 Niharendu Dutt Majumdar v. the King Emperor, AIR 1939 Cal 703

36 King Emperor v. Sadasiv Narayan Bhalerao, (1947) L.R. 74 I.A. 89

37 Suresh Sahni, Sedition Law vs Freedom of Speech and Expression, Punjab Today, https://www.punjabtodaytv.com/english/sedition-2/, (27/12/2022 at 05.29 p.m)

38 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

apparent that every citizen must be permitted to take part in the democratic acts of the country, and in order for him to rationally use his right to choose, open and widespread debate of public concerns is vitally necessary.[39]

The Indian Constitution protects freedom of speech and expression, which implies the ability to freely express one's own beliefs and ideas by speaking, writing, printing, images, or any other methods. Article 19(1) defines fundamental rights as *"those great and basic rights that are recognised as natural rights intrinsic in every person."*[40]With regard to Article 19, the essential condition of law's legitimacy is that it should not be arbitrary,[41] and the limits or limitations imposed on rights under Article 19(1)(a) must conform with the reasonable constraints set forth in Article 19 (2).[42]

The court in *Romesh Thappar v. State of Madras*[43]"*the Court noted that the elimination of the word 'sedition' from the proposed Article 13(2) of the Constitution of India demonstrated that condemnation of the government instigating disaffection towards it cannot be considered as a rational justification for limiting freedom of speech and expression and of the press, unless the provocation is such that it undermines the security of the State or tends to topple it."*

In 1950 in the High Court of Punjab a case was filed against one *Tara Singh Gopi Chand*[44]"*who was prosecuted under Section 124A and 153A 6 of IPC. The petitioner challenged the constitutional validity of the provisions. The High Court accepted the position as settled by the Privy Council in Sadashiv Narayan Bhalerao*[45] *instead of NiharenduDuttMajumdar.*[46]*It ruled that inciting public unrest was not required to invoke Section 124A. After concluding this, the High Court had no doubt that Section 124A constituted a constraint on the freedom of expression guaranteed by Article 19(1)(a) and examined it to determine if it was protected by Article 19(2). It relied on two full-bench 7 judgments of the Apex Court in RomeshThapar v. State of Madras*[47] *and BrijBhushan v. State of Delhi,*[48]*Court had stated that Section 124A would be unlawful since the Constituent Assembly had omitted the word "sedition" from Article 13 (which was adopted as Article 19), and so the clause would violate the basic right to free expression. However, because the two decisions were deciding the validity of other legislative provisions, they did not directly find Section 124A unlawful."*

39 Whitney v. California, 247 US 214.

40 State of W.B. v. Subodh Gopal Bose, AIR 1954 SC 92.

41 Dwarka Prasad LaxmiNarain v. State of U.P., AIR 1954 SC 224; Chintaman Rao v. State of M.P., 1950 SCR759.

42 AkshayAnurag and Dibya Prakash Behera, Section 124-A IPC- Where to draw the line, SCC, October 3, 2017 https://www.scconline.com/blog/post/2017/10/03/section-124-a-ipc-where-to-draw-the-line/

43 RomeshThappar v. State of Madras 1950 AIR 124

44 Tara Singh Gopi Chand vs The State 1951 CriLJ 449

45 Emperor vsSadashiv Narayan Bhalerao (1944) 46 BOMLR 459

46 NiharenduDuttMajumdarAnd Ors. vs Emperor AIR 1939 Cal 703

47 Supra note 35

48 Brij Bhushan v. State of Delhi, 1950 AIR 129

The Constitution (First Amendment) Act, 1951, amended Article 19 to invalidate the impact of these judgments since Parliament did not consider them acceptable. Two revisions were made to Article 19 in the Constitutional (First Amendment) Act of 1951. (2). First, it broadened the scope of legislative limits on free speech by introducing new grounds, and second, it stipulated that any limitations on free speech must be fair. During the discussion on the amending Act, Prime Minister Jawaharlal Nehru labelled the act of sedition under Section 124A of the IPC *"highly objectionable and obnoxious."*

The first constitutional challenge to Section 124A after the first constitutional amendment occurred before the Patna High Court in the case of *Debi Soren & Ors v. State of Bihar*[49], "*in its Judgment, a Patna High Court Division Bench recognised a clear separation between disapprobation and disaffection, ruling that only disaffection causes public unrest. The High Court also upheld the legality of Section 124-A of the Indian Panel Code of 1860, holding that it does not contradict Article 19 of the Indian Constitution."*

In the case of *Sagolsem Indramani Singh*[50] the court stated that, "*notwithstanding the addition of 'public order' in clause (2) of Art. 19, it could barely be anticipated that simple criticism of the Government would be criminal in the interest of public order.*" As a result, the Manipur High Court ruled that Section 124A of the IPC was partially unconstitutional insofar as it sought to restrict freedom of expression as a communication merely causes or seeks to incite disaffection against the government.

For goodness sakes, the Allahabad High Court also stepped forward in the interpretation of the Section 124A in connection to Article 19 of the Indian Constitution in 1958. The Allahabad High Court overturned Ram Nandan's conviction and declared Section 124A of the Indian Penal Code unconstitutional. "*It was determined that a threat to public order is not a component of the crime of sedition. The constraint on the right to free speech and expression cannot be validated by saying that it is in the interests of public order. The High Court overturned the Patna High Court's decision in Debi Soren and declared Section 124A of the Indian Constitution invalid. It was of the opinion that restricting certain remarks would be in the public interest, but not restricting other speeches."*[51]

In summary, the Patna High Court considered Section 124A to be constitutional; the Manipur High Court found it as partly unconstitutional; and the Allahabad High Court found to be unconstitutional.

This conflict in the judgement of the three High Courts could now could only be resolved by the Supreme Court of India, which did so in the historic ruling in *KedarNath Singh v. State of Bihar*.[52]"*The Supreme Court of India maintained the constitutionality of 124A of IPC. KedarNath Singh was guilty of sedition and instigating public disturbance after giving a speech criticising the government and advocating for the Forward Communist Party. The Court reasoned that punishing sedition is a constitutionally permissible restriction*

49 Debi Soren & Ors v. State of Bihar, 1954 CriLJ 758

50 SagolsemIndramani Singh v. The State, A.I.R. 1955 Ma

51 Ram Nandan v. State, AIR 1959 All 101

52 Kedar Nath Singh v. State of Bihar, 1962 AIR 955

on the right to free expression only when the comments are meant to disrupt public peace via violence."

In the case of *S. Khusboov. Kanniamal & Anr.*[53]*, observing that the morality and criminality do not co-exist, the Supreme Court opined that free flow of the ideas in a society makes its citizen well informed, which in turn results into the good governance. For the same, it is necessary that people be not in a constant fear to face the dire consequences for voicing out their ideas, not consisting with the current celebrated opinion.* In the case of ***Tata Press Ltd.*** **v.** ***Mahanagar Telephone Nigam Ltd. &Ors.***[54]*, emphasising the importance of the freedom of speech the Supreme Court observed: Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to impart and acquire information about that common interest.*

In the case of ***Shreya Singhal*****v.** ***Union of India***[55]*, section 66A of the Information and Technology Act, 2000, was declared unconstitutional on the ground that it was in direct conflict with the fundamental right of freedom of speech and expression. The Supreme Court held that under the Constitutional scheme, for the democracy to thrive, the liberty of speech and expression is a cardinal value and of paramount importance*[56].

In***Vinod Dua v. Union of India,***[57] the Court held, *"…... a citizen has a right to criticise or remark on actions implemented by the government, so long as he does not incite others to violence against the government. Sections 124A and 505 of the IPC must be invoked when remarks or phrases have the poisonous tendency or intention of causing public commotion or disrupting law and order."*

On 30.04.2021, in *Kishorechandra Wangkhemcha & Anr Versus Union of India,*[58]*"a Supreme Court bench issued directions in response to a petition challenging the constitutionality of Section 124A of the Indian Penal Code. Given that the KedarNath Singh v. State of Bihar*[59] *decision was decided by 5 Supreme Court justices, the constitutional legitimacy should be reviewed by a bench of at least 7 judges."*

On 31.05.2021, the Supreme Court in the case of *M/S Aamoda Broadcasting Co. Pvt. Ltd. v. State* pointed that *"India's Supreme Court has stated that the understanding of sections 124A, 153A, and 505 of the Indian Penal Code would necessitate interpretation,*

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53 AIR 2010 SC 3196

54 AIR 1995 SC 2438, see also *LIC of India* v. *Prof. Manubhai D. Shah &Cinemart Foundation*,AIR 1993 SC 171

55 AIR 2015 SC 1523

56 Ibid.

57 VinodDua v. Union of India, 2021 SCC OnLine SC 414

58 Order dated 30.04.2021, Writ Petition (Criminal) No.106/2021, Kishorechandra Wangkhemcha & Anr Versus Union of India, https://main.sci.gov.in/supremecourt/2021/4955/4955_2021_33_7_27815_Order_30-Apr-2021.pdf

59 Supra Note 39

specifically in the context of the right of electronic and print media to communicate news, information, and rights, including those that may be critical of the prevalent government."[60]

CONCLUSION

George Orwell said, *"If liberty means anything at all, it means the right to tell people what they do not want to hear."*[61] Imagine a democratic country where there is no one to raise any question or bring up any issue against anything, be it against the government, religion, environment, etc. There is no participation from the citizen, they do whatever is told to them. Will that country flourish truly? Can that be called a true democracy? Will that country produce people like Swami Vivekanand, Subash Chandra Bose, Kabir, Tulsidas, Mahatma Gandhi, Bhagat Singh, Nelson Mandela, Aung San SuuKyi, and any such people? The answer is obviously, No.

The basic requirement to produce such set of people is Dissent i.e. going against the established norms. If there is no questioning the present system then no new system can ever be developed and the horizon of the mind will never develop. The above mentioned people did not grow because they were swimming with the flow but they grew as they were swimming against the flow. If they had submitted to the views of the people prior to them then today's world would have been different and that too not in a good way. A democracy is healthy where there is active participation from its citizens. India is a country which has a history of dissent. Where ever India is today, dissent has played a very important factor. Dissent has and will always be a cornerstone of India's characteristics and tinkering with it is not a great idea.

It is not sane to defeat one evil with the help of another bigger evil, Freedom of speech and expression might be your worst enemy but it is not sane to constraint it with a law like Sedition, which has done no good to the country till now. Sedition appears to be a dependable weapon for the government, which employs it to curtail a citizen's right to free speech and expression in the guise of committing a crime against the state. But there is no doubt that there are few people who crosses the threshold of this freedom, so for those we have a pretty competent court and laws and overall calculating the percentage of success but the Indian Courts, we can say that they are doing a pretty good job.

So to conclude the relationship between Freedom of speech and expression and sedition is not sweet but bitter so it is better to separate them and abolish sedition but that is a long term solution so as of now what can be done is amend the provision of sedition and bring the below mentioned changes:

60 Order dated 31.05.2021 in Writ Petition(s)(Criminal) No(s).217/2021, M/S Aamoda Broadcasting Company Private Limited &Anr Versus the State of Andhra Pradesh & Ors at https://main.sci.gov.in/supremecourt/2021/12172/12172_2021_35_329_28040_Order_31-May-2021.pdf

61 Penguin, https://www.penguin.co.uk/articles/2018/nov/12-essential-george-owell-quotes-about-freedom-liberty.html, (31/11/2022 at 01.29 a.m)

- Law of sedition in India lacks the concept of' 'mensrea,' or the mental aspect, which leads to a misunderstanding of the law. As a result, there should be some clarification made.
- There should be a yardstick for measuring the degree of 'hate,' 'contempt,' 'disaffection,' and 'offence' that might lead to sedition. Because it is largely subjective as to what constitutes Sedition what doesn't, and there is a heavy reliance on the court and the government to provide a paradigm for the same, which causes numerous bogus charges of sedition in India.
- The sentence for Sedition should be decreased.
- Sedition has been abused as a result of erroneous interpretation of the law, thus the current section can be revised and replaced with a new provision with reformed and concrete wording.

Police Accountability for Human Rights Violation – An Analysis

*Mr. Aditya Rathi**

ABSTRACT

Policing in India raises various human rights issues like: unlawful and arbitrary killings perpetuated by police, torture, cruel, inhuman and degrading treatment by police officials, arbitrary arrest and detention by government authorities. Independent India has been on a quest for police accountability reforms since the National Police Commission (NPC) was set up in 1977. The existing police accountability mechanism can be divided into, internal dimension and external dimension. Internal accountability includes the mechanism provided under the Police Act, 1861 and the regulations made thereunder. The external accountability mechanism includes the accountability through judicial mechanism, accountability through Police Accountability Commissions and accountability through Human Rights Commissions. Accountability towards the judiciary can be categorised into liability under public law, liability under criminal law and liability under private law. The liability under public and private law is compensation centric while the liability under criminal law raises question of the applicability of section 197 of the Code of Criminal Procedure and the consequent impunity that the police officers are granted thereby making the criminal prosecutions superfluous. The mechanism provided through Police Accountability Commissions has proven to be ineffective because most of the State governments have established them only for name-sake without effectively complying the directives of the Supreme Court. Human Rights Commission are also ineffective because of the non-binding nature of recommendations. There is a need to establish a transparent process of police accountability towards the government, Parliament and the public.

Key Words: *Police, Human Rights, Accountability, Police Accountability Commission, Police Reforms.*

1. INTRODUCTION

Police can be a catalyst of positive change in society if they are made to serve the rule of law and held accountable for their illegal acts or omissions. Nonetheless, there are various human rights issues with policing in India: unlawful and arbitrary

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killings perpetuated by police, torture, cruel, inhuman and degrading treatment by police officials, arbitrary arrest and detention by government authorities, et. al. Despite the efforts of the government to counter abuses, lack of accountability of officials for misconduct persists at all levels of government, contributing to widespread impunity.[1] The National Campaign against Torture reported 111 deaths in police custody in 2020.[2] Out of the 111 deaths in police custody, 51 persons died due to alleged torture, 35 persons died in alleged suicide, eight persons died due to suspected foul play, five due to alleged sudden illness, two while attempting to flee, and others died due to various reasons. In the prisons of Haryana, 47.78% of prisoners claimed to have been subjected to degrading and inhuman treatment, including torture, during police remand.[3] The victims of police abuses and excesses are often subjected to intimidation, threats, and attacks by government officials.

The use of force by the police is a major issue in India.Independent India has been on a quest for police accountability reforms since the National Police Commission (NPC) was set up in 1977.[4] The issue of accountability is closely linked to the type of superintendence and control exercised over them.[5] Effective accountability is indispensable to achieve the object of policing as it enhances legitimacy and public perception, particularly on the part of weaker sections of society.

Accountability can be understood at two levels; agency-level accountability and individual-level accountability. The existing police accountability mechanism can be divided into, internal dimension and external dimension.[6] The mechanism provided under the Police Act, 1861 and the regulations made thereunder, which prescribes disciplinary actions, is the internal accountability mechanism. The mechanism under the general law of the land, that is to say, the Indian Penal Code, subject to the limitations provided under the Code of Criminal Procedure, 1973 (specifically section

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1 Bureau of Democracy, Human Rights, and Labor India, U.S. Department of State,"2020 Country Reports on Human Rights Practices: India" (March 30, 2021), *available at* https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/india/(last visited on September 15, 2022).

2 National Campaign Against Torture, "Indian Annual Report on Torture 2020",10, *available at* http://www.uncat.org/press-release/india-torture-report-2020-increase-in-custodial-deaths-despite-covid-19-lockdown-at-least-one-suicide-every-week-due-to-torture-in-police-custody/ (last visited September on 15, 2022).

3 Commonwealth Human Rights Initiative, "Inside Haryana Prisons"(2019), 94,*available at* https://www.humanrightsinitiative.org/download/1565414272Inside%20Haryana%20Prison%20Report.pdf (last visited on September 15, 2022).

4 Priya Vedavalli and Tvesha Sippy, "How Can We Rethink Police Accountability in India?"56(33) *Economic and Political Weekly*(Aug. 14, 2021).

5 G P Joshi, "Police Accountability in India" 1, *available at* https://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/police_accountability_in_india.pdf (last visited on October 15, 2022).

6 OtwinMarenin, "The goal of democracy in international police assistance programs" 21(1) *Policing: An International Journal of Police Strategies & Management* 170 (1998).

197), the accountability towards the judiciary and the National Human Rights Commission, etc. can be termed as the external accountability mechanism.

2. INTERNAL ACCOUNTABILITY MECHANISM

The Police Act, 1861 authorises senior police officers of and above the rank of Superintendent of Police to dismiss, suspend or reduce any police officer of the subordinate ranks who are remiss or negligent in the discharge of their duty or unfit for the same. They may also award any of the following punishment to a police officer of subordinate rank who is found to be careless or negligent or unfit:[7]

i. fine to any amount not exceeding one month's pay;

ii. Confinement to quarters for a term not exceeding fifteen days;

iii. Deprivation of good conduct pay;

iv. Removal from any office of distinction or special emolument;

v. Withholding of increments or promotion, including stoppage at an efficiency bar.

Under section 29 of the Act of 1861, a police officer can be disciplined if found guilty of:

i. violation of duty;

ii. willful breach or neglect of any rule or regulation, or lawful order made by a competent authority;

iii. withdrawal from the duties without permission;

iv. failure to report on the expiration of leave;

v. engagement in any other employment without authority;

vi. cowardice;

vii. offering any unwarrantable personal violence to any person in his custody.

The penalties prescribed under this section includea fine not exceeding three months' pay, and imprisonment for a period not exceeding three months. It is ironical that 'causing violence to any person in custody', which is a grave violation of human rights, will not incur the punishment of suspension or dismissal under the scheme of the Act. Further, the punishments, except censure and reprimand, cannot be imposed without conducting a regular departmental inquiry which takes time because of being highly elaborate, cumbersome and time-consuming. Moreover, if the charges are proven, the delinquent police officer can approach a court of law against the findings and punishment imposed.[8]

7 The Police Act, 1861 (Act 5 of 1861), s. 7.

8 *Supra* note 5 at 11.

The National Police Commission, in its first report, suggested an arrangement according to which Departmental Inquiries in the normal course shall be conducted according to the following scheme:[9]

Complaint Against	To be Inquired into by
Head Constables/Constables	An officer not below the rank of Inspector of Police
Sub-Inspectors/Asst. Sub-Inspector	An officer not below the rank of Deputy Superintendent of Police
Inspectors of Police/Deputy Superintendents of Police/Assistant Superintendents of Police	An officer not below the rank of Superintendent of Police
Superintendent of Police and above	Complaint Cells directly supervised by the Deputy Inspector General or Inspector General, as the case may be

There shall further be a Complaint Cell to be headed by the Deputy Superintendent of Police in every district to inquire into police misconduct in which departmental officers are likely to take a biased view for any local reason. The DSP shall be assisted by two or three Inspectors in the fieldwork, and the discretion to entrust inquiries to the cell shall be vested with the SP. Similar cells shall be established under each range DIG to handle inquiries wherein the involvement of SP in a particular situation is under scrutiny.[10] There shall be certain guidelines for the cells carrying out inquiries:[11]

i. the complainant should be heard in detail, and witnesses should be examined;

ii. important witnesses shall be examined in the presence of the complainant;

iii. the inquiry officer shall meticulously refrain from doing anything which is likely to create doubt in the mind of the complainant about the objectivity and impartiality of the inquiry;

iv. the inquiry shall be conducted in any appropriate place near the complainant's residence;

v. if it is reported that the complainant was not interested in pressing the complaint then that face shall be verified by the next superior officer or the district complaint cell.

Some specific categories of complaints, including rape of a woman in police custody, death or grievous hurt in police custody, and death of two or more persons arising from police firing in the dispersal of an unlawful assembly,[12] shall be inquired into by Additional Sessions Judge nominated for the purpose in consultation with the High Court and designated as District Inquiry Authority.[13] However, the

9 Government of India, "First Report of the National Police Commission, Chapter X: Modalities for Inquiry into Complaints against Police" (February, 1979) Para 10.13.

10 *Id.*, para 10.14.

11 *Id.*, para10.17.

12 *Id.*, para10.19.

13 *Id.*, para10.20.

recommendations of the Commission were never accepted.In practice, the internal accountability mechanism proves to be evasive as the unlawful acts of subordinate police officers are often ignored by the superior on the ground that punitive actions could demoralize the ranks.[14]

3. EXTERNAL ACCOUNTABILITY MECHANISM

The external accountability mechanism can be categorized into accountability through judicial mechanism, accountability through Police Accountability Commissions and accountability through Human Rights Commissions.

3.1. Accountability through Judicial Mechanism

It can be further divided into liability under public law, liability under criminal law and liability under Private law.

3.1.1. Liability under Public Law

The accountability under public law is found on the Constitution of India. A writ can be issued by a constitutional court against violation of fundamental rights. Article 22 of the Constitution of India guards against arbitrary arrest and detention. Moreover, it protects the life and personal liberty and affords protection from discrimination and unequal treatment, etc. The Constitutional Courts are empowered to issue writs for the protection of these fundamental rights. In essence, the writ is an order issued by a higher Court directing the person by whom a person is alleged to be kept in confinement to bring such person before the court and inform the court of the reason for the person's confinement. If the detention is without any legal basis, then the person under confinement is released. In Kanu Sanyal v. District Magistrate,[15] the Supreme Court observed that the production of the body of the person alleged to be wrongfully detained is incidental to the main purpose of the writ, which is to secure the liberty of the subject illegally detained.

The Supreme Court has held the State liable for police misconduct and abuse of authority in a number of cases and has attempted to redress the wrong by awarding compensation to the victim. The first of such cases can be traced to *Rudal Shah* v. *State of Bihar*,[16] wherein the petitioner approached the Supreme Court for a writ of habeas corpus as he was kept in jail for fourteen years despite being acquitted. The State claimed that he was not released from jail because he was insane; however, it failed to produce any medical records. The Court, while granting a compensation of 30,000 rupees in addition to a sum of already paid 5,000 rupees, observed:[17]

14 HL Kapoor, "Custodial Crime"*The Statesman*, April 24, 2000: Sudipto Roy, "Brutality in Police Custody in India" 8 *KRIMINOLOGIJA iSocijalna INTEGRACIJA*100 (2000).

15 1974 SCR (3) 279.

16 (1983) 4 SCC 141.

17 *Id.*, para 10.

the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip service to his fundamental right to liberty which the State Government has so grossly violated…One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation.

Later, in *Bhim Singh* v. *State of Jammu and Kashmir*,[18] the apex Court awarded compensation for the illegal arrest and detention of the petitioner. O. Chinnappa Reddy, J. observed

Police Officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Their duty is to protect and not to abduct…When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation.

In *Nilabati Behera* v. *State of Orissa*,[19] a case concerning the custodial death of Suman Behera, who was detained by the police for alleged theft and was found dead on the railway tracks the following day, the court observed that the liability to pay compensation in proceedings under Article 32 and Article 226 are public law remedy arising out of strict liability for contravention of fundamental rights. This remedy is distinct from and in addition to the remedy in private law for damages for the tort. This principle justifies the award of monetary compensation for contravention of fundamental rights as it is the only practicable mode of redress available against excesses made by the State and its servants in the purported exercise of their powers. Here, the Court directed the payment of compensation of 1,50,000 rupees and costs amounting to 10,000 rupees.

In *Saheli* v. *Commissioner of Police, Delhi*,[20] a writ petition was filed by a Women's Resource Centrein relation to the death of a 9-year-old boy Naresh with alleged connivance and conspiracy of the local police. Having regard to the principle that the State is liable for the torts committed by its employees in the course of their employment, the Court awarded a compensation of 75,000 rupees to the mother of deceased boy.

In *State of Maharashtra* v. *Ravi Kant Patil*,[21] an undertrial prisoner was handcuffed and both his arms were tied by a rope and was taken through the streets. Since the respondent was subjected to unwarranted humiliation and indignity, the Court directed the State to pay a compensation of 10,000 rupees to the respondent because the said act was done by the Inspector while acting as an official of the State.

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18 (1985) 4 SCC 677, 685.

19 (1993) 2 SCC 746.

20 (1990) 1 SCC 422.

21 AIR 1991 SC 871.

In *DK Basu* v. *State of West Bengal*,[22] a public interest litigation was filed through a letter mentioning deaths in police lock-ups and custody. Considering the significance of the issue raised, the letter was treated as a writ petition. It observed that custodial death is one of the worst crimes in a civilised society governed by the rule of law.[23] The Court observed as follows:

Death in custody is not shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. (Para 24)

The abuse of police powers can be checked by two possible safeguards: transparency in action and accountability.[24] The award of compensation for infringement of fundamental rights is a public law remedy since the purpose of public law is to civilise public power and assure the citizens that their rights are protected and preserved under the legal system, they live in.[25]

In *State of Maharashtra* v.*Christian Community Welfare Council of India*,[26] the Supreme Court maintained that compensation of 1,50,000 rupees shall be paid to the wife of the deceased in terms of the judgment in *Nilabati Behera*.

In *Sube Singh* v.*State of Haryana*,[27] a letter petition was made to the Supreme Court alleging torture, harassment and illegal detention for three days by the police. The Court observed that in cases of violation of article 21 through custodial death or custodial torture, the Courts have got the power to award compensation in proceedings under article 32 and article 226. Nonetheless, the Courts must look into the following questions: (a) whether the violation is patent and incontrovertible; (b) whether the violation is gross and of a magnitude that shakes the conscience of the Court; (c) whether the custodial torture has resulted in death or whether the custodial torture is substantiated by medical reports or visible marks or scars or disability.[28]

In *Dr. Rini Johar* v. *State of Madhya Pradesh*,[29] the petitioner alleged that they were arrested from Pune and treated in an undignified manner and were humiliated while transporting them to Bhopal. The apex court granted a compensation of rupees five lakh while observing that the constitutional courts taking note of suffering and humiliation, are entitled to grant compensation in petitions made under article 32 and article 226 of the Constitution.

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22 (1997) 1 SCC 416.

23 *Id.*, para 22.

24 *Id.*, para 29.

25 *Id.*, para 44.

26 (2003) 8 SCC 546.

27 (2006) 3 SCC 178.

28 *Id.*, para 46.

29 AIR 2016 SC 2679.

It is, therefore, clear that one of the redresses available against police excesses is the remedy for compensation as a public law remedy under the writ jurisdiction. Nonetheless, the writ jurisdiction can be exercised by Constitutional Courts only, thereby limiting its accessibility as it is difficult for the economically vulnerable sections to approach the High Court and Supreme Court.

3.1.2. Liability under Criminal Law

While writ petitions can be made to higher courts, criminal prosecution can be initiated before the courts of subordinate jurisdiction. The Code of Criminal Procedure and the Indian Penal Code contain numerous remedial and preventive measures to limit the abuse of discretionary powers by the police. These are being discussed as follows:

Sections 56 and 57 of the Code of Criminal Procedure are analogous to Article 22 of the Constitution. Section 56 requires that a person arrested without a warrant shall, without unnecessary delay, be produced before a Magistrate having jurisdiction. Section 57 further requires that a person shall not be detained in custody for a period exceeding twenty-four hours unless there is an authorisation from a Magistrate. The violation of these laws is made punishable under section 220 of the Indian Penal Code, 1860. The clause forbids the abuse of authority by a public official who has the authority to imprison or try anyone. It provides punishment to a person who corruptly or maliciously confines any person, knowing that in doing so he is acting contrary to law.[30]

Further, section 166 provides punishment for a public servant disobeying any direction of law intending to cause, or knowing it to be likely that such disobedience will cause injury to any person. Section 167 provides punishment for a public servant framing an incorrect document with intent to cause injury, etc.

Other provisions dealing directly with police atrocities include sections 330 and 331 of the IPC. They penalise the infliction of injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code.[31]

Sections 340 to 348 of the Penal Code constitute a group of sections dealing with wrongful restraint, and wrongful confinement and their aggravated forms. The offences require the confinement itself to be illegal – an ingredient prominently brought out by the adjective 'wrongful'. Section 348 specifically provides punishment to a person who wrongfully confines any person for extorting any confession, etc. the section also punishes extortion committed to extract information leading to the detection of offence or misconduct.[32]

30 Law Commission of India, "152nd Report on Custodial Crimes" 9(1994).

31 *Supra* note 22, para 41.

32 *Supra* note 22.

When it comes to sexual offences, section 376 (2) penalises rape committed by police officers within the limits of their police station, or on a woman in their custody.[33] The offence of rape committed by persons having charge or management of a jail or remand home is also made punishable.[34]

Section 503 of the Penal Code, read with section 506, penalises criminal intimidation given to any person by a police officer.

However, the question of prosecution of police officers' dwells into the discussion about section 197 and section 132 of the Code of Criminal Procedure, 1973. Under section 197, whenever a judge or a Magistrate or a public official, not removable from his office without the sanction of the government, is to be prosecuted, then previous sanction shall be obtained from the government. The object of the provision is to ensure that public officials performing an onerous and responsible function shall act fearlessly and be protected from false, vexatious and mala fide prosecutions.[35] Section 197 aims at protecting responsible public servants against the institution of possibly vexatious complaints for offences alleged to have been committed while in the performance of their official duties.[36]

It is under the provisions of sub-section 3 of section 197 that the State Governments can extend the protection to members of forces charged with the maintenance of public order in the State thereby making the previous sanction of government imperative, provided the offence alleged to have been committed by such members has been committed while acting or purporting to act in the discharge of their official duty.[37] However, to afford the protection of section 197, there must be a reasonable connection between the act and the discharge of official duty. The act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.[38] Before offering the protection of section 197(3), the Court must first decide whether the alleged acts are done in the discharge of their official duties, or at any rate, they purport to be, or bear the colour or semblance of, the acts that could be done in the discharge of their official duties.[39]

While dealing with a case of protection under section 197, the question to be ascertained is whether it was necessary for the petitioner to conduct himself in such a manner which would result in such consequences. "It is necessary to protect the public servant in the discharge of their duties. They must be made immune from being harassed in criminal proceedings and prosecution, that is the rationale behind section 196 and

33 The Indian Penal Code, 1860 (Act 45 of 1860), s. 376(2)(a).

34 *Id.*, s. 376(2)(d).

35 Law Commission of India,"41st Report on the Code of Criminal Procedure, 1898"Volume I 116 (September 1969).

36 *State of Himachal Pradesh* v. *MP Gupta*, (2004) 2 SCC 349, para 8.

37 *Balbir Singh* v. *DK Kadian*, (1986) 1 SCC 410.

38 *Matajog Dubey* v. *H.C. Bhari*, AIR 1956 SC 44.

39 *Bhikaji Vaghaji* v. *L.K. Barot*, 1982 Cr LJ 2014.

section 197 of the Cr. P.C. But it is equally important to emphasises that rights of the citizens should be protected and no excesses should be permitted. "Encounter death" has become too common. In the facts and circumstance of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time, it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."[40]

In order to attract the rigors of section 197, it is necessary that the offence alleged against a government officer must have some nexus or/and relation with the discharge of his official duties as a government officer.[41]The section has certain limitations and the protection is available only when the act alleged is reasonably connected with the discharge of his official duties.[42] It is not every offence that requires the sanction of the government nor every act with which an official engage in the performance of his duties but only the acts having direct connection with the official duties.[43]

In construing the expression, "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", the Court has adopted a mid-way holding that it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1); an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution.[44] The expression 'official duty' implies that the act must be done in the course of his service and that it should have been in the discharge of his duty. A police officer, in the discharge of duty, may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in the discharge of his duty then the bar under Section 197 of the Code is not attracted.

In *S.K. Zutshi* v. *Bimal Debnath,*[45] the Court held that there is no universal rule to determine whether there was a reasonable connection between the act done and the official duty of the public servant. The appropriate test is to consider whether the omission or neglect to perform the act will result in dereliction of his official duty.

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40 *Bakhshish Singh Brar* v. *Smt. Gurmej Kaur*, (1987) 4 SCC 663.

41 *Devendra Prasad Singh* v. *State of Bihar*, (2019) 4 SCC 351.

42 *State of Himachal Pradesh* v. *MP Gupta*, (2004) 2 SCC 349, para 8.

43 *P. Arulswami* v. *State of Madras*, AIR 1967 SC 776, para 6.

44 *B. Saha* v. *M.S. Kochar*, (1979) 4 SCC 177.

45 (2004) 8 SCC 31, para 5.

The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity.[46]

This provision of law has been abused to provide protection to police officers, even in serious cases of misconduct.[47] The National Police Commission's recommendation that protection available to the police officers under Section 197 of the Code be withdrawn has not been accepted.[48]

While the law is well established, difficulty is faced in the application of the law to the facts of any given case. The object of the section is to protect public employees from being harassed unnecessarily. The section is not limited to cases of anything purportedly done in good faith, because a person who ostensibly acts in the execution of his duty still purports to do so, even if he has a dishonest intention. It is also not limited to cases in which the act constituting the offence is the official duty of the official in question. Such an interpretation would be a logical contradiction because an offence is never an official duty. The test appears to be that the offence is committed by a public servant is an act done or purported to be done in the execution of his duty, rather than that it is committed by anyone else. The section cannot be limited to acts done directly in pursuance of a public servant's public office, even if done in excess of the duty or under a mistaken belief as to the existence of a such duty. Neither does the act constituting the offence have to be so inextricably linked with the official duty that it becomes part and parcel of the same transaction. What is required is that the offence be committed in the course of performing or attempting to perform an official duty. It does not apply to acts performed solely for personal gain by a public servant.An act does not cease to be one done or purporting to be done in execution of a duty simply because it was done negligently.[49] Further, if there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection.[50] Once the act or omission has been found to be committed by a public servant in the discharge of his duty then it must be given a liberal and wide interpretation so far as its official nature is concerned. Otherwise, the entire purpose of affording protection to public servants without sanction shall stand frustrated.[51]

In *Amrik Singh* v. *State of Pepsu*,[52] section 197 of the Code of Criminal Procedure, 1898, which is parimateria with section 197 of the present Code, came for consideration

46 *Centre For Public Interest Litigation* v. *Union of India*, (2005) 8 SCC 202, para 9.

47 *Supra* note 5.

48 Government of India, "EighthReport of the National Police Commission, Chapter LXI: Accountability of Police Performance" (May, 1981) Para 61.31.

49 *Pukhraj* v. *State of Rajasthan*, (1973) 2 SCC 701, para 2.

50 *State of Orissa* v. *Ganesh Chandra Jew*, (2004) 8 SCC 40, para 7.

51 *K Kalimuthu* v. *State by DSP*, (2005) 4 SCC 512,para 11.

52 AIR 1955 SC 309, para 8.

of the Court. The Court observed that it is not every offence committed by a public servant that necessitates sanction for prosecution under Section 197(1); nor is it every act done by him while he is actually engaged in the performance of his official duties. However, if the act complained of is directly related to his official duties in such a way that it could be claimed to have been done by virtue of the office if questioned, then sanction would be required; and this would be irreversible, because that would really be a matter of defence on the merits, which would have to be investigated at the trial and could not arise at the stage of sanction, which must precede the institution of the prosecution.

In *Rakesh Kumar Mishra* v. *State of Bihar*,[53] cognizance was taken against the appellant for the offences punishable under sections 342, 389, 469, 471 and 120-B of the Indian Penal Code, 1860 by the Chief Judicial Magistrate. The appellant contended that in the absence of sanction under section 197 the proceedings could not be continued.The Court observed that in the absence of protection afforded by section 197, the public servants who discharge various hazardous duties may be exposed to vexatious prosecutions.The use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Hence, the Court allowed the appeal and the order of cognizance was set aside.

In *Sankaran Moitra* v. *Sadhna Das*,[54] the respondent filed a complaint against the police for beating her husband to deathunder sections 302, 201, 109 read with section 120-B of the Penal Code. The Chief Judicial Magistrate took cognizance of the offence and issued a warrant for the arrest of accused. The apex Court held that a prosecution hit by section 197 cannot be launched without the sanction contemplated. The sanction is a condition precedent for a successful prosecution of a public servant when the provision is attracted. It is correct to say that killing of a person by use of excessive force could never be performance of duty. But if it was done in performance of duty or purported performance of duty, section 197(1) cannot be bypassed by reasoning that killing a man could never be done in an official capacity.

In *State of Maharashtra* v. *DevahariDevasingh Pawar*[55] the proceedings of a criminal case were quashed by the High Court for want of sanction under section 197. The apex Court observed that tampering with entries made in official registers, tearing of pages from different official registers and stowing them away in one's house cannot be related to the discharge of official duties. These acts do not have any nexus or connection with the discharge of official duties, hence, the prosecution on these counts do not require sanction of the government as warranted by section 197.

In *Choudhury Parveen Sultana* v. *State of West Bengal*,[56] a complaint was made against some of the police officers for the offences punishable under section 387/504/34 of

53 (2006) 1 SCC 557.

54 (2006) 4 SCC 584.

55 (2008) 2 SCC 540.

56 (2009) 3 SCC 398.

the IPC for threatening the husband of the appellant to give a tutored statement. The Magistrate took cognizance of the complaint. The point of contention was that in view of the respondents being public servant, the Magistrate should not have taken cognizance of the matter as previous sanction of the government was required under section 197 of the Code. They further claimed that since the complaint concerns the acts of extortion and criminal intimidation, which were alleged to be committed while conducting investigation of a case, such offences were purported to have been committed while discharging official duties. The Court held that the offences complained of cannot be said to be part of the duties of the investigating officer while investigating an offence. It was no part of the duties to threaten the complainant or her husband to withdraw the complaint. In order to determine the application of section 197, each case has to be considered in its own situation to decide whether the protection of section 197 could be given to the public servant or not.

In *Chandan Kumar Basu* v. *State of Bihar*,[57] a complaint was made against the appellant for offences under section 409/420/467/468/471/34/120-B of the Penal Code, 1860. The Magistrate took cognizance of the same; the appellant raised objection primarily on the ground that the cognizance was without jurisdiction as the sanction for prosecution was not obtained or granted prior to the date of taking of cognizance. The Court held that it can be no part of the duty of a public servant or acting in the discharge of his official duties to commit any of the offences covered by sections 406, 409, 420, etc., and the official status of the public servant can, at best, only provide an opportunity for the commission of the offences. Hence, no sanction for prosecution of offences under these sections is required.

In *Inspector of Police* v. *Battenapatla Venkata Ratnam*,[58] the question before the Court was whether the sanction was required to initiate criminal proceedings under sections 420, 468, 477A, and 120B read with section 109 of the Penal Code, 1860. The allegation against the Inspector of Police was that he conspired with stamp vendors and other staff to gain monetary benefits and resorted to manipulation of registers resulting in a wrongful gain to themselves and loss to the Government. The Magistrate took cognizance of the same, but the High Court quashed the proceedings on the sole ground that there was no sanction under section 197 of the Code. The Court observed that it is no duty of a public servant to fabricate false records and misappropriate public funds. Where a criminal act is performed under the colour of authority but which, in reality, is for the public servant's own pleasure or benefit, then such acts shall not be protected under the doctrine of State immunity.

In *D Devaraja* v. *OwaisSabeer Hussain*,[59] a private complaint was filed against the appellant for the offences punishable under sections 120-B, 220, 323, 330, 348, and 506-B read with section 34 of the Penal Code, 1860. The question before the Supreme Court was whether the Magistrate could take cognizance against the appellant, in

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57 (2014) 13 SCC 70.

58 (2015) 13 SCC 87.

59 (2020) 7 SCC 695.

the private complaint in the absence of sanction under section 197 of the Code. The Court noted that beating a person suspected of a crime or confining him away in an injured condition, at a time when the police were engaged in the investigation were acts done or intended to be under the provisions of the Criminal Procedure Code or any other law conferring powers on the police. It could not be said that the provisions of section 161 of the Code authorised the police officer examining a person to beat him or to confine him for the purpose of inducing him to make a particular statement. If,in doing an official duty, a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policemen of the protection of the government sanction for initiation of criminal action against him.

In *MatajogDobey* v. *HC Bhari*,[60]aconstitution bench concluded that in order to determine whether an act was committed in the discharge of official duty, there must be a reasonable connection between the act and the discharge of official duty. The act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim that he did it in the course of performance of his duty. Nonetheless, is it not the duty of the police officers to kill the accused merely because he is a dreaded criminal. The requirement of sanction to prosecute affords protection to the policemen who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack.

In *Bakhshish Singh Brar* v. *Gurmej Kaur*,[61] the question before the Court was whether it was necessary for the police to conduct an investigation in such a way that it resulted in injury and death while performing their duties aspolice officers. The Court held that the trial of a police officer accused of causing grievous injury and death during a raid and search should not be stayed at the preliminary stage for want of sanction for prosecution. It further observed that criminal trials should not be stayed at the preliminary stage in every case because it may cause damage to the evidence. The Court noted that, if necessary, the issue of sanction could be raised at a later stage.In *Bhagwan Prasad Srivastava* v. *NP Mishra*,[62] the Supreme Court observed that no protection can be claimed in respect of prosecution for such excesses or misuse of authority.

In *State of Uttar Pradesh* v. *Ram Sagar Yadav*,[63] the Supreme Court observed

> We would like to impress upon the Government the need to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence. Police Officers alone, and none else, can give evidence as regards

60 AIR 1956 SC 44.

61 (1987) 4 SCC 663.

62 (1970) 2 SCC 56.

63 (1985) 1 SCC 552, para 20.

> the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station, are left without any evidence to prove who the offenders are. The law as to the burden of proof in such cases may be re-examined by the legislature so that hand-maids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protect on.

The issue was considered by the Law Commission of India in its 113th Report on Injuries in Police Custody. It noted that there is a need for a special provision to cover the situation in light of the incidents that are reported from time to time. While in most cases, victims of police abuse did not pursue criminal cases against the police because they feared retaliation. As in the context of rape, the Parliament has enacted a special provision to address the situation of women who are sexually exploited by persons in whose custody or under whose charge they might have been placed for the time being.[64] The provision becomes necessary in view of incidents of abuse of position and transgression of the law by such a person. It is, therefore, necessary to insert a suitable provision addressing the problem which Supreme Court dealt with.

The Law Commission, therefore, recommended the insertion of section 114-B reading as follows:

> 114B. (1) In a prosecution (of a police officer) for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period.

The issue of the requirement of sanction for criminal prosecution was considered by the Law Commission in its 152nd Report as well. Owing to the fact that, in numerous instances, attempts have been made to include sexual offences or offences against the human body as part of the acts done in prosecution or furtherance of official duty, the Commission recommended the inclusion of an explanation to section 197 of the Code.[65]

"*Explanation* – For the avoidance of doubts, it is hereby declared that the provisions of this section do not apply to any offence committed by a judge or public servant, being an offence against the human body committed in respect of the person in his custody, nor to any other offence constituting an abuse of authority."

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64 Section 114-A, Indian Evidence Act, 1872 read with section 376(2)(a), Indian Penal Code, 1860.

65 *Supra* note 30 at 40.

3.1.3. Liability under Private Law

The State can be held accountable under private law using civil suit to claim compensation for violation of fundamental rights caused due to police misconduct. However, in cases of private remedy, the question of sovereign immunity arises. In *Nilabati Behera* v. *State of Orissa*[66], the Supreme Court held that the principle of sovereign immunity is not applicable to the guarantee of fundamental rights. Nonetheless, the concept of sovereign immunity was upheld for tortious acts of government servants.[67]

However, in *State of Rajasthan* v. *Vidyawati*[68] damages were claimed by the dependents of a deceased who died in an accident caused by the negligence of a government driver. The Court held that it wasn't an appropriate case for the application of the principle of sovereign immunity, a concept which is based on a mediaeval concept *Rex non-potestpeccare*. The question of sovereign immunity came for consideration in *KasturilalRalia Ram Jain* v. *State of Uttar Pradesh*.[69]Certain gold ornaments sorted in the malkhana of the Police station were lost due to police negligence. A civil suit was filed for claiming compensation for the same. The Supreme Court applied the principle of sovereign immunity because the act of negligence on the part of police officers was committed in the course of employment. Distinguishing *Kasturilal* from *Vidyawati*, the Court held that driving a car is not a sovereign function while the duty of policemen was in the exercise of sovereign function. The judgement in *Kastirulal*has not been overruled; nonetheless, it has been criticized and distinguished in later authorities like *Rudal Shah* v. *State of Bihar*,[70]*Bhim Singh* v. *State of Jammu and Kashmir*,[71]*Nilabati Behera* v. *State of Orissa*,[72]*Saheli* v. *Commissioner of Police, Delhi*,[73]*State of Maharashtra* v. *Ravi Kant Patil*,[74]*State of Maharashtra* v. *Christian Community Welfare Council of India*,[75]*Sube Singh* v. *State of Haryana*,[76]*Dr.RiniJohar* v. *State of Madhya Pradesh*.[77]

4. ACCOUNTABILITY THROUGH POLICE COMPLAINTS AUTHORITY

In order to ensure better accountability of the Police towards the Constitution, law and the public they serve, the Supreme Court came up with seven directives in the case of *Prakash Singh* v. *Union of India*.[78] The sixth Directive relates to 'Police Complaints

66 *Supra* note 19.

67 *KasturilalRalia Ram Jain* v. *State of Uttar Pradesh*, 1965 SCR (1) 375.

68 AIR 1962 SC 933.

69 *Supra* note 66.

70 *Supra* note 16.

71 *Supra* note 18.

72 *Supra* note 19.

73 *Supra* note 20.

74 *Supra* note 21.

75 *Supra* note 26.

76 *Supra* note 27.

77 *Supra* note 29.

78 (2006) 8 SCC 1.

Authority'. The Court directed that a Police Complaints Authority shall be established at the district level to look into complaints against police officers of and up to the rank of DSP. It further directed that a Police Complaints Authority shall be constituted at the State level to look into complaints against officers of the rank of SP and above. According to the scheme of the Court, the authorities were to have following facets:

1. The Chair of the State-level Authority shall be chosen by the Government out of a panel of names proposed by the Chief Justice, while the head of the district-level Authority may be headed by a retired District Judge who may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of High Court nominated by him.
2. These authorities shall be assisted by three to five members selected from a panel prepared by the State Human Rights Commission/Lok Ayukta/State Public Service Commission.
3. The Authority may utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organization.
4. The State-level Authority would take cognizance of allegations of serious misconduct, including death, grievous hurt, or rape in police custody.
5. The district-level authority may also inquire into allegations of extortion, land/ house grabbing or any incident involving serious abuse of authority.
6. The recommendations of both the complaints authority, for any action, departmental or criminal, shall be binding on the authority concerned.

The directives of the Prakash Singh judgment were incorporated in the Model Police Act, 2006, prepared by the Soli Sorabjee Committee. In order to introduce enhanced police accountability, it called for the establishment of a State-level Police Accountability Commission[79] consisting of a retired High Court Judge as the Chairperson, a retired DGP from another state cadre, a person having 10 years-experience as a judicial officer, public prosecutor, advocate or a professor of law, a member from civil society and a retired public administrator from another state.[80] The Commission is to inquire into allegations of 'serious misconduct' including death in police custody, grievous hurt, rape or attempt to commit rape, arrest or detention without due process of law.[81] After the completion of inquiry, the Commission can issue directions to register First Information Report and initiate departmental action based on its findings.[82]

The Act further envisaged the establishment of a District Accountability Authority to monitor inquiries in cases of misconduct, including any willful breach or neglect of any law, rule, regulation adversely affecting the rights of any member of the

79 The Model Police Act, 2006 s. 159.

80 *Id.*, s. 160.

81 *Id.*, s.167.

82 *Id.*, s.171.

public. It is to act as a media forwarding complaints of 'serious misconduct' to the Commission and complaints of 'misconduct' to the SP.[83]

In 2015, the Bureau of Police Research and Development came up with a draft Model Police Bill, 2015. It called for the establishment of a Police Accountability Commission at the State level and a District Accountability Authority for every Police District. The Commission is to be Chaired by a retired High Court Judge and accompanied by four members: a retired DGP from another State cadre, a person with ten years-experience as a judicial officer, a public prosecutor or a practicing advocate, two members with ten years' experience in the field of criminology, psychology, law, human rights or gender issues. The District Authorities shall be Chaired by a District and Sessions Judge and accompanied by two members: a retired police officer of SP rank, a person with ten years-experience as a judicial officer, public prosecutor, advocate or public administrator.[84] The Commission shall inquire into allegations of misconduct against officer of and above the rank of SP and allegations of 'serious misconduct' including death or hurt in police custody, death or grievous hurt other than in police custody, molestation, rape or attempt to commit rape or any other offence against a woman, arrest or detention without adherence to due process of law.[85]The Commission can direct the registration of First Information Report and initiation of departmental action based on its findings.[86]Despite the directive of the Supreme Court functional Police Accountability Commissions have not been established in all the States. Further, PAC is more like a Dog that can bark but cannot bite as is reflected in the observation of Tripura PAC."Despite two orders wherein it was clearly mentioned that the Commission wants an urgent report, S.P. West has not submitted a report".[87]

NATIONAL AND STATE HUMAN RIGHTS COMMISSIONS

The National Human Rights Commission (NHRC)is authorised to investigate any violation of human rights or negligence in the prevention of violations either on its own initiative or in response to an individual complaint or a court directive.[88]It can, with the concurrence of the government, order any agency or officer to conduct an investigation.[89] At any stage of the inquiry, the NHRC can recommend the government to provide immediate interim relief to victims in the form of monetary compensation.[90] It does not have prosecutorial powers, but it may recommend the government to initiate prosecution of officials, or approach the Supreme Court or High Court to issue directions or orders.[91]

83 *Id.*, s.174.

84 The Model Police Bill, 2015, s. 77.

85 *Id.*, s.81(1).

86 *Id.*, s.91.

87 *Mani Das* v. *Officer In-charge, Ramnagar Outpost*, Complaint No. 38 of 2022 dated 01.10.2022.

88 The Protection of Human Rights Act, 1993 (Act X of 1994), s. 12(a).

89 *Id.*, s.14(1).

90 *Id.*, s.18(c).

91 *Id.*, s.18(b).

The majority of the complaints received by the Commission are against police personnel andfall into the following categories:

a. Brutality or excessive use of force;

b. Corruption;

c. Partiality or bias; and

d. Failure to register complaints[92]

In 2019-20, the Commission registered 76,628 cases of human rights violations[93]and dismissed 17,861 cases in-limine, disposed of 39,923 cases with directions and transferred 6801 cases to SHRCs. The Commission concluded 2174 cases of custodial death/rape after receipt of reports.[94]During the period, Commission recommended monetary compensation of Rupees 12,32,05,002 in 437 cases out of which compliance was made only in 113 cases.[95] The Commission recommended disciplinary action/prosecution only in 2 cases.[96] The Investigation Division of the Commission carried out spot enquiries only in 71 cases.[97]176 cases of 2018-19[98] and 64 cases of 2012-17 are still pending compliance of NHRC's recommendations.[99]

In practice, when the NHRC finds a prima facie case of a human rights violation, it usually recommends that the government provide immediate interim relief in the form of compensation but does not recommend prosecution of or disciplinary action against individual offenders. This limits the deterrent effect of NHRC investigations because even when NHRC identifies individual perpetrators, it does not assess the liability of superior officers who ordered or condoned the actions of other police.

The Human Rights Act was amended in 2019. To the disappointment of many human rights lawyers, the government failed to amend the Act to permit the NHRC to inquire into violations occurring more than one year before the date of the complaint;[100] the current one-year 'statute of limitations' is unrealistic given the limited access victims may have to counsel and limited awareness of their rights under the Act.

There are certain limitations of the Commission. Firstly, it is supposed to be independent; however, the Act makes it dependent on the government for requirements like manpower and finance. The Commission is deficient in having its own independent investigative machinery. The Commission has to rely on investigative staff provided

92 *Supra* note 5.

93 National Human Rights Commission, "Annual Report 2019-20" Annexure I,*available at* https://nhrc.nic.in/publications/annual-reports (last visited on October 20).

94 *Id.*, annexure II.

95 *Id.*, annexure IV.

96 *Id.*, annexure V-A.

97 *Id.*, annexure VIII.

98 *Id.*, annexure VI.

99 *Id.*, annexure VII.

100 *Supra* note 88, s. 36(2).

by the central or state government who operate under the supervision of the DGP. Second, the Commission's mandate is limited to asking for a report from the Government on the reported incidents of torture, ill-treatment, and custodial deaths. The worst fact is – that there is no obligation on the part of the government to proceed with any recommendation that the Commission may make. The Commission has no power to enforce its decisions. It can only advise the government to grant relief to the victim and take action against the guilty persons[101]

CONCLUSION

The police, with their wide powers, are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to fall under their secluded jurisdiction. That tendency and temptation must, in larger interest of justice, be nipped in the bud.[102] Police violence undermines human dignity; brutalizes the police system; forfeits the trust of the people and the judiciary, and also affects the image of law enforcement as a whole.[103]When police officer is accused of using excessive force, they are afforded a multitude of protections that are unavailable to civilian defendants. These protections have proven to be effective shields for officers from both criminal and civil liability and, in many cases, lead to public mistrust of police.[104]

A transparent process of police accountability should also be put in place. Accountability structures should provide a clear system of police accountability to the government, Parliament and the public. Included in this system should be methods of direct communication with the public, including the introduction of hotlines and anonymous reporting mechanisms for complaints against the police. To be effective, the public must have easy access to the complaint procedure. This should include raising people's awareness of their legal and human rights as well as their civic responsibilities.[105]

101 Roy Sudipto, "Brutality in Police Custody in India" 8 *KRIMINOLOGIJA iSocijalna INTEGRACIJA* 97 (2000).

102 *Dagdu* v. *State of Maharashtra*, 1977 SCR (3) 636.

103 *Supra* note 101.

104 Kami N. Chavis and Conor Degnan, "Curbing Excessive Force: A Primer on Barriers to Police Accountability" 11 *ADVANCE* 24 (2017).

105 James J. Nolan, Frank Crispino, *et.al.* (eds.), *Policing in an Age of Reform*36 (Palgrave Macmillan, 2020).

Cross Border Insolvency & Indian Bankruptcy Code

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ABSTRACT

Cross border bankruptcy in worldwide exchange is significant for its partners like cross boundary ventures, legal counsellors, academicians, and analysts who without a doubt are associated with global exchange and vulnerability that overcomes. The development of UNCITRAL model regulations and the UNICITRAL authoritative Aide by the Unified Countries is a pointer of colossal importance to cross boundary bankruptcy, its overall political and monetary ramifications and it gives a way to deal with the arrangement of such business emergencies. Business of companies being directed universally through big business bunches that are associated by different types of proprietorships and control and when anybody or some of them being constituent become bankrupt than absence of domestic legitimate structure and global system neglects to determine indebtedness procedures frequently including numerous jurisdictions. This article shows that the reliant state, to build its benefits from cross-line financial movement. Also cover the conceptual framework & compare with other countries, the impact of the US on the drafting of the UNCITRAL Model Regulation on Cross-Line Indebtedness is utilized as a contextual investigation. It investigates the difficulties and open doors in regards to the cross-line framework in the IBC, including a judicial response related to cross-border dispute & IBC. The last part of the article sets out the closing comments and ideas.

***Keywords**: Insolvency Law, conflict of law, Bankruptcy, IBC, UNCITRAL Model.*

I. INTRODUCTION

Cross-border monetary movement adds to financial development. A typical language works with cross-line financial action: so too outfits business regulation. Be that as it may, language and business regulation vary from one another in one significant regard. In the current times, pretty much every nation has exchange relations reaching out past one purview. Having a presence in different purviews likewise brings about having banks and borrowers arranged at different such areas.[1] This makes the

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indebtedness interaction including covering of various regulations and procedures, a confounded cycle.

Indebtedness implies the inability to reimburse obligations. It applies both to disappointment of business association as well as distinctive individual chapter 11, yet the Indebtedness is typically alluded to business or corporate bankruptcy. Once more, bankruptcy or obligation suggests deficiency to pay commitments upon the date when they become due in the standard course of business; the condition of an individual whose property and assets are lacking to deliver the singular's commitments.[2]

Indebtedness is normally characterized into two, "cash flow bankruptcy and accounting report bankruptcy". There is a distinction between two the limited idea of income indebtedness "not capacity get together with business commitments emerging from day today deal with outsiders; and the more extensive idea for the subsequent one is where the liabilities of the organization more than the resources of the organization. The fundamental issue in that particular situation wouldn't be the drawn-out plausibility of the business however a transient defers in the income, which can be right through different strategies. Now and again indebtedness and insolvency are utilized reciprocally. In any case, the legitimately both are not having same significance universally.

Each state has its own cross-line indebtedness regulation. Basically, states can pick between two principal ways to deal with cross-line indebtedness regulation: territorialism and universalism. Under a regional methodology, each state applies its own considerable bankruptcy regulation to the resources of a global firm[3] located in its jurisdiction. Under a universalist methodology, the considerable indebtedness law of the purview, where a global firm has its 'focal point of fundamental interests', applies to all resources of this worldwide firm around the world. The central contrast among territorialism and universalism is that on account of territorialism, states are ensured of the use of their own bankruptcy regulation to resources situated in their locale, though on account of universalism, states need to acknowledge that unfamiliar regulation might apply to resources situated in their jurisdiction.[4]

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1 https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/(Last visited on Oct 15th 2022)

2 Md Rashid Shamim, Bankruptcy Laws: A Comparative Study of India and USA, *International Journal of Management*, 10 (2), 247 252 (2019) http://www.iaeme.com/IJM/issues.asp?JType=IJM&VType=10&IType=2 (Last visited on Oct 15, 2022)

3 For the purpose of this article a multinational firm is a firm having assets, operations and creditors in more than one country.

4 The EC Insolvency Regulation first introduced the concept of 'centre of main interests' as a connecting factor, which concept was later adopted by the UNCITRAL Model Law. Both the EC Insolvency Regulation and the Model Law presume that in the case of a company or legal person, the place of the registered office shall be the centre of main interests in the absence of proof to the contrary. For the interpretation of 'centre of main interests by the European Court of Justice sees Case C–341/04 Euro food IFSC Ltd [2006] OJ C 143/11.

II. CROSS- BORDER INSOLVENCY

• Meaning

Cross-border bankruptcy is an idea that is collecting a great deal of consideration in contemporary times attributable to the ascent in transnational business and trade. With an ever-increasing number of corporate bodies and organizations setting up shops across the world, there is a developing organization of auxiliaries.

Accordingly, in instances of monetary trouble, the intricacies associated with the goal of bankruptcy connected with corporate substances have just compounded. For the most part, nations are represented by their home grown bankruptcy goal regulations or guidelines, prompting the production of a situation where in the unfamiliar leasers may not be knowledgeable with the cycle. While certain nations might have comparable bankruptcy systems, the loan bosses managing specific nations that have unmistakably unique administrative conditions might confront hardships in the goal of the corporate bankruptcy process. General standards of private worldwide regulation are as of now not adequate to determine clashes between nations emerging from such cross-line bankruptcy procedures. There could associate with three occurrences concerning cross- border insolvency.[5]

As per Teacher Ian Fletcher, "Cross-border Bankruptcy' ought to be considered as a circumstance: in which bankruptcy situation here and there or the other rise above the limits of a solitary general set of laws, and where a solitary arrangement of home grown bankruptcy regulation arrangements can't be only applied without giving due respect to the issues raised by the unfamiliar components of the case."[6]

• Legal Framework

The Insolvency and Bankruptcy Code (IBC) is a significant piece of regulation that tries to make the bankruptcy goal process more strong, speedy, and proficient. It combines and changes the regulations connecting with the indebtedness goal process for organizations, LLPs, association firms, and people. It has revoked a portion of the past obsolete regulations, for example, the Administration Towns Indebtedness Act, 1909 and the Commonplace Bankruptcy Act, 1920 (IBC Section 243, theme toward sure investments), although changing sure additional laws such as The Indian Partnership Act, 1932, The Central Excise Act, 1944, The Income-tax Act, 1961, The Customs Act, 1962, The Recovery of Debts due to Banks and Financial Institutions Act, 1993, The Finance Act, 1994, The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, The Sick Industrial Companies (Special Provisions]) Repeal Act, 2003, The Payment and Settlement Systems Act, 2007, The Limited Liability Partnership Act, 2008, and The Companies Act, 2013 (IBC, Sections 245–255).

5 Ishita Das, "The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016" https://journals.sagepub.com/doi/full/10.1177/0256090920946519#bibr24-0256090920946519 (Last visited on Oct 16, 2022)

6 https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/ (Last visited on Oct 16, 2022)

Sec 234and Sec 235 of the IBC address circumstances of cross-border bankruptcy. By temperance of sec 234,[7] the central government of India might go into reciprocal concurrences with the public authority of any country outside India to implement the arrangements of the IBC. These incorporate arrangements to apply the IBC to resources and property of the corporate borrower, which incorporate individual underwriters situated in unfamiliar nations.

In the event that a goal expert, vendor or liquidation legal administrator, by and large, is of the assessment that property or resources of the debt holder are arranged in an unfamiliar country with which corresponding arrangements under segment 234 of the IBC exist, he might make an application to the mediating authority, i.e., the NCLT as for body corporate, that proof or activity connecting with such resources is expected regarding the procedures. This is given by sec 235 of the IBC.[8]A comparative application lies before the Obligation Recuperation Court for people or limitless liability associations; however the arrangements connecting with these elements have not been informed at this point. The system contained under segment 234 and 235 of the IBC basically accommodates a plan to be made per case, between nations or the mediating specialists, likely to fulfilling that a reason exists for this sake. Such an exchange explicit tailor-made approach would sensibly demand investment and assets. Albeit expected to work with the goal cycle, no means have been taken towards carrying out between legislative arrangements till date. As of now, a request for the NCLT relating to cross-line bankruptcy wouldn't track down acknowledgment and requirement in an unfamiliar jurisdiction.

Certain arrangements in the IBC suggest foreknowledge to stretch out the law to manage cross-line bankruptcy; however it doesn't set out a component to manage all cases relating to cross-line bankruptcy. Unfamiliar lenders can record an application for bankruptcy of an Indian corporate debt holder and partake in procedures started under the IBC. It likewise treats home grown and unfamiliar lenders similarly comparable to the next.[9]

III. THE UNCITRAL MODEL LAW

The UNCITRAL Model Regulation is the most acknowledged regulation in this circle of private global regulation and appeared because of boundless understanding that legal collaboration could involve an official structure for goal of cross-line bankruptcy matters.[10] The Model Regulation was taken on May 30, 1997 by the UNCITRAL at its thirteenth meeting of UNCITRAL held in Vienna. States can carry out the Model Regulation into their home grown systems to aid the coordination and goal of muddled cross-line bankruptcy issues. Dissimilar to a Unified Countries show, the Model

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7 Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 234.

8 Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 235

9 Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 3(23).

10 Harold S. Burman, Harmonization of International Bankruptcy Law: A United States Perspective, 64 *FORDHAM L. REV.*, 2543, 2543 (1996).

Regulation doesn’t need a State to inform the Assembled Countries or some other Conditions of its choice to execute it starting today.[11] As of today, 44 States have adopted the Model Law in varying degrees into their domestic legal systems

As per Model Regulation, there are two sorts of procedures i.e., ‘unfamiliar primary procedure’ and ‘unfamiliar non-principal continuing’. An unfamiliar principal continuing happens in the State where the borrower has COMI[12]. A foreign non-principal continuing is an unfamiliar procedure other than the unfamiliar primary procedure, where the indebted person has another foundation. The Model Regulation gives clearness to different terms like COMI, Public Approach, Unfamiliar Primary Procedure, and Unfamiliar non-Fundamental Procedure. States can take on the Model Regulation into their home grown general sets of laws subsequent to making varieties as appropriate to their locales to dispose of equivocalness and unclearness of the expression “public strategy” to bring straightforwardness and lucidity prior to summoning the arrangement of public approach.

The Model Law have four principles:

a Access

The target of the Model Regulation is to give direct admittance to home grown courts to the unfamiliar lenders or potentially experts consequently empowering them to take part in or start the bankruptcy procedures against any concerned account holder.

b Recognition

The Model Regulation gives acknowledgment of unfamiliar procedures in Home grown Courts of any nation and empowers the Home grown Courts to decide the help to be allowed as per the foreign procedures.

c Cooperation

One more unbiased of the Model Regulation is to accommodate achieving successful collaboration between Bankruptcy Experts and Courts of different locales and to guarantee coordination to productively deal with the direct of simultaneous procedures in various wards.

d Coordination

The point of the Model Regulation is by all accounts to help nations to shape their bankruptcy regulations in a cutting edge, orchestrated and fair structure in order to address the occurrences of cross-line indebtedness all the more really. Be that as it may, the Model Regulation regards the distinctions in home grown regulations and fundamentally centres around further developing

11 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, available at: https:// www.uncitral.org/pdf/english/texts/insolven/1997-ModelLaw-Insol-2013-Guide-Enactment-e.pdf. (Last visited on Oct 17, 2022)

12 The jurisdiction with which a person or company is most closely associated for the purposes of cross-border insolvency proceedings. https://uk.practicallaw.thomsonreuters.com/ (Last visited on Oct, 17th 2022)

participation and coordination between nations, rather than endeavouring to bring together the domestic regulations.

Article 29 expresses that when there are simultaneous neighbourhood and foreign procedures, the court ought to participate under Articles 25, 26, and 27 and award suitable alleviation (UNCITRAL Model Regulation, art. 29). Article 30 gives that in the conditions of numerous simultaneous unfamiliar procedures, the court ought to look for collaboration and coordination among the procedures under Articles 25, 26 and 27 of the Model Regulation (UNCITRAL Model Regulation, art. 30)

Thusly, the Model Regulation presents an unassuming, [13], yet feasible methodology[14]for settling cross-line indebtedness issues. Certain parts of the Model Regulation are not incredibly clear like the assurance of the COMI of the corporate debt holder, procedural fair treatment, acknowledgment of[15], recognition of foreign discharges [16]unfamiliar releases and decision of regulation. It is, in any case, a significant stage towards managing transnational bankruptcy procedures.

IV. JUDICIAL RESPONSE

a) ***Kamsley V Barclay bank:*** Mr. Kemsley was an English finance manager to whom Barclays made an unstable credit for £5million. In June 2009, he and his family moved to the US. A chapter 11 request was given against him by HMRC in the UK in November 2011. He then, at that point, gave a borrower's request for his liquidation in January 2012. He guaranteed he was in the UK on the date the appeal was introduced, he was domiciled in the UK and had a position of home in the UK inside the past 3 years, as expected by Segment 265, Bankruptcy Act 1986.U.K. On 1 Walk 2012, Barclays gave procedures in New York, in the USA. Kemsley was made bankrupt in the U.K on 26 Walk 2012 on his request. Liquidation Legal administrators were designated in the U.K, they applied for acknowledgment of the U.K insolvency in the U.S under Section 15 of the U.S Chapter 11 Code (in August 2012). The US liquidation court decided that Kemsley's COMI was in the U.S as of such date on the grounds that "the Borrower's relationship with his kids fills in as a valuable intermediary for the Debt holder's emotional plan in regards to his routine spot of home." At the hour of the recording of the U.K continuing, he was residing in the US with his family, thusly his COMI was then in the U.S.

b) **The case of Rubin v. Euro finance:**[17] It is about the subject of, the unfamiliar procedure will be perceived and started in a home grown court given the

13 https://journals.sagepub.com/doi/full/10.1177/0256090920946519#bibr32-0256090920946519

14 LoPucki L. (2005). Global and out of control? *American Bankruptcy Law Journal, 79*

15 Bufford S. L.Global venue controls are coming: A reply to Professor LoPucki. *American Bankruptcy Law Journal*, 79, 105 (2005)

16 Westbrook J. L. A journey of 1000 miles begins with a single step. *American Bankruptcy Law Journal*, 79, 713 (2005)

17 https://www.careyolsen.com/briefings/rubin-v-eurofinance-a-welcome-clarification-for-theinsolvency-world (Last visited on Oct 17th 2022)

way that the debt holder doesn't have a place with the unfamiliar purview. It likewise brings a basic issue up in cross line bankruptcy if, requirement of a request for an unfamiliar court can be impacted through the global help arrangement of the UNCITRAL Model Regulation.

Facts of the Case: Euro finance was an English Regulation trust. It at the same time ran a deals advancement firm in the US which ran into a fight in court with the U.S Courts in light of buyer security regulation. U.S Insolvency Court made orders for the recuperation of fake exchange of assets against the litigants, who were occupants of Britain. The respondents didn't partake in any of the U.S bankruptcy procedures and hence defaulted. Rundown decisions were placed against them.

The U.S courts then, at that point, presented an application to the U.K court for acknowledgment and affirmation of indebtedness procedures. In a momentous judgment, that's what U.K High Court held "there was not a great explanation to class evasion decisions connecting with bankruptcy procedures any distinctively to some other kind of unfamiliar judgment and based the acknowledgment to U.S Liquidation Court on the accompanying premise that unfamiliar officeholders should show that the judgment debt holder:

a. Was present in the unfamiliar locale at the time procedures were established;

b. Was the petitioner or the counter-inquirer in the unfamiliar procedures

c. Had submitted to the unfamiliar procedure by arrangement.

The choice of the U.K High Court gives invite alleviation to the unfamiliar purview and builds up the significance of regional cut-off points in regard of bankruptcy procedures and explains the customary regulation situation on the enforceability of unfamiliar decisions in the event of cross boundary bankruptcies as well.

c) Maxwell Communication Corp. (MCC):[18] The U.S and U.K Courts, showed a surprising level of collaboration and compromise of the laws of the two gatherings.

Facts of the Case: Maxwell Company Gathering because of outrages constrained the worldwide enterprise into chapter 11. MCC was a surprising business, with its valid "seat" of organization and the board of its monetary issues particularly advances and the award of safety in London incredibly with its central resources in the US as different enormous working organizations. The Organization announced wilful bankruptcy when it was settled and overseen in the U.K. It had brought about the greater part of its obligations in the U.K purview. 80% of Maxwell's resources were situated in the US, basically in its two significant auxiliaries. Upon liquidation, Maxwell recorded a request for

18 Ibid.

redesign under Part 11 of the U.S Chapter 11 Code and at the same time appealed to the High Official courtroom in London for an organization request.

Simultaneous procedures in various nations, by and large in multi-party cases like liquidations, can prompt strange irregularities and conflicts. For this situation, the two courts of the USA and the U.K freely raised with their separate direction the idea that a convention between the two organizations would be useful to determine a stalemate and to work with better and speedy trades of data. These equal procedures in the U.K and USA courts brought about a very elevated degree of worldwide participation and gave a critical level of harmonization of the laws of the two nations.

d) Jet Airways Case: Indian Judiciary's Noteworthy encounter with cross border insolvency dispute.

In 2019, the Public Organization Regulation Redrafting Council ("NCLAT") gave a decision, ensuing to which Fly Aviation routes (India) Restricted ("Fly Aviation routes") turned into the principal Indian organization to be exposed to cross-line bankruptcy. NCLAT's decision set a main trend in the developing bankruptcy regulation in India as it coordinated the lead of a "Joint Corporate Bankruptcy Goal Cycle" under IBC.

Everything started when State Bank of India recorded a Part 7 application against Fly Aviation routes, upon the confirmation of which the Corporate Indebtedness Goal Cycle ("CIRP") of Stream Aviation routes was initiated on June 20, 2019. Following this, the mediating authority knew about the way that a Dutch Court had previously started indebtedness procedures and a Chapter 11 Director was selected in Netherlands to assume responsibility for Fly Aviation routes' resources found in that. The equivalent was finished at the occurrence of an insolvency request which was documented by two European loan bosses against Fly Aviation routes for cases of neglected levy adding up to almost INR 280 crores. The European leaders were looking for the capture of one of the Fly Aviation routes' Boeing 777 airplanes as the equivalent was stopped in the Schiphol Air terminal in Amsterdam.

The essential issue that was considered was relating to the locale of the courts in Netherlands to arbitrate upon and pass appropriate requests regarding this situation connecting with the chapter 11 of Stream Aviation routes which is enrolled and consolidated in India.

Be that as it may, the NCLT wouldn't keep the Indian indebtedness procedures. The premise accommodated the equivalent was that Segment 234 and Area 235 of the Code, manage cross-line indebtedness and they were not yet brought into impact. Subsequently, the NCLT held that without such a regulation, the Chapter 11 Overseer was banned from partaking in the Indian bankruptcy procedures and further proclaimed that continuous procedures in Netherlands were invalid and void.

The Liquidation Director, being bothered by the NCLT's choice, moved an allure against something very similar in the NCLAT. As such the NCLAT permitted the allure in the accompanying way:

1. NCLAT put away the request passed by the NCLT upon a confirmation being given by the Insolvency Chairman that it wouldn't estrange any seaward resources of Fly Aviation routes.
2. NCLAT permitted the Chapter 11 Manager to help out the Goal Proficient as selected under the Code and furthermore to take part in the gatherings of the Council of Banks, but just to the degree of noticing and forestalling any probably cross-over of abilities.
3. Further, the NCLAT resulted collaboration between the Indian gatherings and the Dutch partner to finish a goal plan the eventual to the greatest advantage of the Fly Aviation routes and every one of its partners.

Compliant with the bearings of the NCLAT, the Goal Proficient under the Code and the Liquidation Head, which was designated by the Dutch Court, commonly settled upon a "cross-line bankruptcy convention" which was basically understood based on the standards gave in the UNCITRAL Model Regulation. Consequently, India was perceived as the "focal point of principal interest" and the procedures being held in Netherlands were taken as the "non-fundamental bankruptcy procedures". Thusly, the instance of Fly Aviation routes introduces itself to be a fascinating review pertinent to the legitimate position relating to cross-line bankruptcy procedures in India as it features a sincere endeavor by the Indian legal executive to be a leader in developing standards and affecting components to manage cross-line indebtedness procedures.

V. PERSPECTIVE OF OTHER COUNTRIES

- **European Union (EU)**[19] - "Cross Border bankruptcy in EU is managed by European Indebtedness Guideline (EIR 2000). Official courtroom of the EU (CJEU) plays had a productive impact by explaining 'focus of principal interests (COMI), 'foundation' and 'related activity. (EIR Recast), which has been gotten impact since 26 June 2017, assume that the indebted person's enlisted office concurs with its COMI. COMI is recognized right when a bankruptcy application has been documented." EU contains an assumption like that referenced in India. On account of reply of assumption, a candidate needs to give proof with that impact. Courts will likewise follow the Demonstrative rundown practically speaking.

  The extent of the EC Guideline is restricted to "aggregate indebtedness procedures which involve the incomplete or complete divestment of a borrower and the arrangement of an outlet."[20]

19 https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law (Last visited on Oct 18th 2022)

20 Article 1(1), EC Regulation

The EC Guideline perceives three sorts of indebtedness procedures that might happen:

a. main procedures, where the debt holder has its focal point of primary interest inside the EU; When bankruptcy procedures might occur in more than one locale, the EC Guidelines perceives principal indebtedness procedures in a single purview and optional procedures in another.The principal procedures have all-inclusive extension and target enveloping every one of the borrower's resources.[21] For a procedure to be perceived as 'principal procedures', the debt holder should have its 'focal point of fundamental interests' in the locale of that Part State. Focal point of principal interests relates to the spot wherein the indebted person leads the organization of his inclinations consistently and can be learned by outsiders.

b. secondary procedures, where the borrower has a foundation; According to the EC Guideline, optional procedures might be opened in a Part State where the debt holder has an 'foundation'. Foundation has been characterized to mean any spot of activity wherein the borrower attempts no temporary financial movement with human means and products run in lined up with the fundamental procedures. Auxiliary procedures might be opened in the Part State where the debt holder has a foundation. The impacts of auxiliary procedures are restricted to the resources situated in that State.[22]

c. territorial procedures, where the debt holder has a foundation, yet principal procedures have not yet initiated somewhere else.[23] To give further clearness to the EC Guideline, Guideline (EU) No. 2015/848 ("Recast Guideline") on indebtedness procedures was endorsed by the European Parliament on May 20, 2015 to supplant the EC Guideline. Notwithstanding a couple of arrangements, the Recast Guideline applies to indebtedness procedures started after June 26, 2017[24], while the EC Guideline keeps on applying to bankruptcy procedures started preceding this date. Like the EC Guideline, the Recast Guideline additionally doesn't endeavour to straightforwardly orchestrate the considerable home grown bankruptcy laws of the part Conditions of the EU. Accordingly, EU part States (with the exception of Denmark) are expected to pass home grown regulations to integrate the arrangements of the Recast Guideline.

- **United States of America:** The Liquidation Code of the US of America accommodates cross boundary related arrangements. This part was added by the Liquidation Misuse Avoidance and Shopper Security Act, 2005. It supplanted Segment 304 of the Insolvency Code to clear a path for USA's reception of

21 Preamble, paragraph 12, EC Regulation

22 Regulation 2(h), EC Regulation

23 Article 3, EC Regulation

24 https://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:32015R0848&from (Last visited on Oct 18th 2022)

UNCITRAL Model Regulation. Thus, the U.S. translation should be facilitated with the understanding given by different nations that have taken on it as interior regulation to advance a uniform and composed lawful system for cross-line bankruptcy cases. This is executed by the rule's five layered goals. To begin with, to advance collaboration between the US Courts and gatherings of interest and different courts and skilful specialists of far-off nations associated with cross-line bankruptcy cases. Second, to lay out more prominent legitimate assurance. Third, to teach decency and productivity in cross line bankruptcies to safeguard interests, everything being equal. Fourth, to bear the cost of assurance and augmentation of the worth of the indebted person's resources and fifth, to work with the salvage of monetarily pained organizations.[25]

- **Singapore**- Singapore has embraced the UNCITRAL Model Regulation. To this tune, alterations were made to the Organizations Act31 which became employable on May 23, 2017. By goodness of presentation of Segment 354B and Xth Timetable to the Organizations Act, direct authoritative instruments to upgrade cross-line bankruptcy were presented. The changes entomb alia, presently grant the acknowledgment of unfamiliar bankruptcy procedures and indebtedness delegates in Singapore. Further, arrangements have been made for forcing and regarding ban in accordance with the UNCITRAL Model Regulation. Further, Model Regulation safeguards the force of the Singapore Courts to intercede when the public strategy of Singapore would be impacted. Singapore Model Regulation by ethicalness of Article 7 which means that the precedent-based regulation will keep on assuming a part in deciphering the segments of the Singapore Model Regulation as well with respect to the elective help choices.

As per the Re. Zetta,[26] the Singapore High Court perceived procedures of Zetta substances forthcoming in the US as unfamiliar fundamental procedures. In doing as such, the Court was wrestled with the subject of deciding a focal point of material interest, considering presence of Zetta elements in Singapore. This was settled by the courts by taking on the US position by focusing on the date at which application for acknowledgment is made.

The Supreme Court declared foundation of an organization of indebtedness decided from a few locales to energize correspondence and collaboration among public courts. The organization, known as the Legal Bankruptcy Organization, contains decided from different locales including US of America, Australia, and so on. The JIN gave a bunch of rules named the "Rules for Correspondence and Participation between Courts in Cross-Line Bankruptcy Matters" ("Rules"). In Singapore, these Rules supplement all regulation, rules and methodology concerning bankruptcy. These rules are to be viewed as anyway including cross-line procedures connecting with the bankruptcy or change of obligation started in more than one ward. These Rules were likewise as

25 11 U.S.C. § 1501

26 Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener) [2019]

of late summoned last year by the Singapore High Court and the US Chapter 11 Court (Southern Region of New York) to deal with the bankruptcy of Ezra Possessions Ltd, a main worldwide seaward administrations supplier mutually.

VI. CONCLUSION & SUGGESTIONS

Cross Border Indebtedness and its regulation the world over is an exceptionally complicated issue. In worldwide exchange, cross boundary bankruptcy might emerge as a result of monetary difficulty in the business and it is a vital piece of it. Because of the Absence of a global normal lawful and requirement structure, it is undeniably challenging for the partners to thump the right purview in a country to get help. The issue turns out to be truly challenging when a business has tasks and resources in more than one country. Who will start and where it will be started and the way in which in the wake of ending up, the resources will be disseminated and how fair, proficient, and compelling goal cycle will be directed remembering when there is no uniform and reliable worldwide regulation to implement the cycle.

One of the new occurrences which feature the effect of not having a compelling cross-line indebtedness goal system is the Nirav Modi episode which shook the country. One of the news reports noticed the clever manners by which a portion of the elements related with Nirav Modi have sought financial protection in the US, trying to try not to manage the Indian controllers.[27]

The Model Regulation is the most practical choice as of now for India, particularly as it exemplifies the significant standards usually imitated by a few nations. The increment of cross-line exchange and utilization of innovation is a sensibly expected. Giving impact to the Draft Regulation is accordingly a critical step in the right direction as of now and certainly the way forward. Despite the fact that there are a few issues in the Draft Regulation, these will probably be figured out over the long run.

"By and by, in the Indian setting, there is no lucidity concerning when such changes will be impacted. In the event that the Draft Arrangements are embraced, regardless of the presence of a few procedural and legitimate difficulties, the system recommended by it could go far in guaranteeing quick coordination and correspondence between purviews to effectively and productively give help, address the goal of cross boundary bankruptcy cases to help different partners."

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Needs for Legislation on Live-in Relationship in India: A Critique

Mr. Akshay Yadav* & Mr. Uday Sanakki**

ABSTRACT

Live-in-relationship is cohabiting relationship between male and female without marriage. Modern generation of youth is adopting to live-in a relationship. Legislation helps justice system to address the social problems and dispense justice to the victims. The marriage relationships between the man and woman were addressed by the family laws. Marriages are a part of customary laws and family laws which impose certain responsibilities on the partners. But live-in relationships do not impose any responsibilities. Without the controls of law over live-in relationship the crime rate forImmoral Trafficking, Rape, Murder, Cheating and Fraud would increase. Therefore there is need for legislation on live-in relationship to control crime and address issues associated with live-in relationships.The main focus of the Article is to examine the legal status of the Live-in-relationship in India. Further it also focus on examining the legal framework of the Live-in-relationship in western countries including USA, UK, Canada, France etc., the authors has focused on suggesting the way forward and need of Legislation on Live-in relationship to overcome the various issues faced by the personnel living in relationship.

Keywords: *Live-in-relationship, Constitutional Rights, Validity, Conjugal Rights.*

1. INTRODUCTION

India is a developing country in the world having population of 1.38 billion people in 2020.[1] Citizens of India were guaranteed several fundamental rights under the constitution of India.[2] It is the tendency of youth towards western culture which imbibed the concept of live in relationship culture in India.[3] But ancient texts of

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1 India: Estimated total Population from 2016-2026 Available at: https://www.statista.com/statistics/263766/total-population-of-india/(Date of Access 16/07/2021 Time: 11:22 AM)

2 Chapter III, Constitution of India, 1950.

3 Aditya Bhide, "*Live-in-relationship and the Indian laws*" NSLRJ BLOG, 2021 Available at: https://www.nslrj.in/live-in-relationship-and-the-indian-laws/ (Date of Access 16/07/2021 Time: 11:32 AM)

India show presence of live-in relationship in India.[4] When a man and a woman lived together without a marriage such relationship is called as live-in-relationship.[5] In live-in relationship the boy and girl may have physical sexual relationship similar to married couples.[6] Marriage is considered as sacramental and holy union of two persons in many religions of India.[7] Religious marriages and court marriages impose responsibilities on married couple in India.[8] In India, live-in relationships do not impose responsibilities of married person on the couple due to lack of specific legislation and legal awareness on live-in relationship.[9]But there are only judicial decisions which regulate the acts of live in relationship in India.[10] Specific legislation on live-in relationship would help Indian judiciary to resolve the disputes associated with live-in relationships in India.[11]Therefore understanding various other social elements would help framing legislation on live-in relationship.

2. PRACTICE OF LIVE IN RELATIONSHIP IN DIFFERENT COUNTRIES

i. Practice of Live-in Relationship inInternational culture

Live-in relationship is practiced in many countries around the world. In 2012 about 42 million people found to be never married in **United States of America.**TheSurvey conducted in March 2013 by Pew Research analysis shows that about 24% of never-

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4 Hari Ravikumar, *Our Vedas Permitted Live In Relationships*, DailyO (open to opinion) Available at: https://www.dailyo.in/lifestyle/live-in-relationships-vedas-marriage-rape-prostitution-supreme-court/story/1/3361.html (Date of Access 16/07/2021 Time: 11:42 AM)

5 TOI: Marriage vs. live-in relationship: Two different approaches to exploring love and companionship, Available at: https://timesofindia.indiatimes.com/life-style/relationships/love-sex/marriage-vs-live-in-relationship-two-different-approaches-to-exploring-love-and-companionship/articleshow/71582056.cms (Date of Access 16/07/2021 Time: 11:44 AM)

6 AakritiVikas, Concept of Marriage under Hindu Law, Available at: https://www.legalbites.in/concept-of-marriage-under-hindu-law/ (Date of Access 16/07/2021 Time: 11:58 AM)

7 Samarth Trigunayat,"*Inter-caste & Inter-Religious Marriages: Social And Legal Issues"* Academike Articles on Legal issues, Available at: https://www.lawctopus.com/academike/inter-caste-inter-religious-marriages-social-legal-issues/ (Date of Access 16/07/2021 Time: 11:46 AM)

8 Sharma, I., Tripathi, C. B., & Pathak, A. (2015). Social and legal aspects of marriage in women with mental illness in India. *Indian journal of psychiatry*, *57*(Suppl 2), S324–S332. https://doi.org/10.4103/0019-5545.161499

9 Astha Saxena, Live in Relationship and Indian Judiciary, Available at: https://www.scconline.com/blog/post/2019/01/23/live-in-relationship-and-indian-judiciary/ (Date of Access 16/07/2021 Time: 12:06 AM)

10 "*Legality of Live-in- Relationship in India*", Tripaksha Litigation, Available at: https://tripakshalitigation.com/legality-of-live-in-relationship-in-india/ (Date of Access 16/07/2021 Time: 12:02 PM)

11 Apoorva Goel, *Are Live-In Relationships Legal in India*?, Available at: https://www.latestlaws.com/articles/are-live-in-relationships-legal-in-india/ (Date of Access 16/07/2021 Time: 12:20 AM)

married Americans ages between 25 to 34 currently live with a partner.[12] Live in relationships are recognized as Common Law relationship in Canada on the basis of partners living together in cohabitation.[13] In **Canada** 3.2 million people age 20 and over lived with a common law partner in the year 2011.[14] The 1753 Marriage Act of **United Kingdom** imposed certain restrictions to prevent bigamous marriages such as parental consent to be mandatory and marriage ceremonies to be conducted only in the presence of minister in a parish church or chapel of church in England to be legally binding. But these restrictions were removed by the parliament in the Marriage Act of 1836.[15] About 61.3% of the population aged 16 and above were living in a couple. Approximately 1 in 4 people were not living in couple and had never been married.[16] In **France** there is significant increase in the number of unmarried couples aged 17 and above living together; in 1960 the number of unmarried couples was 2.9% but in 2017 the number of unmarried couples was 26%.[17] The **French legal system** passed a civil law on 15 November 1999. According to this law unmarried couples can create agreement for civil union and live together.[18] The **United Arab Emirates** decriminalized living together by unmarried couples in November 2020.[19] Inancient **Rome**, monogamous union and a permanent cohabitation was referred by

12 Wendy Wang and Kim Parker, "Record Share of Americans Have Never Married" Pew Research Center, 2014 Available at: https://www.pewresearch.org/social-trends/2014/09/24/record-share-of-americans-have-never-married/ (Date of Access 29/07/2021 Time: 05:37 PM).

13 Assessing a Common-Law Relationship, Government of Canada, 2019 Available at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-determining-spouse/assessing-common.html (Date of Access 29/07/2021 Time: 05:40 PM).

14 Martin Turcotte,Living Apart Together, Statistic Canada,2016 Available at: https://www150.statcan.gc.ca/n1/pub/75-006-x/2013001/article/11771-eng.htm (Date of Access 29/07/2021 Time: 06:03 PM).

15 The Law of Marriage, UK Parliament, Available at: https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/ (Date of Access 29/07/2021 Time: 06:19 PM).

16 Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2019 (Date of Access 29/07/2021 Time: 06:50 PM).

17 Amanda Sharfman, Population estimates by marital status and living arrangements, England and Wales: 2019, Offices of National Statistics, 2020 Available at: https://www.connexionfrance.com/French-news/French-cohabiting-unmarried-couples-are-more-equal (Date of Access 29/07/2021 Time: 07:00 PM).

18 Civil Union (Solidarity civil pact - PACS), Notaries de France, 2017 Available at: https://www.notaires.fr/en/couple-family/civil-union-solidarity-civil-pact-pacs (Date of Access 29/07/2021 Time: 07:16 PM).

19 UAE decriminalizes alcohol and lifts ban on unmarried couples living together, The Guardian, 2020 Available at: https://www.theguardian.com/world/2020/nov/07/united-arab-emirates-to-relax-islamic-laws-on-personal-freedoms (Date of Access 29/07/2021 Time: 07:16 PM).

the word *concubinatus* it means *concombinage* or cohabiting union, according to this union a law needs to recognize unmarried man and woman living together.[20] Around the world many developed countries have recognized live-in relationship in their law system.

ii. Practice of Live-in Relationship in Indian culture

According to Manusmriti, Gandharva marriage is a voluntary relationship between man and woman.[21] Ancient Hindu Scriptures suggest presence of marriage where girl selects her own husband. The Gandharva marriage is explained in Rig veda, as per this marriage male partner is free to select female partner and vice versa. As per Atharvaveda parents can usually allow the daughters to select her lover and come forward in her love affairs.[22] Indian ancient history clearly depicts presence of live-in relationship in the Indian culture.

In India during 1970-1980 studies reported that more than 20% of abortion cases were constituted by unmarried woman.[23] In many cases the male partner refuses to marry female partner, such refusal threatens woman to give a birth to child without father and it is considered as illegitimate in Indian society. The social stigma of illegitimacy is the reason to force unmarried Indian woman to go for abortion of their pregnancy.

Britannica defines Illegitimacy as, status of children begotten and born outside of wedlock.[24] Fatherless children face educational drawbacks and face mental issues causing suicide.[25] A study conducted at Jawaharlal Institute Urban Center of Pondichery, India found that: 56.3% of the unwed mothers were 15-19 years of age and 59.0%

20 Jenny Gesley, "*Concubinage and the Law in France*", In CustodiaLegis Law Librarians of Congress, 2018 Available at:https://blogs.loc.gov/law/2018/09/concubinage-and-the-law-in-france/(Date of Access 02/08/2021 Time: 07:45 PM).

21 Live-in relationships or convenient marriage in India with its historical and legal perspective, Sandeep Bhalla's Blog, 2012 Available at: https://sandeepbhalla.com/2012/10/23/live-in-relationships-or-convenient-marriage-in-india-with-its-historical-and-legal-perspective/ (Date of Access 29/07/2021 Time: 08:05 PM).

22 Raj Das, Did You Know Love Marriages & Live-In Relationships Were Totally Cool In Ancient India?, Feb 08, 2016, Scoopwhoop.com, Available at: https://www.scoopwhoop.com/Gandharva-Marriage/(Date of Access 29/07/2021 Time: 08:23 PM).

23 *Abortion in Case of Unmarried Women in India - Everything That You Need To Know*, The News minute, 2021 Available at: https://www.thenewsminute.com/article/abortion-case-unmarried-women-india-everything-you-need-know-152027 (Date of Access 10/08/2021 Time: 07:17 AM).

24 Available at:https://www.britannica.com/topic/illegitimacy(Date of Access 18/08/2021 Time: 07:07 PM).

25 Claudio Sanchez, Poverty, Dropouts, Pregnancy, Suicide: What The Numbers Say About Fatherless Kids, Available at:https://www.npr.org/sections/ed/2017/06/18/533062607/poverty-dropouts-pregnancy-suicide-what-the-numbers-say-about-fatherless-kids(Date of Access 18/08/2021 Time: 07:38 PM).

were Hindu. 83% were illiterate and 67% were unemployed.[26] Society in Punjab, India will not readily accept illegitimate children born out of wedlock.[27]

Emotional and financial support is required to prevent abortion in unmarried woman.[28] Activities such as legal awareness, sex education and early abortion services can improve life of unmarried woman.[29] Legal Provisions are required to solve the problem of illegitimacy and protection to illegitimate children.

3. SOCIO-LEGAL STATUS OF LIVE IN RELATIONSHIP

i. International perspective

Live-in relationship has showed different societal and legal disputes around the world. Understanding socio-legal status on live-in relationship would help frame a better law on live-in relationship with respect to their society. The Supreme Court of California in the case of ***Marvin v. Marvin***[30]held that an express agreement between a couple living together outside wedlock to share income in consideration of companionship could be legally enforceable. However, Ms. Marvin wasn't awarded "palimony" because the court found that Mr.Marvin hadn't agreed to share his income with her.

Agreements can play important role to document the status of unmarried couple and accountability can be maintained for future dispute resolution. In the case of ***Trutalli v. Meraviglia***[31] the legal principle is established that the non-married partners may lawfully contract concerning the ownership of property acquired during the relationship. In the case of ***Vallera v. Vallera***[32] the court have stated that '*If a man and woman (who are not married) live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property*.'

Determining ownership rights and property laws with the help of agreement made between live-in partners can uplift principle of equity. In the case of ***Eric v. Lola***[33] couples lived together for seven years but Respondent does not wanted to institute

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26 Srinivasa DK, Pankajam R. A study of out-of-wedlock pregnancies: outcome and utilization of maternal/child health services. Int J Gynaecol Obstet. 1980;18(5):368-71. doi: 10.1002/j.1879-3479.1980.tb00517.x. PMID: 6110585.

27 "*Country Advice India: Illegitimate Children, Premarital Sex, Student Teacher Affair, Police Effectiveness, Punjab, Community Mob Violence*", Australian Government Refugee Review TribunalAvailableat:https://www.refworld.org/pdfid/4d5a37112.pdf(Date of Access 18/08/2021 Time: 07:59 PM).

28 Shveta Kalyanwala, A. J. Francis Zavier, Shireen Jejeebhoy and Rajesh Kumar, "Abortion Experiences of Unmarried Young Women In India: Evidence from a Facility-Based Study In Bihar and Jharkhand" Volume 36, Number 2, June 2010, p.64

29 *Id. 70.*

30 (1976) 18 Cal.3d 660.

31 (1932) 215 Cal. 698, 12 P.2d 430.

32 (1943) 21 Cal.2d 681, 685, 134 P.2d 761, 763.

33 Quebec (Attorney General) v. A., 2013 SCC 5.

the marriage. Thus Petitioner challenged the provisions of the Quebec Civil Code because these laws only apply to married couples but do not apply to the rights of unmarried couple to divide property. But the Supreme Court of Canada upheld the constitutional validity of provisions of the Quebec Civil Code. Furtherthe court maintained the *status qua* for defacto spouses in Quebec whereinthe event of separation between spouses, there will be no right to spousal support or to the division of property of which one defacto spouse is not the owner.

A provision of law is required to divide property between unmarried couple. In the matter of an application by ***Siobhan McLaughlin for Judicial Review (Northern Ireland)***[34] the facts of the case are: Ms McLaughlin and her partner, John Adams, lived together for 23 years until he died on 28 January 2014. John Adams had made sufficient National Insurance contributions for Ms McLaughlin to be able to claim a bereavement payment and widowed parent's allowance had she been married to him. But the claims made by Ms McLaughlin, for both bereavement payment and widowed parent's allowance were refused by the Northern Ireland Department for Communities. Aggrieved by the refusal she applied for judicial review of that decision on the ground that the relevant legislation was incompatible with the European Convention on Human Rights. The Supreme Court held that the legislative requirements of birth status and marital status are discriminatory against children and survivors and therefore it is contradictory to the Articles 8 and 14 of the European Convention on Human Rights.

As per **European Convention Human Rights** is concerned a country signatory to the convention needs to protect such human rights. Thus legislation on live-in relationship needs to make the non-discriminatory provisions of law against live-in partners and children born out of live-in relationship.

The Court of Cassation of France decided that Article 1382 of the civil code does not mandate legal bond between the deceased. Therefore cohabitants (unmarried couples) could claim compensation for their loss in case of the accidental death of their partners due to the actions of a third party.[35]

It is important to decide the required provisions to be framed regarding compensation procedure in case of loss to life of live-in partners.

Merriam Webster defines Prostitute means a person who engages in sexual intercourse in exchange for pay.[36] In, ***State* v. *Dusin***[37], it was held that, a concubine is a woman who cohabits with a man to whom she is not married. "Concubinatus", as per the ancient Roman law meant an informal or natural marriage, as contradistinguished from *justummatrimonium*, the civil marriage.

34 (2018) UKSC 48.

35 Court of Cassation, MIXED Chamber, of February 27, 1970, 68-10.276, Published in the bulletin.

36 Available at: https://www.merriam-webster.com/dictionary/prostitute (Date of Access 18/08/2021 Time: 06:22 PM).

37 125 Kan. 400, 264 P. 1043, 1044

A clearer demarcation between the definitions of prostitute and female live-in partner needs to be given in legislation on live-in relationship. Non marital births are correlated to increase abortion rates.[38] Illegitimacy and poor economic conditions of non-marital couples are linked to increase child criminal behaviour.[39] Non marital fertility is also linked to increase rape, murder and property crimes.[40]Children born to unmarried parents performed poorly in the schools.[41] To improve Child education there is a need to research on interlink between the connecting measures of women's fertility, relationship statuses, living arrangements, cohabitation, family structure, differential distribution of socioeconomic resources by birth status and children's birth status.[42] A specific provision is required to address the problems arising due to Non marital fertility, thereby to establish provisions for child welfare and prevention of social evils rape, murder and property crimes.

ii. Indian perspective

Indian society has witnessed the drastic change in living style wherein the live-in-relationship is highly discussed and criticised due to lack of legality and acceptance by the society. In India man and women relation is considered legitimate only when marriage is undertaken as per the Marriage Laws wherein mandatorily requires couple must of 'legal age to marry'[43]. The Government of India has proposed the amendment to "Prohibition of Child Marriage (amendment) Bill, 2021[44] raising the minimum age of marriage for women from 18 to 21 years. In Indian scenario Live-in-relationship is not defined in any Act but the judiciary in various numbers of cases has interpreted and played a vital role to fill the gap created in absence of specific statute on Live-in-Relationship. In case of ***Revansiddappa v. Mallikarjun***[45], Hon'ble Justice Ganguly observed that Live-in-relationship is considered to be immoral from the societal belief

38 Tamura, Robert & Kendall, Todd. (2010). Unmarried Fertility, Crime, and Social Stigma. Journal of Law and Economics. 53. 185-221. 10.1086/596116.

39 *Id.*

40 Id.

41 Crosnoe, Robert, and Elizabeth Wildsmith. "Nonmarital Fertility, Family Structure, and the Early School Achievement of Young Children from Different Race/Ethnic and Immigration Groups." *Applied developmental science* vol. 15,3 (2011): 156-170. doi:10.1080/10888691.2011.587721

42 *Id.*

43 Legal Age to Marry- The Hindu Marriage Act, the Indian Christian Marriage Act, the Special Marriage Act and the Prohibition of Child Marriage Act prescribe 18 years as the minimum age of marriage for women and 21 for men. But for Muslims, who marry under the Muslim Personal Law (Shariat) Application Act, the minimum age for marriage, both for men and women, is the age of puberty, which is assumed to be 15 years.

44 Bill No. 163 of 2021 as introduced in Lok-Sabha available at, https://prsindia.org/files/bills_acts/bills_parliament/2021/The%20Prohibition%20Of%20Child%20Marriage%20(Amendment)%20Bill,%202021.pdf(Date of Access 26/12/2021 Time: 06:10 PM).

45 (2011) 11 SCC 1 : (2011) 2 UJ 1342

but may not be illegal from the eyes of law. The judiciary has taken a lead to protect the partners of live-in-relationship who were not protected by any statute when such partner were subjected to abuse arising of such relationship. The Indian Laws are been very clear that wherein Men and Women who are lived respectively as a spouse is presumed to be a married couples unless the opposite be obviously demonstrated that they were living respectively in result of a legitimate marriage but not in a condition of concubine[46]. The men and women living for a long time in a relationship without marriage are not criminal offenders.[47] The term of live-in-relationship is not only restricted to opt-in or opt-out relationship but there is a presumption of marriage between the couples[48]. This view is taken by the Supreme Court in case of S. ***Khushboo v. Kanniammal,***[49] and held that Live-in-relationship is comes within the ambit of right to life under Article 21 of Indian Constitution and is considered as legal and lawful. The Concept of the Live-in-relationship is recognised by view of the Domestic Violence Act. It is pertinent to note that holding the adultery as unconstitutional[50] has further conceptualised the concept of Live-in-relationship.

The judiciary has also criticised the concept of Live-in-relationship through numerous cases wherein the cases of ***Deepak @ Gajanan Ramrao Kanegaonkar v. The State of Maharashtra,***[51] the Bombay high Court denied the relief to a women from Domestic Violence who was living with a married man for 15 years further holding that live-in-relationship between a married and unmarried is illegal. In case of (a) ***Simranjeet Kaur & Anr. Vs. State of Haryana & Ors.*** (CRWP-7799-2021 (O&M) decided by the Hon'ble Punjab & Haryana High Court on 18.08.2021); (b) ***Seema Devi & Anr. Vs. State of Rajasthan & Ors.*** (S.B. Criminal Misc. Petition No. 4796/2021 decided by this Hon'ble Court at Jaipur Bench on 16.08.2021); (c) ***Smt. Maya Devi & Anr. Vs. State of Rajasthan & Ors***. (S.B. Criminal Misc. Petition No. 3314/2021 decided by this Hon'ble Court at Jaipur Bench on 13.08.2021); (d) ***Smt. Aneeta & Anr. Vs. State of U.P. & ors.*** (Writ-C No. 14443/2021 decided by a Division Bench of the Hon'ble Allahabad High Court on 29.07.2021); (e) ***Smt. Surabhi Vs. State of U.P. & Ors***. (Writ-C No. 5455/2021 decided by a Division Bench of the Hon'ble Allahabad High Court on 21.06.2021); (f) ***Gulza Kumari & Anr. Vs. State of Punjab & Ors.*** (CRWP No. 4199/2021 (O & M) decided by the Hon'ble Punjab & Haryana High Court on 11.05.2021); (g) ***Moyna Khatun & Anr. Vs. State of Punjab & Ors***. (CRWP No. 2421/2021 decided by Hon'ble Punjab & Haryana High Court on 10.03.2021); (h) ***Daya Ram & Anr. Vs. State of Haryana & Ors***. (Criminal Writ Petition No. 5212/2021 decided by the Hon'ble Punjab & Haryana High Court on 10.06.2021); the High

46 Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Blahamy, 1927 SCCOnLine PC 51 : AIR 1927 PC 185; Mohabbat Ali Khan v. Md. Ibrahim Khan, 1929 SCC OnLine PC 21 : AIR 1929 PC 135.

47 Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, (2006) 8 SCC 726.

48 Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

49 (2010) 5 SCC 600.

50 Joseph Shine v. Union of India, AIR2018SC4898

51 2015 (4) Bom.C.R. (Cri.) 406

Court across the Country has denied the protection for illegal relationshipowing to fear of disruption in social fabric.[52]

The women living in live-in-relationship is not a legally wedded wife and is not entitled for maintenance under Section 125 of Code of Criminal Procedure, but whereas the children born out of the live-in-relationship are entitled to claim maintenance as the said section itself expressly mentions 'both Legitimate or Illegitimate Child'. The Supreme Court analysing the provision of the Section 125 of CrPCread with section 26 Protection of Women Domestic Violence Act 2005 held that women in live-in-relationships are equally entitled to all claims and reliefs which are available to legally wedded wife[53].

Live-in-relationship can give rise to various offences such as rape as in case where in on the basis of postmortem report and forensic expert opinions the woman accused was arrested for killing her male live-in partner and case is registered under section 302 of IPC.[54]A male live-in partner was stabbed to death by cousin brother of female live-in partner.[55] A male live-in partner killed his female live-in partner over a suspicion of illicit relationship; the FIR was registered against the accused under section 302 of IPC.[56] Provisions of law were required to decide nature of the offence and guilt of the accused. But on the other side it is true that Consensual sex between live-in partners cannot be termed as rape, this ruling was determined by the Supreme court of India in a case where a male live-in partner broke five years live-in relationship with female live-in partner and moved on to marry another woman.[57]

4. LIVE IN RELATIONSHIP A CHOICE OF PERSONAL LIBERTY

Article 14 provides equal protection of laws thereby everyone gets equal opportunity to benefitted from the use of laws. It provides law should treat citizens irrespective of their caste, creed and sex.[58] Therefore the woman living live-in relationship and

52 Leela and Ors. vs. State of Rajasthan and Ors. (15.09.2021 - RAJHC) : MANU/RH/0560/2021

53 Chanmuniya v. Chanmuniya Kumar Singh Kushwaha(2011) 1 SCC 141

54 Hindustan Times, "*Woman Arrested for killing Live-in-partner*, 2020Available at: https://www.hindustantimes.com/cities/woman-arrested-for-killing-live-in-partner/story-WBGIEn5SihyGQtfePGQNiP.html (Date of Access 22/08/2021 Time: 06:10 PM).

55 The Indian Express, "*Man stabbed to death over 'live-in relationship with younger woman'*2018 Available at:https://indianexpress.com/article/cities/ahmedabad/man-stabbed-to-death-over-live-in-relationship-with-younger-woman-5097053/(Date of Access 22/08/2021 Time: 06:23 PM).

56Time of India, "Delhi: Man arrested for killing live-in partner" 2019Available at:https://timesofindia.indiatimes.com/city/delhi/delhi-man-arrested-for-killing-live-in-partner/articleshow/70614763.cms(Date of Access 22/08/2021 Time: 06:27 PM).

57 Times Now"*Consensual sex in a live-in relationship can't be categorized as rape, says Supreme Court*", 2021, Available at:https://www.timesnownews.com/india/article/consensual-sex-in-a-live-in-relationship-cant-be-categorized-as-rape-says-supreme-court/726964(Date of Access 22/08/2021 Time: 10:02 PM)

58 INDIA CONST. art.14.

children born out of live-in relationship cannot be deprived of fundamental rights. Constitution of India provides certain rights to citizens and other persons, therefore live-in relationship cannot be completely disregarded. Thus provisions of laws required to determine application of constitutional rights and their exceptions.

Article 15prohibits discrimination on the grounds of religion,race, caste, sex or place of birth, or any of them[59]; therefore a provision is required in the legislation to prevent discrimination against live-in partners and their children in the society. Article 15 (3)provides that nothing shallprevent the State from making special provisions for women and children[60]; it reiterates to make inclusion of provision directing state to make provision for women in live-in relationship and children born out of live-in relationship.

Article 16(1)provides for equality of opportunity in matters of public employment[61]; addition of this provision to the legislation can provide equal status to partners in live-in relationship and their children. Article 21guarantees rightto life and personal liberty; No person shall be deprived of his life or personal liberty except according to procedure established by law.[62]A procedure of law needs to be prescribed by way of reasonable classification such as age criteria for live-in partners. Article 23prohibitshuman-trafficking and forced labour, making it punishable under the Suppression of ImmoralTraffic in Women and Girls Act, 1956 (which was renamed in 1990 as the Immoral Traffic(Prevention)Act)[63];A live-in relationship linked offences such as immoral trafficking, rape, cheating, needs to be prevented, in this direction provisions are required. Article 39(f)provides that children should be given opportunities andfacilities to develop in a healthy manner and in conditions which do not put to compromisetheir dignity and freedom, also childhood and youth should be protected against exploitation,moral and material abandonment[64]; A provision prescribing reasonable care towards children born out of live-in relationship is required. Article 46directs the State to promote the educational andeconomic interests of women and people of weaker sections of society, to protect them fromsocial injustice and all other forms of exploitation[65]; A provision is required to direct the state to make provisions into the legislation based on Article 46. Article 51-A enjoins duty on every citizento develop scientific temper, humanism and the spirit of enquiry and reform and to strivetowards excellence in all spheres of individual and collective activity so that the nationconstantly rises to higher levels of endeavor and achievement.[66] Thus it becomes duty of State to make suitable provisions for the welfare of woman

59 INDIA CONST. art.15.

60 INDIA CONST. art.15. cl.3.

61 INDIA CONST. art.16. cl.1.

62 INDIA CONST. art.21.

63 INDIA CONST. art.23.

64 INDIA CONST. art.39. cl.(f).

65 INDIA CONST. art.46.

66 INDIA CONST. art.51.cl.A.

living in live-in relationship and children born out of live-in relationship. Such welfare legislations need to be included into legislation on live-in relationship.

In the case of ***Payal Sharma v. NariNiketan***[67]the Allahabad High Court observed that "In our opinion a man and woman, even without getting married, can live together if they wish to. This may be regarded as immoral by society, but it is not illegal. There is a difference between law and morality. In ***Pardeep Singh and Anr v. State of Haryana***[68] the Punjab & Haryana High Court has granted protection to a couple who entered into a live-in relationship.The Supreme Court in the case of ***S.Khushboo*v. *Kanniammal***[69]held that right to life includes right to live-in relationship within the meaning of Article 21 of the Constitution of India. The Supreme Court further held that live-in relationships cannot be considered as illegal or unlawful. Live-in relationships are not illegal in India but lack of suitable legislation can keep on increasing number of disputes moving towards judiciary.

5. LEGISLATION ON LIVE IN RELATIONSHIP IS REQUIRED IN INDIA

India needs legislation on live in relationship to grant legal rights to couples and children born out of live in relationship.[70]The Supreme Court of India in the case of ***Gaurav Jain* v. *Union of India,***[71] decided the issue related to the rehabilitation of the children of the prostitutes. The Court observed that, segregating children of prostitutes by locating separate schools, and providing separate hostels, would not be in the best interest of the children and the society at large. The Honorable Court further directed that, these children should be segregated from their mothers and should be allowed to mingle with others and become a part of the society. Children born out of live-in relationships needs to be part of the society, therefore certain rights need to be prescribed by legislation as it is already been upheld by Hon'ble Supreme Court that a child born out of live in relationship for considerable years, there will be presumption of marriage under Section 114 of evidence Act and the child born will be considered as legitimate and is entitle to receive share in ancestral property.[72]Psychiatrists opine that engaging into lovable, positive and meaningful relationship is more fruitful than being lonely and negative relationship.[73]

In the case of ***Nandakumar & Anr v. The State of Kerala & Ors***[74] concluded that in some situations when freedom of choice is available to one of the partner then live-

67 2001 SCC Online All 332.

68 2008(2)HLR361; MANU/PH/1342/2007

69 (2010) 5 SCC 600.

70 Dr.Rajesh.M.Dave, "Legal Status of Live in Relationship in India" Volume-9, Issue-12, December-2019, DOI:10.36106/ijar

71 1990 Supp SCC 709.

72 Balasubramanyam v. Suruttayan AIR 1992 SC 756; BharathaMatha v. VijeyaRenganathan, (2010) 11 SCC 483; Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

73 Chaudhary Laxmi Narayan, Mridula Narayan, MridulDeepanshu, "Live in Relationships in India-Legal and Psychological Implications" Journal of Psychosexual health, 3 (1) 18-23, 2021

74 AIR2018SC2254

in-relationship is allowed and the marriageable age is not a relevant factor to live in together by the two adults.

In the case of ***State of West Bengal v. Orilal Jaiswal***[75] a girl committed suicide within a year of her marriage. The victim girl was subjected to abuses, humiliation and mental torture by her husband and mother in law, both of them were convicted u/s. 498A IPC. Wherein Section 498A IPC addresses marriage relationship; similarly legislation on live-in relationships is required to determine the punishment for abuses, humiliation and mental torture.Section 493 of IPC[76] provides: Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also liable to fine. Similarly a man may deceit woman partner of live–in relationship,and then the lack of penal provision would cause major difficulties to dispense justice.Section 494 of IPC[77] provides: Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. In situations where live-in partners repeatedly change live-in partners then there is a need arises to apply similar penal provision of Section494 to repeated live-in relationships.

In the case of ***Santosh Kumari v. Surjit Singh***[78]where without granting a divorce the orders passed by a court relieving the physically weak wife from the burden of the husband's sex demands and at the request of the wife permitted him to take another wife, that was held to be wrong .The procedure of divorce is absent in live-in relationship. Therefore it causes further problems to dissolving a valid live-in relationship and permitting another live-in relationship.

In the case of ***Lily Thomas v. Union of India***[79]a married Hindu person contracted second marriage after embracing Islam. The Supreme Court said that despite his conversion he was guilty of the offence u/s.17 of the Hindu Marriage Act 1955 read with S.494 IPC, since mere conversion did not automatically dissolve his first marriage. Similarly In the case of ***Sarla Mudgal v. Union of India***[80] a Hindu husband who had after conversion to Islam contracted a second marriage without dissolving his first marriage was guilty of the offence u/s.494.

Inter-caste live-in relationships can create another hardship before criminal justice system to apply their family laws. Largest reductions in crime can be found in stable

75 AIR 1994 SC 1418.

76 Indian Penal Code, 1860, § 493, No.45, Acts of parliament, 1860 (India).

77 Indian Penal Code, 1860, § 494, No.45, Acts of parliament, 1860 (India).

78 AIR 1990 HP 77.

79 AIR 2000 SC 1650.

80 AIR 1995 SC 1531.

relations lasting at least one year.[81] Marriage relations show reduction in crime because marriage forms a social bond and imposes social responsibilities.[82] According to National Survey on Drug Use and Health women "living with an unmarried partner" use more illicit drugs than women who were "living with an unmarried partner" compared to those who were married, divorced/separated, or never married.[83] A provision related to drug abuse needs to be addressed in the legislation on live-in relationship.

According to Section 373 of the Indian Penal Code, 1860, any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of 18 years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.[84] A precautionary provision needs to be added to prevent prostitution to by way of live-in relationship.

Section 16 of the Immoral Traffic (Prevention) Act, 1956, provides for the rescue of persons living or carrying on, or made to carry on prostitution, in a brothel. Magistrate (that is, Metropolitan Magistrate, Judicial Magistrate of First Class, District Magistrate or Sub- Divisional Magistrate) may direct a police officer not below the rank of a sub-inspector to enter any brothel and remove any person there from; after removing the person, the police officer must forthwith produce him before the Magistrate.[85] Determining live-in relationships and prostitution would be difficult. After abandonment of live-in relationship unmarried woman and her children needs to face similar situations of a woman faced prostitution. It also reiterates need for similar authorities to address the disputes arising in live-in relationships.

The High Court of Punjab and Haryana located at Chandigarh, in the case of ***Soniya&Anr v. State of Haryana &Ors***[86] opined that live in relationship may not be accepted to all but it cannot be said that such a relationship is an illegal one or that living together without the sanctity of marriage constitutes an offence. The Petitioner having attained the age of 18, got approved for protection of life and liberty under Article 21.Section 370 of Indian Penal Code provides Trafficking of Person[87] for this offence consent is immaterial. Therefore any partner in live-in relationships may accuse other partner on this ground.

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81 Gottlieb, Aaron, and Naomi F Sugie. "Marriage, Cohabitation, and Crime: Differentiating associations by partnership stage." *Justice quarterly : JQ* vol. 36,3 (2019): 503-531. doi:10.1080/07418825.2018.1445275

82 Robert J. Sampson, John H. Laub , Christopher Wimer , "Does Marriage Reduce Crime? A Counterfactual Approach To Within-Individual Causal Effects", Criminology Volume 44 Number 3 2006.

83 Substance Abuse and Mental Health Services Administration. *Results from the 2003 national survey on drug use and health: National findings (No. NSDUH Series H-25, DHHS Publication No. SMA 04–3964)* Rockville, MD: Office of Applied Statistics; 2004.

84 Indian Penal Code, 1860, § 373, No.45, Acts of parliament, 1860 (India).

85 Immoral Traffic (Prevention) Act, § 16, No.104, Acts of parliament, 1956 (India).

86 MANU/PH/0464/2013.

87 Indian Penal Code, 1860, § 370, No.45, Acts of parliament, 1860 (India).

The Medical Termination of Pregnancy Act, 1971 prescribes required legal reasons for married woman in India to get abortion are "failure of contraceptive" and "unplanned pregnancy".[88] But unmarried woman cannot give legal reason of contraceptive failure and minors need consent from their parents to get an abortion.[89]Provisions are required to address the procedure for medical termination of pregnancy in case of live-in relationships.

First time in India woman living with a male partner in living relationship got their rights and protection under Domestic Violence Act, 2005.[90] According to Section 2 (f) of the Domestic violence act 2005, Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.[91] The grammatical interpretation by the courts on words "through a relationship in the nature of marriage" from the provision gives some basic rights to woman to protect themselves from bigamous relationships and fraudulent marriages[92]. Therefore provisions are required to prevent bigamous live-in relationships and fraudulent live-in relationships. In order to avoid destitution and vagrancy, partners of a live-in relationship can claim under Section 125 CrPC.[93]

There are provisions made in Section.498A of Indian Penal Code 1860 to decide of cruelty by husband or relatives of husband. Section.498A provides Husband or relative of husband of a woman subjecting her to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.[94] This Section is applicable only for married woman but there is need for legislation which decides cruelty on unmarried woman living in live-in relationship.

6. CONCLUSION

Live-in relationship being a popular way of life is found to be linked with various social problems. Some live-in relationships lead to end in offences like Murder and Rape. There are educational and socio-economic problems needs to face by the female live-in partner and her children after abandonment by male live-in partner. Law

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88 "*Changes in abortion law may allow unmarried women to terminate pregnancy due to birth-control failure*" Money Control, 2020, Available at:https://www.moneycontrol.com/news/india/changes-in-abortion-law-may-allow-unmarried-women-to-terminate-pregnancy-due-to-birth-control-failure-4874781.html (Date of Access 18/08/2021 Time: 05:47 PM).

89 *Id.*

90 The Protection of Women from Domestic Violence Act, 2005, No.43, Acts of parliament, 2005 (India).

91 The Protection of Women from Domestic Violence Act, 2005,§ 2, cl.(f), No.43, Acts of parliament, 2005 (India).

92 Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.

93 Ajay Bhardwaj v. Jyotsna, 2016 SCC Online P&H9707.

94 Indian Penal Code, 1860, § 498, cl.A, No.45, Acts of parliament, 1860 (India).

needs to impose certain duties and responsibilities on live-in relationship otherwise it leads to hardship on justice system to decide the matters without proper channel of law. Understanding socio-legal status on live-in relationship would help frame a better law on live-in relationship with respect to their society. Legal status can be provided to live in relationship by allowing forming agreement between the couples. Thus it helps to determine the rights of couples. A provision of law is required to divide property between unmarried couple. It is important to decide the required provisions to be framed regarding compensation procedure in case of loss to life of live-in partners provisions to define Non marital fertility, live in relationship, unmarried couple, provisionsto provide child welfare, provisions for protection of illegitimate children and prevention of social evils of rape, abuses, humiliation, mental torture, cruelty murder and property crimes.

The problems arising out of live in relationships such as conjugal rights, maintenance, property rights, inter caste live in relationship, dissolving a valid live in relationship, determining validity of live in relationship, eligibility criteria for live in relationship, duties and responsibilities of live in partners, actions to address live in relationship infringement, divorce needs to be regulatedLegal provision is required to prevent cruelty on unmarried woman living in live-in relationship. From the discussion made it is concluded that India needs a legislation on live-in relationship.

An Overview of Motor Vehicle Insurance Against Third-Party Risks

Dr. K. S. Brijwal & Dr. Anil Kumar Maurya***

ABSTRACT

In India, according to the Motor Vehicles Act, of 1988, it is mandatory that every vehicle used on the road must have valid insurance. Under third-party risk insurance, the insurer pays an amount to the victim in case of an accident due to the use of the insured's vehicle in a public place.This form of insurance is statutorily recognized so that the insurer must pay for the damages regardless of the economic capacity of the driver or owner of the vehicle. Although the law relating to third-party insurance claims is largely settled, there are concerns about general public awareness, fixing of subsequent premiums and complexities of claim procedures. The purpose of this article is to present an overview of third-party motor vehicle insurance from a legal perspective to enhance general public awareness and suggest ways to address other concerns.

Keywords: *Third-party insurance policy, insurer, insured, claimant, vehicle, public place.*

INTRODUCTION

Motor vehicles play a crucial role in an economy for the purpose of transportation of people and goods. The use of vehicles ranges from social, domestic, and commercial to business purposes. Many people are directly or indirectly engaged in transport activities. Some people are engaged as service providers and others are as service-taker. Unfortunately,whenever a motor vehicle accident occurs it often results in the loss of lives or damage to the properties. In that way, vehicle owners may become liable to third parties for their losses. Prior to the Motor Vehicles Act, of 1988, such people could not get compensation due to the intricacies of the law.Therefore, special provisions have been added to the Motor Vehicles Act to deal with this type of situation. Due to compulsory third-party risk insurance, any person who gets injured

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or dies in a motor accident is entitled to compensation from the insurance company, regardless of the economic capacity of the driver or owner of the vehicle.

THE NECESSITY FOR INSURANCE AGAINST THIRD-PARTY RISK

Third party insurance has been made mandatory keeping in view that third parties who suffer loss without their fault must be compensated at all cost. Seldom the economic capacity of the owner/driver of the vehicle causes hindrance against that objective. Hence, law requires that insurance companies may fulfill the lawful necessities of the victim. As such the third party insurance is never meant to compensate the insured person but to those who suffer losses cause of the actions of insured. In this regard the law provides that No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter.[1]

Section 146 (1) speaks that no person shall use or allow to use a vehicle in a public place without a third-party risk insurance policy. Hence, third-party insurance is mandatory if the vehicle is used in a public place.

Third-Party includes the Government, the driver and any other co-worker on a transport vehicle.[2] Here, Third Party means 'Victim' other than the Insurance Company (Insurer) and Owner of the Vehicle (Insured)[3]. The firstparty is the policy holder or who takes an insurance policy is known as 'Insured'. The second party is the insurance company that calculates risks, provides insurance policies, and pays out claims known as the 'Insurer'. Third-party is Claimant or the person (people) who is covered under the insurance policy.

The word Public Place has been defined under Section 2 (34) of the said Act to mean a road, street way or other places, whether a thoroughfare or not, to which the public have a right of access and includes any place or stand at which passengers are picked up or set down by a stage carriage.

Oriental Fire & General Insurance Co. Vs S N Rajguru[4], the expression "to which public have a right of access" indicates a place where members of the public have access as a matter of right without hindrance or being required to take permission.

The word public place was interpreted in the case of ***Chairman, The Trustee of Port of Madras Vs Suganesan & Co.[5],*** as a place accessible to members of the public and available for their use, enjoyment, avocation and other purposes though right of access thereto may be permissive, limited, restricted or regulated by tickets, passes, payment or oral or written permission and any place restricted generally or to a particular purpose or purposes, such as Harbor, Port Trust, or Railway Station.

1 S 146 (1), The Motor Vehicle Act, 1988.

2 S 145 (i), *Ibid*.

3 Kishori Vs. Chairman Tribal Service Coop. Society Ltd., AIR 1988 MP 38.

4 (1985) ACJ 243 (Bom).

5 1996 ACJ 1224 (Mad.).

It Act also states that if a vehicle is carrying dangerous or hazardous goods, it must also have an insurance policy issued under the Public Liability Insurance Act, 1991.[6]An employee driving a vehicle shall not be deemed to act in violation of this sub-section if he is unable to know or has reason to believe that the policy is in force.[7]

COMPLEXITIES IN CLAIMING INSURANCE

The procedure for making a successful third party insurance claim is more cumbersome in reality than it appears on paper. The procedure starts with the immediate filing of First Information Report (FIR) and obtaining a chargesheet. Such filing mainly needs to be done by personally visiting to the police station having jurisdiction. Getting properly narrated FIR registered for the accident in itself is a daunting task. This needs to be followed by approaching a lawyer to file a case in a motor accident claim tribunal having jurisdiction. The jurisdiction is decided as per the place of the accident or where the claimant or the defendant resides.

The rules of insurance claims also vary according to the nature of the policy. If a person has only a basic third party insurance, he himself cannot be compensated unless he proves the fault of third party in court. People are urged to resolve it outside of court because the process is not only time-consuming but also onerous. Injury and death claims from third parties are made, but it takes a while for them to be resolved. "The turnaround time for third-party claims involving bodily injury is typically one to two years. Settlement of claims in cases of death typically takes three to four years.

NO REQUIREMENT OF INSURANCE AGAINST THIRD PARTY RISK

Sub-Section (1) shall not apply where the vehicle is owned by the Govt. (Centre or State) and used for Government purposes, not for commercial purposes.[8] Exemption from the application of sub-Section (1) for which 4 conditions must be satisfied[9]: -

1. The vehicle is owned by the Government (Central or State, Local Authority and State Transport);[10]
2. Such vehicle must be used by the Government (Centre or State) for commercial purposes;
3. An Order of exemption must be made by such Government; and
4. A fund has been established and is maintained by that Govt. (Centre or State), in accordance with the rules made in that behalf under this Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

6 S 146 (1) Proviso, The Motor Vehicle Act, 1988.

7 S 146 (1) Explanation, *Ibid*.

8 S 146 (2), *Ibid*.

9 S 146 (3), *Ibid*.

10 AIR 1988 MP 38.

Kishori Vs Chairman Tribal Service Co-operative Society Ltd.[11]**,** If there is insurance against third party risk, the person suffering due to the accident (third party) caused by the use of vehicle may recover compensation either from the owner or the driver of the vehicle, or from the insurance company, or from them jointly.

PUNISHMENT FOR USE OF UNINSURED VEHICLE

Driving a vehicle or allowing a vehicle to be driven without a valid insurance is punishable for the first offence[12] with imprisonment which may extend to three months, or with fine which may extend to two thousand rupees or with both, and for a subsequent offence[13] shall be punishable with imprisonment which may extend to three months, or with fine which may extend to four thousand rupees or with both.[14]

REQUIREMENT OF POLICIES AND LIMITS OF LIABILITY

Section 147 lays down the requirements of the policies and the limits of liability in respect of passengers and persons other than passengers in relation to passenger vehicles and goods carriages.

For the purposes of Chapter-XI, 2 conditions must be satisfied. Firstly, policy must be issued by an authorized insurer[15] and secondly, insure person or class of persons must be specified in the policy[16].

Authorised Insurer means an insurer who carrying on general insurance business in India & registered under the Insurance Regulatory and Development Authority Act, 1999 and any Government insurance fund authorised to do general insurance business under the General Insurance Business (Nationalisation) Act, 1972.[17]

LIABILITY OF THE INSURER

The policy must cover risk in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party due to the use of the vehicle in a public place[18], here any person means other than passenger(s) and against the death of or bodily injury to any passenger of a public service vehicle due to the use of the vehicle in a public place[19].

Death or bodily injury of any person or damage to any property of third party shall be deemed to be caused by the use of the vehicle in a public place, despite of this

11 Ins. by Act 32 of 2019, s. 81. (w.e.f. 1-9-2019).

12 *Ibid*.

13 S. 196, The Motor Vehicle Act, 1988

14 S. 147 (1) (a), *Ibid*.

15 S. 147 (1) (b), *Ibid*.

16 S. 145 (a), *Ibid*.

17 S. 147 (1) (b) (i), *Ibid*.

18 S. 147 (1) (b) (ii), *Ibid*.

19 S. 147 (1) (b) Explanation, *Ibid*.

that the person who died or got injured or the property which have damaged was not in the public place at the time of the accident.[20]

Despite other existing laws, the Centre Government shall, in consultation with the Insurance Regulatory and Development Authority, prescribe a base premium for an insurance policyholder under sub-Section (1) and also the liability of the insurer regarding such premium.[21]

A policy shall be effective if it is issued by the insurer in favour of insured person (people) and an insurance Certificate contain particulars and conditions must be in prescribed Form.[22]

Despite anything contained in this Act, an insurance policy issued before the commencement of the MV (Amendment) Act, 2019 shall continue to be in force at the present time in accordance with the terms of the contract for that time.[23]

Under this Chapter or the rules or regulations made thereunder, if the insurer does not issue an insurance policy within the specified time after the issuance of the cover note, then the insurer shall inform to the registering authority or such other authority within 7 days from the expiry of the validity of such cover note.[24]

Despite other existing laws, an insurer shall be liable to indemnify the person or classes of persons specified in the policy if any liability arises.[25]

OTHER RELEVANT POINTS

I. Effect & Validity of Insurance

National Insurance Co. Agartala Vs. Benu Chandra Deb[26], where insurance policy expired and accident happened before issue of subsequent policy, insurance company will not be liable unless the policy is issued with retrospective effect.

Deddo Vs National Insurance Co.[27], case the Apex Court laid down by the clarities that if on the date of accident, the policy subsists, then only the third party would be entitled on avail the benefit.

In ***S.M. Sharmila Vs National Insurance Co. Ltd.[28],*** it was held by the Apex Court that evidence indicated that vehicle had been insured for a period of one year commencing from 3-3-1997. As per postage book, policy was dispatched on 25-3-1997. This clearly showed that policy had been taken much before 25-3-1997 and 25-

20 S. 147 (2), *Ibid*.

21 S. 147 (3), *Ibid*.

22 S. 147 (4), *Ibid*.

23 S. 147 (5), *Ibid*.

24 S. 147 (6), *Ibid*.

25 AIR 2001 Gau. 114.

26 AIR 2008 SC767.

27 (2012) 2 SCC 770.

28 AIR 2015 NOC 845 Mad.

3-1997 was not the date from which policy had commenced. Therefore, the vehicle was not insured on the date of accident on 3-3-1998.

***Valliammal Vs Sivakumar*[29],** case the cheque for payment of premium was dishonoured and consequently the policy was cancelled and in between accident happened, the Court held that the insurer had to pay compensation amount and recover it from the owner.

II. Driver Don't have Valid Licence

Where the driver causing the accident had no valid license the question arises whether the insurance company is liable or not?

In ***New India Assuarnce Co. Ltd. Vs Kamala*[30],** the Supreme Court held that the insurance company is liable to pay compensate first and then recover the compensation amount from the owner of the vehicle.

***National Insurance Co. Vs Swaran Singh*[31],** case the Supreme Court held that the insurer is entitled to raise a defence in claim petition U/S 163A or 166 of the MVA that there has been a breach of conditions of policy e.g, disqualification of the driver or invalid licence of the driver of the vehicle, but mere absence, fake or invalid licence or disqualification of the driver at the relevant time are not themselves defences available to the insurer against either the insured or the third party.

In ***New India Assurance Co. Vs Kamla*[32],** the court held that once a licence is faked renewal cannot make it valid. No licensing authority has power to renew a faked licence. Therefore, renewal cannot transform a fake licence as genuine.

III. Vehicle must be in Use

The Act provides for liability for damage caused by the use of a vehicle in public place. It must therefore be in use at the time of causing damage. The expression "use" does not here mean that the vehicle must be running at the time. It will be taken to be in use even when it is parked or its battery has been taken out.

In ***Oriental Fire & General Insurance Co. Vs S N Rajguru*[33],** case an oil tanker was parked on the footpath near a public road, suddenly it burst and due to explosion, a person was thrown at a distance of about 10 feet. He was badly injured and later died. It was the contention of the insurer that the tanker was not in use at the time. The Court rejected this argument and held the insurer liable. It pointed out that the tanker at the material time was parked on footpath near a highway, not in garage.

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29 AIR 2001 SC 1419.

30 AIR 2004 SC 1531.

31 2001 AIR SCW 1340.

32 (1985) ACJ 243 (Bom).

33 AIR 2005 HP 9.

United India Insurance Co. Ltd Vs Sardari Lal[34]**,** case where a tractor was being used for propelling thrasher and due to negligent starting the deceased was wrapped with belt and struck against the thresher it was held that merely because the tractor was not being plied on the road it cannot be said that accident had not occurred out of the use of the motor vehicle.

In ***New India Assurance Co. Ltd. Vs YaduSambhaji More***[35]**,** case a petrol tanker fell on Katcha ground about 5 feet below the road and petrol started leaking from the tanker. About 4 hours later tanker exploded resulting in death of persons who had gathered to collect petrol. It was held that accident did not arise out of use of the vehicle.

IV. Use of vehicle must be in a Public Place

It is essential condition of insurer's liability that damage must be caused by use of vehicle in public place.

It was held in ***ChinnaGangappa Vs B. Sanjeeva Reddy***[36]**,** that an accident which occurred in garage in the process of reversing a tractor, would be held as accident in a public place, since access to garage is not prohibited to members of public.

Alias Vs E M Paul[37]**,** case it has been held that an automobile workshop is a public place as public has access to that place. If accident happens in workshop insurance company cannot escape liability on the ground that it happened in a private place.

In ***National Insurance Co. Ltd. Vs William JenifarAjitha***[38]**,** case it was held by the Madras High Court that even those places of private ownership where members of public have access whether free or controlled, falls under public place.

V. Liability to Gratuitous Passengers

Whether insurance Company is liable in the event of death caused to a gratuitous passenger travelling in a vehicle/goods vehicle?

In ***New India Assurance Co. Ltd. Vs Asha Rani***[39]**,** case the words "any person" as used in Section 147 would not include passengers in the goods vehicle.

United India Insurance Co. Ltd. Shimla Vs Tilak Singh[40]**,** case the issue came before the Court that whether the insurance Company was liable for death of or injury to gratuitous pillion rider? The SC held that though Asha Rani's case was concerned with gratuitous passenger in goods vehicle the same would apply with equal force

34 AIR 2011 SC 666.

35 1998 (1) TAC 268 AP.

36 AIR 2004 Ker. 214.

37 2009 ACJ 1042.

38 AIR 2003 SC 607.

39 AIR 2006 SC 1576.

40 AIR 2011 (NOC) 2 (Guj.).

to gratuitous passenger in any other vehicle. The Court held that the insurance policy was statutory one and therefore did not cover the risk of death or personal injury to gratuitous passenger.

In the case of ***National Insurance Co. Ltd. Vs Smt. Bimla Dey[41],*** the deceased was travelling in a goods carriage vehicle as a gratuitous passenger. Risk of such gratuitous passenger was not covered by policy. It was held that the insurer was not liable to pay compensation.

Manager, National Insurance Co. Ltd. Vs Raju P. Paul[42], case it was argued by the claimant that he was travelling in the vehicle in the course of his employment since he was a spare drive in the vehicle although he was not driving the vehicle at the relevant time but he was directed to go to the work site by his employer. The insured (owner) got insurance cover in respect of the subject goods vehicle for driver and cleaner only and not for any other employee. There is no insurance cover for the spare drive in the policy. The insured had paid premium for one driver and one cleaner and, therefore, second driver or for that purpose "spare driver" was not covered under the policy. As a matter of law, the claimant did not cease to be a gratuitous passenger though he claimed that he was a spare driver. Claimant was not employed to drive that vehicle and he was merely travelling in vehicle. Hence, he could not to be said to be acting in course of his employment. Insurer is not liable to pay compensation since he could only be classified or categorized as a gratuitous passenger.

CONCLUSION

Third party risk insurance policy protects the interests of third parties who suffer damage due to the fault of the insured.Therefore, the third-party insurance policy establishes a mechanism by which any liability arising on the insured by a third party will be borne by the insurance company.Since third-party risk insurance is mandatory, it cannot be overridden by any clause in the insurance policy. Due to the mandatory nature of third-party insurance, this is justified as it facilitates the process for the claimant to recover money from the insured.The purpose of a third-party insurance policy is to protect the interests of the third party, who is injured due to the use of the vehicle.If insured against third party risk, he can recover compensation from the insurance company and will not depend on the financial condition of the owner or driver of the vehicle. It is suggested that a central repository could be maintained by IRDA in collaboration with state traffic/transport authorities to make profiling of the driving habits of insured. The rate of premium should be enhanced in case of insured frequently violating traffic norms.

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41 (2013) 2 SCC 41.

Freedom of Speech and Internet Censorship: Need for Restriction

Mr. Bhupinder Singh Yadav*

ABSTRACT

This article examines whether the Internet has grown to be so important for the dissemination of information, access to it, the development of political communities, and the participation issues that go along with those, that it requires additional human rights protection beyond freedom of expression. Supreme court granted the broadest possible meaning to the freedom of speech and expression in various case laws and also recognised the right ti internet but at the same time all these rights are not absolute and can be restricted and curtailed if situation demands.

INTRODUCTION

"John Milton says that "give me the liberty to know, to argue freely, and to utter according to conscience, above all liberties".

The largest platform available to the public is the Internet, which is utilised for a variety of activities like conducting business and exchanging data and information. It serves as a global platform for different networks. With so many options and sources of information available on one platform, there must to be a way to regulate or stop abuse. The idea of internet censorship was established to stop abuse. The restriction of what can be accessed, seen, and published online is referred to as internet censorship. But, for ethical, religious, or commercial reasons, private organisations and individuals may also control it in addition to the governments of various nations.The only reason the internet is controlled is to stop social outbreaks, slander, invasions of privacy, etc. The social scourge may be either political, religious, or commercial in nature.In the past, the Internet was known colloquially as the "Information Superhighway" because it allowed everyone to access an unlimited amount of material. One of the many advantages of internet censorship is that it shields kids from adult material that is very improper for their development as

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people and is available online. The authority's mandate and goal are to try and regulate the country's access to information.

MEANING OF FREEDOM OF SPEECH AND EXPRESSION

Freedom of speech has its beginnings many years ago. Greeks were the ones who first introduced it. They referred to it as "parrhesia," which is Greek for "free speech" or "to speak the truth." The fifth century B.C. marks the earliest use of this phrase. It has taken a long time for nations like England and France to recognise this freedom as a fundamental human right. Freedom of expression was included as a constitutional right in the English Bill of Rights of 1689, and it is still in force today. The Declaration of the Rights of Man and of Citizens was also adopted by the French during the time of the French Revolution in 1789.On December 10, 1948, the UN General Assembly enacted the Universal Declaration of Human Rights, recognising freedom of speech and expression as one of the fundamental human rights.The freedom to seek, receive, and communicate information and all kinds of ideas without regard to boundaries, whether orally or in writing, print, art, or through any other media of their choice, is included in the right to freedom of speech and expression, according to Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The essence of freedom of speech and expression is the ability to freely express one's own ideas, thoughts, and opinions through writing, printing, pictures, gestures, spoken words, or any other manner. It entails the dissemination of one's thoughts by audible sounds, gestures, signs, and other forms of the communicable medium. It also involves the freedom to spread one's ideas via print media or any other form of communication.

This means that press freedom belongs to this group as well. The necessary goal is the free dissemination of ideas, which can be accomplished through the media or any other venue. Both of these freedoms—freedom of speech and freedom of expression—have unique restrictions.

The Indian Constitution's Article 19(1)(a) states that everyone has the right to freedom of speech and expression. The right to freely express one's thoughts and beliefs through spoken words, written words, printed words, visual images, or any other methods is known as freedom of speech and expression. Limitation on the freedom of speech and expression can be imposed on the following grounds

State Security

According to Article 19(2), the right to free speech and expression may be curtailed when it comes to maintaining national security. "Security of State" includes acts of war, revolt, and insurrection but excludes riots and unauthorised assemblies. This leads to the conclusion that freedom of speech and expression may be constrained when it comes to the security of our country.

Incitement to commit a crime

This clause was included in the Constitution (First Amendment) Act of 1951. The

right to freedom of speech and expression does not apply to the right to inspire others to commit crimes.

Friendly relations with other countries

The First Amendment itself imposed this requirement in 1951. This was included so that people couldn't abuse their freedom of speech and expression in a way that would harm relations between the nation and other foreign states. The Foreign Relations Act (XII of 1932) in India imposes penalties for insulting foreign dignitaries by Indian nationals. The suppression of legitimate criticism of the government's foreign policy, however, would not be justified by the need to maintain favourable relations with other countries.

Public Order

Public order was incorporated to the First Amendment Act itself. When it comes to the underlying definitions, "public order" has a broad range of applications. Public order is the end effect of internal control that the government has imposed. Law and order upkeep is only one aspect of public order; it encompasses much more. Public order is the same as civil serenity, security, and harmony. By observing whether the act is interfering with the established way of life in society, or if it only affects one person, it can be determined whether the act complies with the criteria of public order.

Public order is disturbed by anything and everything that interferes with how society runs or disrupts public tranquilly. Public order is only implied by the lack of violence and the ability of people to live peacefully in their daily lives. A part of public order is public safety. Basically, "in the interest of public order" refers to both statements that are actively designed to cause disruption and those that have the potential to do so.

Defamation

Basically, defamation occurs when someone's reputation is put at risk or is the cause of slander. It can be expressed verbally or in writing.

Contempt of court

Except when analysing the court's decision, disrespecting or demeaning its ruling is basically considered contempt of court. there are two categories of contempt: civil and criminal.

Decency or Morality

Several restrictions have been imposed in the name of morality and decency in Sections 292 to 294 of the Indian Criminal Code. The meaning of the words "decency" and "morality" is more expansive. These terms adhere to a strict criteria that curbs the spread of offensive language.

In case of Naveen Jindal and Others v. Union of India[1] Government officials refused to let the respondent Naveen Jindal hoist the national flag at the location of his factory on the grounds that it was against India's Flag Code.In this case, the high court ruled that Article 19(2) of the Indian Constitution did not permit the Flag Code's limits on citizens' rights to hoist the National Flag. The court also ruled that flying a flag is an act of true patriotism and pride, and that it can only be limited in conformity with the Constitution's prescriptive limitations.

The following are the main components of the right to freedom of speech and expression:

Only an Indian citizen has access to this right; other nations, i.e., foreigners, are not eligible.

According to Article 19(1)(a) of the Indian Constitution, one has the freedom to express themselves verbally, in writing, on paper, orally, through gesture, etc.

This right is not absolute, so the government has the authority to enact laws and impose reasonable restrictions when doing so will protect India's sovereignty and integrity, friendly relations with other nations, its security, public order, morality, and against defamation, court disobedience, and incitement to commit crimes.

Such a right ought to be carried out equally by the State's action and inaction. Hence, it would likewise be a violation of Article 19(1)(a) of the Indian Constitution for the State to fail to ensure that all of its citizens had the right to freedom of expression.

Every citizen in India has access to the freedom of speech and expression guaranteed by Article 19(1)(a) of the Indian Constitution. The scope of freedom of speech and expression has expanded as a result of numerous legal decisions. It now includes:

1. Right to gather and spread knowledge.
2. The freedom to express oneself through any medium, including through speech, movies, and advertisements.
3. Right to an open and free debate.
4. Press freedom.
5. Freedom to be informed
6. Right to remain silent.

The distance between international boundaries has shrunk or, to put it another way, this barrier has been lessened as a result of technological improvement or the revolution in communication and electronic media. It has made information transfer possible in only a fraction of a second, even to different areas of the world. In Maneka Gandhi v. Union of India[2] the Supreme Court considered whether Article 19(1)(a) of the Indian Constitution was limited to Indian territory before concluding that the right to free speech and expression did not have any geographical restrictions.

1 Union Of India vs Naveen Jindal & Anr on 23 January 2004

2 1978 AIR 597, 1978 SCR (2) 621.

Right to remain silent is protected by the freedom of speech and expression. After the verdict in the preeminent case of Bijoe Emmanuel v. The State of Kerala[3] the public became aware of this privilege. The National Anthem case is another name for this one. In one instance, the school administration expelled three students for refusing to perform the national anthem.But, when the national anthem began to play, these kids rose from their chairs in reverence. The Kerala High Court heard a case challenging the legality of the expulsion of minors. The court ruled that it was acceptable to expel students on the grounds that singing the national anthem was part of their fundamental responsibility.

At the moment, internet serves as a forum for worldwide news and topics. Everyone will be able to access it, express their opinions, and share them with the rest of the world. Finland was the first nation to grant internet access legal status. By the year 2016, the UNHRC has acknowledged internet access as a fundamental human right. Although it is still a relatively new idea in India, all forms of speech, whether expressed in words, photographs, or other media, are protected under the ruling in PUCL v. Union of India. Access to the internet is a crucial component of education and is protected by Article 21. This was the first instance in which the legal status for using the internet was also recognised as a fundamental right for Indians after a petitioner by the name of Faheema Shirin RK complained to the court about limitations on using mobile phones in the UG hostel. The first amendment established the justifiable limitations for Article 19(1)(a).

The justifiable limitations on the use of cyberspace imposed by the President's rule during the state of emergency were upheld in the case of Anuradha Bhasin v. Union of India. These days, there is a lot of focus on social networking sites because of the political high drama, the spread of various ideologies, and the promotion of a lot of movies. As a result, Twitter wars are also closely watched and some may even be stopped because they violate the rules and regulations or the privacy policies of their respective platforms.

NEED OF RESTRICTION

There are various cybercrimes which are committed and because the identity of person committing is anonymous there is a urgent need to restrict the cybercrimes cybercrime can be defined as "Any criminal conduct where computer, communication device, or computer network is utilised to commit or enable the commission of a crime" is one definition of cybercrime.Child pornography OR content that is sexually harmful to children (CSAM)The term "child sexually abusive material" (CSAM) describes content that includes sexual images of mistreated or sexually exploited children in any format. According to Section 67(B) of the IT Act, "it is illegal for posting or transmitting in electronic form material depicting children in the sexually explicit act, etc. other cyber crime is Cyberbullying where using computers, mobile phones, laptops, or other technological or communication devices to harass or intimidate

3 1987 AIR 748, 1986 SCR (3) 518.

another person. Other cyber crime includes Cyberstalking is the use of electronic communication to track down a person, or persistent attempts to get in touch with a person to foster personal interaction despite a clear indication of disinterest on their part. Cyberstalking also includes monitoring the internet, email, or any other form of electronic communication, which is a crime.

Some other cyber crimes includes Phishing is a sort of fraud that includes collecting personal data from recipients of emails that seem to be coming from a reliable source, including Customer ID, IPIN, Credit/Debit Card number, Card expiration date, CVV number, etc.Vishing is an attempt when criminals attempt to obtain personal information over the phone, such as Customer ID, Net Banking password, ATM PIN, OTP, Card expiration date, CVV, etc.Smishing is a sort of fraud that employs text messages sent to mobile devices to entice victims into dialling a fake phone number, going to a fake website, or downloading harmful software.

The SIM Switch Scam is when criminals use the mobile service provider to fraudulently obtain a new SIM card for a registered mobile number. They obtain the One Time Password (OTP) and notifications they need to conduct financial transactions through the victim's bank account with the use of this new SIM card. The fraudulent acquisition of a new SIM card using a registered cellphone number is referred to as SIM Swapping.

When someone receives an unwanted commercial communication by email, SMS, MMS, or any other comparable electronic messaging medium, it is called spamming. They may attempt to fool the recipient into disclosing bank account or credit card information, or they may try to get him or her to visit a website where he can make transactions.

A sort of computer software known as ransomware encrypts files and storage media on communication devices including desktops, laptops, mobile phones, etc. and holds data and information hostage. To unlock the victim's device, the required ransom must be paid.

Although it is global, cyberspace lacks a formal structure. Apart for the access hardware's capacity, it has no set metes and bounds. Cyberspace is no one's territory due to the absence of a formal framework. Cyberspace is owned and controlled by no one single person, organisation, or country. Cyberspace may be seen as res nullius in terms of property law since, like outer space, it cannot be appropriated privately.

Cyberspace regulation presents a new set of difficulties. According to Harvard Law School professor Lawrence Lessig, anonymity is the norm in the online world. The exercise of freedom is encouraged and enhanced by anonymity. A child who is too bashful to express himself in person can act someone else in virtual space and speak his mind there.

Moreover, speech and data transmission over the internet is quick and simple. The ease of communication significantly improves international trade. Instead of the more traditional person-to-person manner, goods are traded through the internet. Computers and even mobile phones are used to conduct massive amounts of financial transactions. Paperless transactions are more popular. Even legal documents are now filed

electronically. Electronic commerce generates a huge amount of revenue, but it also presents a huge temptation for white collar crimes.But, the ease of publication and the possibility of anonymity can also be damaging to other people's reputations or feelings of dignity. Character assassination and the distribution of false information are also practised on the internet, often with no consequences for the offenders.

Many Jurisdictions – All legal systems suffer legal uncertainty as a result of the anonymity of Internet users, the lack of physical boundaries in cyberspace, and the cross-border impact of Internet transactions.Legal Vacuum: Lawmakers and legal draughtsmen must, in some way, come up with a fix for the issues that are currently plaguing cyberspace. Yet, there are no suitable model laws.The problem of policing is too complex to be resolved due to a lack of technical expertise, a lack of cooperation among various police organisations, etc.Procedure that costs a lot of money: Training law enforcement personnel to combat cybercrime is quite expensive.

The Ministry of Electronics and Information Technology of the Government of India houses the Indian Computer Emergency Response Team (CERT-IN or ICERT).The national nodal organisation for responding to computer security events as they happen is called CERT-In. In operation since January 2004, CERT-In.

The following tasks related to cyber security will be carried out by CERT-In as the designated national agency:

- Information gathering, analysis, and distribution regarding cyber events.
- Cybersecurity incident forecasts and warnings.
- Emergency procedures for responding to cyber security breaches.
- Coordination of actions for responding to cyber incidents.
- Publicize guidelines, advisories, vulnerability notes, and whitepapers about information security practises and protocols, as well as about the prevention, response, and reporting of cyber incidents.

CONCLUSION

Internet freedom should be viewed critically, but if it is taken seriously and given more thought, it might end up being a major and even risky idea. For some, it could be too soon to declare whether or not Internet freedom is recognised as a human right. Our view of the world and our consciousness have both been shaped by technology, which has also contributed to the development of our notion of human rights. Although its impacts are complicated, the Internet is having an effect in this area. In addition to bringing stability and a consistent framework to bear on such complications, the task for human rights jurisprudence and discourse is also to adapt to them. The idea of Internet freedom and the discussion of human rights are similar in one important way: both are subjects of criticism and yet also serve as tools of criticism.Although the Internet is frequently portrayed as future, it may actually be outdated technology. The discussions about Internet freedom, however, are resonating with well-known themes that can be linked to the development of the telegraph,

later arguments over the influence of television, and even the Cold War and its aftermath. Despite the fact that internet freedom is not yet acknowledged as a human right, current discussions will help to determine how important it will be in the future, both in terms of freedom of speech and on its own.When applying classic human rights notions of freedom of expression to digital and online situations, internet freedom emphasises the significance of participation and access. It also raises concerns about the possible limits of conventional free speech law when it tries to take into account the Internet's wide range of advantageous and detrimental interactions.

The right to free speech and expression must be used deliberately and with caution. The Internet is public cyberspace where you may express and interact with individuals from all around the world. To uphold the law and public order in the state, appropriate constraints are placed on the right to freedom of speech and expression. As an integral aspect of the right to life and personal freedom under Article 21 of the Indian Constitution, the access to the internet was also guaranteed. The internet has been proven to be a fundamental human right in numerous instances. Government restrictions on the right to the internet are acceptable, while arbitrary orders to shut down the internet are an abuse of authority.To address public unrest, government should use other strategies rather than outright banning internet usage. The interruption of information sharing, trade, and business on the internet, as well as other services wholly dependent on the internet, results from an outright ban on internet services.

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Cyber Crimes and Child Protection in Digital India: A Critical Analysis

*Mr. Gaurav Kumar**

"No violence against children is justifiable and all violence against children is preventable".

– Prof. Paulo Pinheiro

ABSTRACT

The legal definition of the term 'Child[1]' includes "a person below eighteen years of age", which is most widely accepted nationally as well as internationally. The Indian Constitution[2] also lays down several important provisions for "protection and welfare of children" like the Fundamental Rights against Exploitation[3] and"Right to live with Human Dignity under Article 21"[4] as well as casts a mandatory constitutional duty on the State in the form of Directive Principles of State Policy "to protect the children against all forms of exploitation and abuse and to provide them opportunities to develop in a healthy manner and in conditions of freedom and dignity".[5]

The main legislations in India dealing with Cyber Crimes and Child Protection are "The Information Technology Act 2000"[6] and "The Protection of Children from Sexual Offences (POCSO) Act, 2012"[7], which has been made stricter by subsequent amendments[8], but still

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1 The Protection of Children from Sexual Offences (POCSO) Act, 2012, (Act 32 of 2012) s.2(d) "Section 2(d) - "child" means "any person below the age of eighteen years";

2 The Constitution of India

3 Id. art 23-24

4 Maneka Gandhi vs. Union of India 1978 SCR (2) 621

5 Supra note 2 art 39 (e) & (f)

6 The Information Technology Act, 2000 (Act 21 of 2000)

7 Supra note 1

8 The Protection Of Children From Sexual Offences (Amendment) Act, 2019 (No. 25 Of 2019)

not much effect has been seen at the ground level. On the contrary, the rate of such cyber offences against children continue in the same way as before and the situation has even worsened in the pandemic of COVID – 19 and its resulting lockdown situations due to more dependency on digital devices and gadgets in the lockdown phase.

This article basically aims to study the different types of cyber-crimes against children in India with special reference to child pornography and how effective are the present Indian laws and their implementation to deal with such cyber-crimes as well as to protect the innocent children from being victims to them.

The Article basically tries to analyze the various provisions under the Constitution of India as well as the international legal instruments concerning with the issue of cyber-crimes against children and the various protective and welfare measures laid down for them. Also efforts will be made to know the actual reasons and causes both legal as well as social, behind it so that relevant remedies and solutions can be found out.

Keywords : *Cyber Crimes, Child, Rights etc.*

INTRODUCTION

With the advancement of science and technology, new devices and gadgets are being invented to make the life easier, faster and convenient but along with their benefits and advantages, there are also hidden dangers and risks associated with them, which can prove to be a serious threat to society, particularly to the most vulnerable groups, specially the children.

One such invention is the Internet which has now become a necessity in present day life and without which now many of us would find their lives in great trouble or would be unable to envision living without it. In some ways, the Internet is similar to the high seas under the International law, which no one owns but which is used by people from all over the world.

But have we ever realized the dangers associated with the virtual world of Internet which has such a powerful network that can connect us to any part of the world in just seconds with a single touch or even by a voice command. So can we allow the children to use it freely and expose them to a world of endless dangers and risks of cyber-crimes which are constantly on rise every day making the children easy targets and pliable victims.

Children are a nation's future and most valuable asset, therefore protecting them from different types of exploitation and abuse is the nation's most essential obligation and responsibility[9]. Children can be exploited and abused in various ways, including physical, mental, emotional, and, worst of all, sexual abuse, as well as cyber-crimes, even when they are at home, which is considered to be the safest place for them.

It's a terrible betrayal of their confidence and a cruel violation of our pledge to safeguard the innocent. Since this is a secretive kind of abuse, reliable estimates are

9 Supra note 5 ; Alakh Alok Srivastava Vs Union of India and Others (2018) WRIT PETITION (C) No.76 OF 2018

difficult to come by.Victims typically suffer in gloomy and claustrophobic silence. Online sexual abuse of children is a heinous crime that puts the child in a condition of mental anguish and despair.

CYBERSPACE AND CYBER CRIMES – ISSUES AND CHALLENGES

The term "cyber" refers to a computer[10], a computer system[11], a computer network[12], or the internet. Cyberspace is a fictitious realm in which people communicate via computer networks.

Cyberspace is essentially a zero-boundary environment. It is a virtual environment in which the internet operates. Because internet has no boundaries, it has become a playground for criminals to commit crimes while being conspicuously absent from the crime scene.Because cyberspace has no geographical restrictions or bounds, nor does it have any physical features, it presents a significant problem to law enforcement authorities tasked with regulating citizens' online transactions inside a country's territorial authority.

Cyberspace handles gigantic traffic volumes every second. Cyber-crime has turned its attention to data in electronic form[13]. It has a total disregard for jurisdictional lines. Traditional law finds it extremely difficult to cope with internet issues. The term "cyber law" refers to a great variety of legal problems relating to the use of communication device[14] or technology. It includes the rights and duties of netizens who are citizens of the cyber world and handles cyber security[15] concerns.

The word "cybercrime" is a broad term that refers to different types of illegal actions carried out in cyberspace via global communication and information networks such as the Internet. To perpetrate such cyber-crimes, all that is required is a digital gadget that is linked to the internet. The whole criminal world has altered dramatically since the internet's inception, as the internet has transformed its topic matter and, more crucially, its modus operandi.It is unavoidable, with its roots in humanity's growing reliance on computers in modern life.

That is, any crime or criminal action that involves the use of a computer[16] is referred to be a cyber-crime.The threat of cyber-crime is not limited to one or two countries; rather, the entire globe is confronted with this massive problem as a technical embarrassment. Cyber thieves today are exploiting computers for a range of crimes because to the anonymity of their nature and the low likelihood of being discovered. Misuse of social media for a variety of causes, from personal to state-level, is on the rise. Cybercrime is a worldwide phenomenon with no geographical boundaries.

10 Supra note 6 S. 2(i)

11 Supra note 6 S. 2(l)

12 Supra note 6 S. 2(j)

13 Supra note 6 S. 2(r)

14 Supra note 6 S. 2(ha)

15 Supra note 6 S. 2(nb)

16 Supra note 10

The expanding number of occurrences, various techniques and modes utilized in perpetrating such spotted wrongdoings using PCs has raised alerts to accommodate a titanic lawful secure particle including the arrangement for disciplines for the utilization of ICT for unlawful purposes. Undoubtedly, this particular field of law has been distinguished to direct the utilization of ICT with two primary destinations viz., advancing exchanges with the utilization of ICT and forestalling the unapproved and illicit utilization of ICT. Besides, brutality against kids submitted using ICTs is harder to distinguish and address than conventional types of viciousness against children.

Data and correspondence advances (ICTs) have quickly evolved throughout the most recent twenty years. Late fast advances in ICTs have permitted grown-ups, just as children, to appreciate uncommon freedoms and advantages as far as socialization, instruction, and amusement. Specifically, the improvement of ICTs has given children and youth utilizing the Internet and related advancements with new dimensions to cooperate and shape social associations with others, like chatrooms, distributed (P2P) sites, and informal communication locales. Ongoing quick advances in ICTs have at the same time permitted brutality to be submitted with the utilization of the Internet and related advances, including viciousness against children.

"The risk of victimization is greater for emotionally vulnerable youth who may be dealing with issues of sexual identity. These young people may be willing to engage in conversation that is both titillating and exciting but appears innocent and harmless. Unfortunately, Internet interactions that initially appear innocent can gradually lead to sexually explicit conduct".[17]"Whereas information and technology advances have not essentially given rise to completely new types of child abuse, they indeed in some cases changes the character and dimensions of the exploitation".[18]

The Delhi High Court also in its landmark judgement of Avnish Bajaj v. State (NCT of Delhi)[19] observed that, "*the main concern of the legislators and parents in relation to the internet is child pornography, rather than other forms of sexually explicit content. This has been the case ever since paedophiles started to use the internet for circulating **pornographic materials related to children**.*"

JURISPRUDENTIAL ASPECTS

The State is basically considered to be the protector and guardian of its citizens[20]

17 Karnika Seth, "Overview of Laws against online child sex abuse in India, U.K, U.S", 2(1) International Journal of Research 75 (2015) "available at http://internationaljournalof research.org" (last visited on 12 March 2023)

18 Ms. Saumya Uma, "Outlawing cyber Crimes in India, Bharti Law Review, April- June, 2017" available at http://docs.manupatra.in. (last visited on 12 March 2023)

19 (2005) 116 DLT 427: (2005) 79 DRJ 576.

20 Article 38(1) in The Constitution Of India - "Article 38 - State to secure a social order for the promotion of welfare of the people (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

and from ancient times, whatever may be the kind of government whether it is democracy or monarchy or any other form, the King or Head of the State is expected to take steps for the protection as well as welfare of its subjects[21].

And moreover, children need special protective measures[22] because of their very nature and lack of maturity. Therefore the State is always considered to be ***duty bound***" to protect the children from different types of exploitation and crimes"[23]. The persons committing any crime against children particularly the cyber-crimes, has certain mentality and psychology in doing them, that is we can say such persons possess that particular mens rea to have specific hunting of children.

There can be different factors or causes as to why these people prefer to target only children, which can be as follows –

- That the children are innocent by their nature depending on the age group they belong to;
- That the children lack understanding and maturity to ascertain the nature and effects of a particular act which an adult has;
- That children can be easily misled or convinced or threatened;
- That some persons have special interests and preference for children;
- That children will not easily complain of their abuse or exploitation;
- That they do not have the wisdom to distinguish between good and evil;
- That they do not have worldly experience to recognise people and gather their intentions in advance.

Justice is the most fundamental value of any society. It is the foundation of a peaceful and stable society[24]. Different jurists and scholars of the east and the west have propounded different theories and doctrines for the concept of Justice and contributed to enrich it with different perspectives and thought processes. The ancient Indian texts laid great emphasis on the ideal of Justice and wrote great texts on it specially the Nyaya Darshan, Dharamashstras, Smritis etc.

GROUND REALITY

The situation has worsened after 2010 as the Smartphones have become the one of the basic necessity of the modern generation. It would not be surprising even to find children below 8 years freely using smartphones and in most of the cases, it is their parents only who offer them to play games on it to avoid unnecessary headache or to bargain with them for some work.

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21 Ibid.

22 Supra note 2 Art 15; The Juvenile Justice (Care and Protection of Children) Act, 2015 Juvenile Act (Act 2 of 2016) S. 3

23 Supra note 3

24 Supra note 20

And when the child starts using smartphones or other digital devices from such a young age, then its quite common that in few years, they get addicted to it and it becomes a basic part of their life and personality. Some teenagers can't live even one hour away from their smartphones. It leads them to a different virtual world which is often far from reality and may sometime cause unnecessary emotional and psychological disturbances.

Now the question arises as to how many parents are actually themselves aware of the various risks of different cyber-crimes which can be easily committed against their children and if they are, what precautions or preventive steps can they take to keep their children safe from the hazards of the virtual world of cyberspace. Can they actually monitor the use of smartphones or digital devices of their children all the time? And does that mean, they should not at all allow the use of smartphones or digital or communication devices[25] to their children?

But that also cannot be done altogether as Smartphones or digital devices are necessary also for some specific purposes and have their own benefits too. Like in this pandemic of Covid-19 where all the education has turned online and so the use of Smartphones or other digital devices becomes inevitable in such circumstances of on-going pandemic when it was not feasible to conduct offline classes.

So we need a balance and practical solution to this problem of Cyber-crimes against children which operates through these Smartphones and digital devices as well as the rising use of social media platforms like Facebook, Twitter,Instagrametc. have led to more possibilities of different cyber-crimes.

SUSTAINABLE DEVELOPMENT AND CHILD RIGHTS

The United Nations has adopted Sustainable Development Goals[26] in 2015 which aims at making the world more peaceful and prosperous at all levels of life. These are basically 17 goals which are sought to be achieved by 2030 and they will lead to balance of different dimensions of sustainable development as well full realization of our potentials.They are also known as Global goals and they strive to create a world where no one is left behind. As these seventeen different sustainable development goals cater to the need of all sections of the society, therefore we would like to highlight the goals which are concerned or related to the rights and welfare of the children.

Goal five aims "*to achieve gender equality and empowerment of all women and girls*"and so this goal can be very effective for welfare and protective measures of the girl children all over the world. Gender Equality is a human right and is a precondition for healthy growth and development.Similarly Goal Sixteen which is "*Peace, Justice and Strong Institutions*" and basically aims the following –

25 Supra note 6 S. 2(ha)

26 Available at - https://sdgs.un.org/goals (Last visited on 02 April 2023)

- "To promote peaceful and inclusive societies for sustainable development of all
- To provide access to justice to all
- To build effective, accountable and inclusive institutions at all levels"

And this goal sixteen is directly connected to our topic of discussion that is cyber-crimes against children and will prove beneficial to grant more protection and safety to children in the virtual world of cyber space. It basically strives "*to protect children from violence, abuse and neglect*". And UNICEF is playing an excellent role in this direction by working towards mitigating different kinds of violence and abuse faced by the children all over the world, whether it is online or offline as well as helping and aiding the governments of different nations to build better and stronger child protection systems.

So the concept of Sustainable Development is universal in nature irrespective of any discrimination of any kind. It is basically a holistic and complete development of an individual as well as the societies. In essence, it is moving more closer and in tune with nature and our surroundings. And this concept was deeply rooted in our ancient Indian culture and philosophy just as part of our daily routine. In ancient India, people always respected and protected the nature; moreover they even worshipped and feared them.

And now the world has again felt the need to realize the importance of nature and environment for our survival and progress. The reason being very simple that we have only one planet earth and we don't have any other planet B where we can migrate after exhausting and exploiting the natural resources of our mother Earth. And in this way, since the whole world is connected and inter-dependent on each other, so here comes the importance of the very ancient ideal of Indian Philosophy – "VasudhaivKutumbkam ", which simply means that the whole world is like one big family.

INTERNATIONAL PERSPECTIVES

"The child, by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth".

-"Declaration on the rights of the child, 1959[27]".

❖ The United Nations Convention on the rights of the child, 1989

The United Nations Convention on the rights of the child[28], 1989 (UNCRC) came into force by taking an initiative from earlier conventions. The UNCRC[29] aims at such rights of the child which will be "*the foundation of freedom, justice and peace*

27 Available at "https://www.ohchr.org/en/resources/educators/human-rights-education-training/1-declaration-rights-child-1959" (Last visited on 02 April 2023)

28 Available at - "https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child" (Last visited on 02 April 2023)

29 Ibid

treating all the human beings as members of the human family".[30]

These objectives are in fact goals of many early international initiatives. These are:

- Recognition of the intrinsic dignity and equal and unalienable rights of the child
- All people, without any discrimination on any ground, are entitled to certain rights.
- "Special care and assistance" for the child owing to its' physical and mental immaturity" and "appropriate legal protection."

Definition of the child:

As per the UNCRC, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[31]

Right to respect for child's personality

- Article 29(1) deals with the guidelines to be followed by state parties for the development of the child through child's right to education that has–
  - Respect for the individuality, skills, and mental and physical capacities of children
  - Respect for human rights and basic liberties
  - Respect for the child's parents, as well as the country's cultural identity, language, and values
  - Mutual understanding of the terms "peace," "tolerance," "equality of sexes," and "friendship"
  - Dedication to the preservation of the natural environment"

Right to participation – It includes the following :

- "Respect for the views of the child
- Right to freedom of expression
- Right to access for appropriate information, and freedom of thought
- Right to conscience and religion etc".

Right to freedom from sexual abuse:

- Article 34 provides for "*the protection of children from all forms of sexual exploitation and abuse*". Also includes appropriate national, bilateral, and international actions to combat a) child coercion, b) exploitative child prostitution, and c) child usage in pornographic performance or materials.

30 Id at Preamble CRC

31 Id. art 1

Duty of state to protect the child from other forms of exploitation:

- According to Article 36 of the convention, states parties must safeguard children from various types of exploitation as well as freedom from cruel, inhumane, or humiliating treatment and neglect.
- Article 37 (a) ensures "protection from torture and inhuman or degrading treatment"; (b) ensures liberty in accordance with the law; (c) ensures respect for inherent dignity; and (d) "ensures access to legal and other appropriate assistance, as well as the right to challenge the legality of deprivation of liberty".

- **"Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography"[32]**

This Protocol (hereafter also referred to as "OPSC"). is the major international tool used to guide this Regional Study and is of paramount importance as well as legally binding international mechanisms that can be utilised to assess Asian countries' "legislative and regulatory approaches to child pornography offencesin accordance with relevant international standards"[33]. The OPSC includes provisions that require State Parties to criminaliseand punish illegal activity involving child pornography.

- **"The Council of Europe Convention on Cybercrime (2001), - the Budapest Convention[34] - The Budapest Convention"**

The **Budapest Convention**, is among the pioneer conventions that deal with the issue of child exploitation as it has "a more pragmatic approach with a universal application to both the judicial officers and the law enforcement agencies at the same time". It defines child pornography as, "*a material that visually depicts a minor or a person appearing to be minor to be engaged in a sexually explicit act*.[35]" The Budapest Convention is also notable for its use of unequivocal terms in its provisions related toonline child pornography as well as prescribing appropriate punishment for it by considering as an illegal activity.

- **"The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) - The Lanzarote Convention"[36]**

  The Lanzarote Convention (2007) categorizes child pornography within child abuse. It is wider in its ambit as it also covers sexual tourism within child abuse. The drawback of this convention is its lack of universal application as it has only been adopted by the European nations so far.

32 See full text at –"https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child"(Last visited on 02 April 2023)

33 Status Report available at –"https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&clang=_en"(Last visited on 02 April 2023)

34 See full text at - https://rm.coe.int/1680081561 (Last visited on 02 April 2023)

35 Id. at art 9

36 See full text at - https://rm.coe.int/1680084822 (Last visited on 02 April 2023)

- **"Economic and Social Council Resolution 2011/33 on Prevention, Protection and International Cooperation against the Use of New Information Technologies to Abuse and/or Exploit Children"[37]**

The UN Economic and Social Council issued a Resolution entitled "Economic and Social Council Resolution 2011/33 on Prevention, protection and international cooperation against the use of new information technologies to abuse and/or exploit children"(hereafter also referred to as "ECOSOC Resolution 2011/33"). New digital technologies and applications are being exploited to commit sexual offences against children, according to ECOSOC Resolution 2011/33.

CONSTITUTIONAL PROVISIONS

"*The Constitution means a document having a special legal sanctity which set out the framework and the principal functions of the organs of the government of a state it and declares the principles governing the operation of those organs"*[38]."Constitutional law generally means the rule which regulate the structure of the principal organs of the government and their relationship to one another as well as determines their principal functions".[39]

The makers of the Indian constitution laid greater emphasis and sanctity to the Preamble."*The Preamble of the Constitution of India embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime*".[40]In Re Berubari case[41], the ApexCourt observed that "*The Preamble to the constitution of India is a key to open the mind of the makers of the constitution and shows the general purpose for which they have made the several provisions in the constitution*".In KeshavanandBharti case[42], the Supreme Court held that "The Preamble is the part of the Constitution of India".Chief Justice Sikri observedthat :

> *"The Preamble of our constitution is of extreme importance and the constitution should be read and interpreted in the light of the grand and noble ideal and vision expressed in the Preamble. The Supreme Court further held that the basic elements in the Preamble cannot be amended under Article 368 by the Parliament."*[43]

According to Article 5 of the Constitution, "a child is a citizen of India if he is born in Indian territory". We may conclude that a child is likewise an Indian citizen, and that all of the Constitution's provisions apply to them. When reading the constitutional provisions, one should consider all of the elements that the Constitution addressed for the child's overall growth and well-being.

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37 See full text at – "https://www.un.org/en/ecosoc/docs/2011/res%202011.33.pdf"(Last visited on 02 April 2023)

38 "Wade and Philips – Constitutional Law", p. 1 (9th ed. 1977)

39 Id. p.4

40 KesavanandaBharativs State Of Kerala, AIR 1973 SC 1461

41 AIR 1960 SC 845, 1960 3 SCR 250

42 Supra note 40

43 Ibid.

By virtue of Article 15(3) of the Constitution, the State has the power "to enact special provisions for the welfare of women and children"[44]. Article 38 requires governments to establish a "secure social order for the advancement of the people's welfare".[45] As a result, a child is considered one of the "people" under the Constitution, and a child can assert a right to welfare based on a "secure social order" in that state.

The Directive Principles of State Policy contained in Part-IV of the Constitution contains several special provisions for children, particularly the Articles 39 (e) and (f), Art. 46 etc.The Indian constitution is highly democratic in nature as well as flexible to accommodate for expansions of rights in general and child in particular.

Further, it is through its popularity based and socialist and adaptable nature, it has a degree for Public Interest Litigation where general society can talk and document a suit for a minor and propose for even a presentation of new laws and revision arrangements for the child. That is the means by which Right to Education[46] turned into a major right; "*free and compulsory education to all children of the age of six to fourteen years*" through a ton of cognizant endeavours and agreement of general society.

STATUTORY PROVISIONS

Police and Public Order are in the State List.[47]The obligation to maintain law and order, protecting and providing safety to the life and property of the residents including children, rests principally with the separate State Governments and UT Administration.States and Union Territories are primarily liable for counteraction, location, examination and prosecution of violations including offences identified with abuse of children, through their law enforcement mechanism.

The Information Technology (IT) Act, 2000[48] has sufficient arrangements to manage different cybercrimes. Segment 67B of the Act explicitly deals with the offence of child pornography[49].

Now under this section[50], "child pornography in electronic form" includes any material in any electronic form[51] that: (a) "depicts children engaged in a sexually explicit act or conduct; or (b) depicts children in an obscene or indecent or sexually explicit manner". It further criminalizes prescribed activities related to such materials.

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44 Supra note 22

45 Supra note 20

46 Supra note 2 art 21(A)

47 Supra note 2 Seventh Schedule

48 Supra note 6

49 Id at S. 67B

50 Ibid.

51 "According to Section 2(1)(r) of the IT Act, *the term "electronic form", with reference to the term "information", means "any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated microfiche or similar device"*.

With respect to defining the term "obscenity" referred to in Section 67B of the IT Act, Section 67 of that Act provides which materials may be deemed "obscene" as stated below.

Moreover, Section 67B (c) of the IT Act makes it an offence "*to induce, cultivate, or entice children into an online relationship with one or more children for sexually explicit acts*". In addition, Section 67B (d) of the IT Act criminalizes "*facilitating online child abuse*". However, the term "facilitate abusing children online" is neither specified nor explained in the IT Act.

As per this, Ministry of Women and Child Development has made different efforts every now and then to spread awareness of the provisions of the POCSO[52] Act through electronic and print media, counsels, workshops and preparing programs with partners concerned. The POCSO 2019 amendment act[53] for the first time defined and added the definition for the offence of child pornography explicitly after the definition of child in following terms –

"Section – 2(da) - "child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child."

Section 13 of the POCSO Act indicates that "child pornography in any form is "any form of media" that "uses a child" for the purposes of "sexual gratification, as well as includes: (a) any representation of the sexual organs of a child; (b) any representation of a child engaged in real or simulated sexual acts (with or without penetration); (c) any indecent or obscene representation of a child".

The term "child pornography in any form" is also referred to as "pornographic material in any form involving a child" under Section 15 of this Act that punishes any person who stores such material for commercial purposes.

The phrase "any form of media" mentioned in Section 13 of thisAct include"programs or advertisements telecast by television channels or on the Internet or any electronic form or printed form". The Explanation to Section 13 of this Act further articulates that the expression "use a child" means "involving a child through any medium like print, electronic, computer, or any other technology for preparation, production, offering, transmitting, publishing, facilitation, and distribution of the pornographic material".[54]

Further Section 14 of the POCSO Act, provides that"whoever uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall be liable to fine"[55]. Further under Section 15,"any person who stores, for commercial purposes any pornographic material in

52 Supra note 1

53 Supra note 8

54 Supra note 1 s.13

55 Supra note 1 s.14

any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both"[56].

There are also rules and guidelines regarding the cyber cafes that they will not allow any person to use a computer system to access internet unless that person produces a valid identity card like college ID card, Aadhar Card, voter id or any other id which has been prescribed as acceptable for such purposes. The person running that cyber café will keep a record of persons visiting and using computer systems there by keeping a photocopy of their Identity card according to the rules and guidelines prescribed for it.

This requirement to maintain records of the users has been made mandatory for the cyber cafes so that if anyone commits any cyber-crime in such cyber café, then it can be easier to track, identify and prosecute them.

REALITY CHECK - GOVERNMENT DATA & STATISTICS

If we look at the data of "National Crime Records Bureau (NCRB)" published in Crime in India Report 2019[57], "a total of 1,54,526 Protection of Children from Sexual Offences (POCSO) cases were pending in 2018 and at 88.8% pendency, if no new cases are added after 2019, it will take 8.2 years to dispose current Protection of Children from Sexual Offences (POCSO) cases in court".[58]

Further according to report of "National Commission for Protection of Child Rights" *- NCPCR, 2020[59], "a total of* 13,244 cases of child rape, gang rape and pornography have been reported in just seven months during the COVID-19 pandemic".*And according to report of India Child Protection Fund - ICPF, 2020[60], "there was 95%* increase in consumption of child pornography during the national lockdown in India".

CONCLUSION & SUGGESTIONS

"As the world is increasingly interconnected, everyone shares the responsibility of securing cyberspace." - Newton Lee

- One such concept is that of Matsya Nyaya in Indian Philosophy, which basically refers to the principle that the protection should be guaranteed to the weakest and smallest one in the society. The Children, women, old, sick, disabled etc. are considered to be the collective responsibility of the society and not of the State alone.
- Generally we are concerned with our rights and seem to be very active and vigilant regarding them as well as complain and seek appropriate remedies, if they are violated by someone, but how often we are so much aware and responsible, when the question comes of our own duties and obligations towards the society and the nation.

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56 Supra note 1 s.15

57 "Available at - https://ncrb.gov.in/en/crime-india-2019-0" (Last visited on 05 April 2023)

58 Ibid.

59 Available at - https://ncpcr.gov.in/report(Last visited on 05 April 2023)

60 Available at - https://www.icpf.org.in/financial-reports(Last visited on 05 April 2023)

▪ Protection and welfare of the children is not the only duty of the State and its law enforcement agencies and neither it is practically possible for the State agencies to monitor every individual every second and that too is much more difficult in case of cyber-crimes which are generally committed in private spaces by the use of digital devices or other technologies. Therefore, unless we as an individual realises our own duty and responsibility towards other individuals of the society, it would not be practicable to curb the increasing rate of cyber-crimes in the society.

▪ Apart from the state actions and obligations, we have to recognise our own role as individuals in society to protect the children of this generation, which is our future from this menace of cyber-crimes and so the most important step in this direction will be creating awareness among the children and educating them about the different risks prevalent in the cyber space and the different cyber-crimes that can be easily committed against them.

▪ And one such important step in this direction would be to include a compulsory chapter or subject of cyber-crimes in the syllabus of students from 6th class onwards which will prove to be very effective in creating awareness among the children and to make them cautious against such cyber-crimes. as there is a popular saying that ignorance is the cause of all evils.

▪ Further, children should be taught the appropriate remedies and procedure that can be done in case they become victim of any such cyber-crime. Therefore wide publicity and awareness programs are required for this purpose and the most important role will that of be of the parents because ultimately they are the ones who can have maximum control over their children.

▪ For this purpose, workshops and awareness campaigns can be conducted by the school authorities in collaboration with concerned agencies or organisations like cyber police cell, NGOs etc. or by inviting expert resource persons and guest speakers to deliver lectures on related or allied topics like that of cyber security etc. Visual and digital technologies like power point presentations or small educative videos can be utilised by the concerned authorities to make the sessions more interesting and interactive so as to amplify the effectiveness and output of such programs.

• "We all understand the need of protecting children in the real world but it is equally important for all parents and elders to protect their children from online threats. As a parent you can play an important role in protecting your children against Cyber Abuse. It is high time for parents and elders to take an active role in sharing with your kids about the use and abuse of cyber. To nab an offender in a cybercrime case is not an easy task as the offender can commit this crime from anywhere in the world. These days the offenders are using high end technologies and in order to take hold of them we need the help of cyber cell police station".[61]

"Children cannot and will not wait. Their childhood must be protected"

- Kailash Satyarthi

61 Karnika Seth, "Computers-Internet & New Technology Laws", 22 (Lexis Nexis, Delhi, 2015).

Group of Companies Doctrine in Arbitration Proceedings: The Journey from Chloro Controls to Cox & Kings

Mr. Mrigank Behl*

ABSTRACT

Arbitration is a unique legal concept which resolve the practical difficulties that ensue while going through the legal process under hierarchical court system in India, namely- long delayed legal procedures, swarmed with technicalities and difficulties for a common man to comprehend. However, with evolution of the arbitration law, the legal issues faced by parties as well as arbitrators have also become quite complex. One of these issues is the Group of Companies Doctrine. This doctrine allows signatory companies to bind non-signatory companies within the same group, if the mutual intention of the parties to bind the non-signatories can be established. The doctrine is currently suffering existential crises in Indian law as the Apex Court has recently expressed a need to reconsider the ingredients of this doctrine. Hence, an attempt here is made to understand – whether the arbitration law can survive without the group of companies doctrine.

Keywords: *Group of Companies Doctrine, Arbitration and Non-signatory.*

1. INTRODUCTION

The doctrine of privity of contract provides that only the parties who are signatories to an arbitration agreement are bound by it. In some legal systems, the formation of the agreement affects the parties status, while in others, it does not. Whatever nomenclature is used, the underlying tenet of arbitration agreement is that only the signatories to an arbitration agreement are responsible for its performance. This notion is consistently highlighted in domestic arbitration laws, institutional arbitration norms, arbitration conventions, court rulings, and arbitral awards. The most common method for identifying the signatories to an agreement is to simply scan and go through the signing page and/ or the contract's recitals to see which parties are identified there. Despite the aforementioned, there are some instances where an arbitration agreement may bind and benefit entities that have not signed or otherwise given their formal

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consent. In such cases, it is usually necessary to apply generally applicable contract, agency, and corporation law principles to ascertain when an arbitration agreement is extended to a third party. In other cases, specialized rules devised specifically for international arbitration agreements have also been formed, but these are exceptional.

Arbitration too gets stuck in tricky situation where the third parties to an arbitration agreement either seek to participate in arbitral proceedings or are brought into by the signatories. Such circumstances create a dilemma where impleading a non-signatory party might jeopardize the enforcement of an arbitral award. On the contrary, avoiding third parties might make the arbitral award more or less ineffective. In case of multi-party transactions, limited parties might enter into principal contract governing their rights and obligations. However, such limited parties might engage other parties to perform, negotiate and do their part of the contract. Such other parties, also called non-signatories, are required to be bound to the principal contract for its effective performance. The need to bind non-signatories result especially from composite transactions i.e., conflicts arising from one transaction, executed through numerous contracts between various entities, despite the fact that some principal entities might not have signed the invoked arbitration agreement.

The efforts to legally bind third parties has led to the development of numerous academic literature and contrasting judicial trends around the globe, indicting that in certain situations an arbitration agreement might bind parties other than its signatories. This has further led to creation of various legal principles to bind third parties and one such principle is the group of companies doctrine. The Supreme Court has recently examined whether the principles of party autonomy and corporate personality were protected in the Group of companiesdoctrine used in Indian law.[1] The Court further highlighted that, as a result of numerous judgments, Indian courts have both lowered the requirement that arbitration be a voluntary agreement and applied the Group of companies concept to the conditions under contract law that must be met in order to bind a party to an arbitration. Additionally, it was mentioned that a 2015 change to the A&C Act 1996 enlarged Section 8 (1) to cover anybody making claims "through or under." However, Section 2 (1) (h) has not undergone the same change, which has led to an anomalous situation where a party "claiming through or under" could potentially be referred to arbitration but would not be able to request relief under Section 9 of the A&C Act 1996.

2. EVOLUTION OF GROUP OF COMPANIES DOCTRINE

Third parties derive their legal status from exceptional circumstances in contract and arbitration law. Non-signatories derive their legal status from exceptional circumstances in contract and arbitration law. The leading case referred to determine whether a third party can be held party to an arbitral proceeding was laid down in the *Dow Chemical case.*[2] In the landmark interim arbitration award, legal status for third parties

1 Cox and Kings Limited V. SAP India Private Limited &Anr.

2 Dow Chemical v. Isover-Saint-Gobain, ICC Award No. 4131, YCA 1984, at 131 et seq.

in arbitral proceedings was derived by expounding the doctrine. The facts of the case surrounded a dispute that arose from multiple contracts executed between the parent Dow Chemical Company's subsidiaries and Isover-Saint-Gobain. Along with its subsidiaries, the parent Dow Chemical commenced arbitration proceedings. Isover objected to the same stating that being a third party to arbitration agreement, the parent company was not a signatory to the principal agreement and hence was not positioned to bring arbitral action according to the arbitration agreement. However, the jurisdiction of the parent company was upheld as stating even the third party of the group may commence arbitral action against the co-contractor if the conduct of the parties reflected a clear intention to do so.

The legal status of non-signatories in arbitration in India was first debated upon in the case of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Anr*.[3] The decision held that third parties to the principal contract subsisting arbitration agreement could not be referred to arbitration. The ratio of the decision was based on the fact that bifurcation of arbitral cause of action was not possible.

In 2013, the legal position of non-signatories in arbitration was brought up again in the case of *Chloro Control Pvt Ltd.*[4]As is consistent with arbitration, party autonomy was regarded on a higher pedestal than the legal status of non-signatories to assume jurisdiction as portrayed in the *Sukanya Holdings* judgment, the same was challenged in this matter. A multiparty agreement was at the heart of this conflict that gave rise to numerous interconnected agreements. The question to be decided in this case was whether a single arbitration could be referred to all the involved parties. The SC decided that such interpretation was possible by applying the doctrine. Hence, SC held that third party could be asked to submit to the jurisdiction of arbitration provided these transactions were within the group of companies and there was a mutual intention of the parties to bind both.However,there was a stark difference between the two where the *Sukanya Holdings* judgment was held in the context of a domestic arbitration.[5] On the other hand, the *Chloro Control* judgment was in relation to a foreign seated arbitration.[6] In the latter, the SC assumed the non-signatory to be under jurisdiction applying the doctrine. In light of the *Chloro Control* judgment, the 246th Law Commission Report discussed the implications of expanding the definition of" party", proposing an amendment to the definition as provided under section 2(h) of the Act. The Arbitration Act was amended in 2015 to replace the word "party" with "a party to the arbitration agreement or any person claiming through or under him" in Section 8 of the Act.

Basis the 2015 amendment, in the case of *AmeetLalchand Shah and Ors. v. Rishabh Enterprises and Ors.*[7], the SC opined that all the parties in a group directly involved

3 Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya &Anr., A.sI.R. 2003 S.C. 2252.

4 Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. &Ors., (2013) 1 S.C.C. 641.

5 Section 8, Arbitration and Conciliation Act, 1996,

6 Section 45, Arbitration and Conciliation Act, 1996.

7 AmeetLalchand Shah and Ors. v. Rishabh Enterprises and Anr, A.I.R. 2018 S.C. 3041.

may be referred to a single composite arbitration, applying the rationale adopted in *Chloro Controls*. The Court expanded the view taken in *Chloro Controls* which was observed to limit jurisdiction of non-signatories in instances of foreign seated arbitration but now was applicable to domestic arbitration as well. However, it is pertinent to note that while declaring the judgment, the Court did not overrule the findings in *Sukanya Holdings*.

3. NEED FOR CONSENT IN ARBITRATION

The Arbitration is based on consent derived from the relevant parties. Such consent plays an important role for successful arbitral proceedings, award and its enforcement. Under arbitration law, this consent needs to be manifested in the form of arbitration agreement.

Significance of such agreements has been recognized by various international treaties and hence, most national laws recognize and enforce only written arbitration agreement. Even Section 7 of the Act asserts the need to have a written arbitration agreement.[8]

This requirement of written agreement is justified on the ground of its power to exclude the jurisdictions of national courts. When parties agree to submit their disputes to arbitration, they choose to replace state institutions for dispute settlement by private forum.

In arbitration, parties usually give their express consent in the following ways:

a) Signing substantive contract which defines their relationship and contains an **arbitration clause** for any dispute which may arise between the parties in relation to such contact; or

b) By entering into **submission agreements** for submitting to arbitration any disputes already arisen between the parties.

Arbitration takes place between persons who have been parties to both the arbitration agreement and the principal contract. Further, A party who has not so consented, usually does not take part in arbitration.

However, this might not always be the case. With increased transnational transaction, corporatization, advancement of technology, etc., commercial transactions have become far more complex to include only two parties to a contract. Increased multiparty transactions with diverse parties and numerous contracts have become the new common way to execute and perform contract obligations.

In such situations, binding only the main parties to the arbitration agreement will exclude from arbitration other important parties which might have performed dominant role in actual execution of contracts and are necessary to be made bound for an effective dispute resolution.

8 Section 7, Arbitration and Conciliation Act, 1996.

4. CONDITIONS FOR THE APPLICATION OF THE DOCTRINE

4.1. The existence of a tight group structure

Simply being a part of the same group would not persuade the tribunal to exercise jurisdiction under the group of companies theory. The tribunal anticipates a "tight group" structure to have been developed between the signatory and the non-signatory party. Strong linkages between the organization and the finances characterize this system. It involves looking at the subsidiaries that run their businesses under close supervision and in accordance with the directives of the parent company, which make all of the significant financial and commercial choices either jointly or independently. Significant control over a subsidiary is shown by demonstrating the influence in the decision-making that affects the subsidiary's financial and legal situation rather than just by showing the parent's ownership portion.

A tight group structure may also be classified based on the extent of intellectual property they share amongst themselves such as ownership titles, trademarks etc. The subject matter of the area of business is also a strong indicator to realize if a tight group structure exists. A distinction between treating the group of companies as a 'single economic unit' opposed to a 'single economic reality' is important to determine if the funds of one are engaged in supporting the finances of the other businesses. On examination, if the corporate and operational structure of the group of companies formed an 'economic whole', the tight group structure may be confirmed.

Generally, a claim for extending an arbitration clause to natural persons instead of a legal entity that is a non-signatory is not accepted unless such a natural person has committed fraud which binds them to personal liability. However, in such cases, an intention to deal with the non-signatory natural person has to be established that would make them personally liable to the arbitration agreement.

4.2. The active participation of the non-signatory party in the contract's discussions, performance, or termination

A tight group alone is not sufficient to enforce the doctrine of the group of companies. Another important factor to take into account is the company's active engagement in carrying out discussions, performing the contract, or terminating the contract that contains the arbitration clause.Where a multinational possesses a divisional structure, a non-signatory may negotiate the contract on behalf of another one of the companies in the group that performs it. Here, the active role of the third party is scrutinized by the tribunal examining the extent to which it is involved. Hence, the active involvement of parties from the initial stage of negotiation to the final stage of termination is sought to bring persuasive and factual evidence in attracting the doctrine upon itself. However, a parent company is not bound by an arbitration clause merely because it holds some interest in a subsidiary to ensure the realization of operation or resolution of disputes arising out of the subsidiary's contractual obligationsbut must possess an active involvement that evidence an intention to consent to the arbitration clause in the contract. More often, the tribunal focuses on the active

involvement of a non-signatory during the stage of negotiation to establish whether the scope of the arbitration clause may be extended.

In cases where more than one contract is signed by several companies in a group to carry out different functions at different stages in the project, many contracts may have to be signed that may or may not include arbitration clauses in each of them. This intermingling of contracts results in a network of rights and duties to be carried out, making it inconceivable to segregate and limit the arbitration clause to a single contract. Hence, the tribunal may decide that the arbitration clause acts binding on non-signatory members whose contracts are closely related to contracts of others that consist of an arbitration clause. It is to ensure that the network of obligations laid out in the series of agreements is discharged by the concerned companies.

The active role of the third-party company can only be viable if such a company was in existence during the time of negotiating or the conclusion of the contract containing the arbitration clause. Hence, if a company is formed after the completion of the conclusion of a contract, the issue of active involvement would not arise as it is not a participant in any capacity.

4.3. Common intention of the parties to arbitrate

The intention of the signatory and non-signatory parties to a contract is a key component in the determination of their active involvement in establishing a group structure. Most tribunals regularly refer to 'common intention' as one of the most essential requirements for non-signatory parties to arbitrate. Common purpose can be inferred from such activity if the co-contractor is honestly led to think that the non-signatory firm was a party to the agreement based on the behavior of both the signatory as well as other group members, including the non-signatory parties.However, the intention may be subjective to each party, and hence hard to determine conclusively for the tribunal. If a genuine interest in the conduct of the business and how it affects the non-signatory parties is proven, it may be inferred that the contract and the arbitration agreement extended to the group of companies as a whole. If the conduct of the signatory is such that it is aware and acknowledges that it is contracting with non-signatory parties of the group, then an integrated operation to perform contractual obligations against the whole group is presumed to have been consented to.

The conduct of the non-signatory member is also considered an important indicator. If, through its behavior, it led the co-contractor to either legitimately believe or confusingly mislead to propose itself as a 'genuine party', then the tribunal may consider it as a group that had a common intention towards the contract.If the non-signatory party intentionally encourages a misleading understanding to the co-contractors to represent itself as a party to the contract, the tribunal may deem it as fraudulent activity. In such instances, any natural person directly responsible or contributing to creating misunderstanding may have the arbitration clause extended to themselves.

5. EXISTENTIAL PROOF OF GROUP OF COMPANIES DOCTRINE IN INDIAN ARBITRATION JURISPRUDENCE

Amidst the empirical conjuncture around the globe concerning group of companies doctrine, the recent ruling of Supreme Court in *Cox and Kings Limited v. SAP India Private Limited and Another*[9] sparked vigorous debates on its feasibility in Indian jurisprudence, which became the starting point for this panoramic evaluation. Regardless of the antipodal contentions between the advocates and the opponents of the group of companies doctrine, Justice Surya Kant in his minority stance in the Cox and Kings case has contended the deep-rooted existence of the doctrine in the Indian jurisprudence and rules out any possibility of reneging its state of being.

The court in *Cheran Properties*[10] exhibited the significance of the group of companiesdoctrine in modern commercial transactions that the grand scheme of the business arrangements as well as unscrambling of the intention of binding an unrelated person who assumes the obligations of the signatory party in layered commercial covenants is of wide purport.Moreover, the highest expansion of the theory was demonstrated in this casewherein a party was subjected to the final award of an arbitration without any opportunity of representation during the arbitral proceedings by employing the expression 'persons claiming through or under'. This dictum was proposed by the Law Commission in its 246th Report to align the reference of a party in Section 45 and 54 to Section 8 and provide 'persons claiming through or under' similar rights as available to the signatories to an agreement.

In view of the same, joinder of non-signatory parties shall be undertaken as per the right acquired by 'parties in their own right' rather than 'claiming through or under', as stated by the majority opinion in the abovementioned case; however, the minority take asserts that the phrase 'person claiming through or under' aims to refer parties to arbitration in a multi-party agreement while enforcing group of companies doctrine. Hence, the inclusion of the parlance 'persons claiming through or under' under the Act of 1996 implies tacit perception of the doctrine and its acceptance in Indian arbitral jurisprudence. Furthermore, the earliest assertions against its application in the form of it being contrary to the principle of separate legal identity is denied by Gary Born, who noted that the doctrine rather acts as a conduit to unearth the parties' intentions and does not impact or meddle with the legal personalities of the entities under consideration. Furthermore, the group of companies'' doctrine is said to act as a special lens for interpreting the intentions of parties in France, observed by the France's leading scholar in international arbitration Bernard Hanotiau[11]. The identification of the intentions in the modern times is assimilated as per the behavioural acts and deeds of the parties through a constructive consent mode rather than the formalistic express consent obtained from putting pen to paper. The illustration of

9 Civil Arbitration Petition No. 38/2020

10 Cheran Properties Ltd. v. Kasturi and Sons Ltd. &Ors. (2018) 16 SCC 413

11 Cox and Kings Limited v. SAP India Private Limited and Another

adopting the constructive consent method is visible in the form of piercing of corporate veil doctrine and equitable estoppel.

Lastly, the Apex Court in *Oil and Natural Gas Corporation Ltd. V. M/s Discovery Enterprises Pvt. Ltd. &Anr.*[12] reiterated the ingrained existence of the group of companies doctrine in Indian arbitration context and listed out the following factors to determine whether a non-signatory company within a cluster of companies would be bound by the terms of the arbitration agreement, which are as follows:

(i) Mutual Intention of parties;

(ii) Relationship between the unrelated party with the signatory to the agreement;

(iii) Commonality of the subject matter;

(iv) Composite nature of transaction; and

(v) Performance of the contract.

6. CRITICAL ANALYSIS OF THE DOCTRINE

The criticisms of the doctrine are mentioned below coupled with the viewpoints of those opposing the doctrine:

a) *Unreasonable Use of Single Economic Entity Concept:* It constitutes as a direct abuse of the concept of separate legal personality because large international corporations frequently use intricate networks of subsidiaries to divide the risk of various international contracts, and this frequently turns into a tactic to avoid arbitration proceedings by arguing that the parent company is not responsible for the contracts that its subsidiaries enter into, in which case the parent company could not be bound by the arbitration clause[13]. Nevertheless, the opponents of the doctrine argue that from the inception of the doctrine in the *Dow Chemicals case*[14], it has been a practice to view the notion from the lens of a single economic entity and introduce the non-signatory group companies to the arbitration. The Apex Court in *Cox and King's* case has laid out that concepts like single economic entity are economic concepts that help the Competition authorities worldwide to decipher the relevance of an organization in a particular market based on geography or a particular product category. Such concepts are arduous to be sanctioned as principles of law since arbitration is based on law rather than economics.

b) *Disregard of Party Autonomy:* Party Autonomy refers to the choice of parties to be governed by a specific set of laws when undergoing an arbitration. In addition, party autonomy is sine qua non to international commerce. It also happens to be an inherent guiding principle of arbitration law, wherein the

12 Civil Appeal No 2042 of 2022

13 Daujotas, R. Non-Signatories and Abuse of Corporate Structure in International Commercial Arbitration. International Economic Law journal (2012), https://rdaujotas.com/non-signatories-and-abuse-of-corporate-structure-in-international-commercial-arbitration-2/

14 Dow Chemical France, the Dow Chemical Company v. Isover Saint Gobain, (ICC Case No. 4131)

parties possess 'freedom of choice'. Moreover, arbitration itself is a surrogate remedy for Court proceedings, which emanates from the parties' autonomy, meaning whereby that the parties can choose to undergo arbitration as a replacement for court proceedings and the award shall be final and binding.

Although in the interest of justice, the non-signatories are obligated to arbitrate, however, this situation seems to be an exception rather than a norm, so as to respect the free will of the parties. Thus, any pursuit commenced in violation of the party autonomy makes it redundant, unless otherwise required in the interests of justice. Henceforth, how come the 'group of companies'' doctrine is feasible when its applicability flouts the underlying norm of arbitration law?

c) *Finding a Legal Basis:* Prof. William Park has highlighted the predicament of linking non-signatories to an arbitration proceeding. He asserts that in doing so, maximizing the practical effectiveness of the arbitral award as well as arbitrations' congruency, both tend to move in opposite directions.[15] Both principles are mutually exclusive in nature. Efficiency cannot be the sole ground to attach a third party to arbitration unless backed by legal bases. This is what the scholars, legislators, and courts of law are trying to achieve through the group of companiesdoctrine- to devise a reliable and hard-and-fast legal convention in arbitration statute to inculpate non-signatories in an arbitration agreement. However, the inconsistent approach taken by courts in India is not well appreciated by commercial undertakings and requires the courts to seriously straighten out this legal dilemma.

d) *Unreasonable Expansion of the Term "Consent":* Usually, only the parties who have added a signature to the arbitration agreement are required to provide free consent; however, application of the same principle to the group of companies'' theory requires to deduce the intention of not only the signatory parties but also the non-signatory parties, who have never put their signatures to the arbitration agreement. But whether such consent is always made available to the unrelated parties, becomes the most important question.

Furthermore, the 'group of companies'' doctrine detracts from the essential elements of a contract as found under Section 10 of the Indian Contract Act, 1872, i.e., free consent. It is evident in cases where the joinder of unrelated parties occurs in the interest of justice to be able to view a larger picture, wherein often free consent is not made available to the latter. Moreover, those who oppose the doctrine have asserted that the courts and tribunals have lowered their threshold in determining the consent of parties while applying this doctrine. The third requirement of mutual intent was seen by Indian courts as being automatically achieved when the first two requirements were

15 Cox and Kings Ltd v. SAP India Pvt. Ltd (2022 SCC OnLine SC 570) in 'William W. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma, in Multiple Parties in International Arbitration' (Oxford University Press) (2009)

met. This has the effect of making it seem as though the level of consent necessary for an arbitration agreement has been decreased after an agreement between two parties has been established.

e) *Abuse of corporate structure:* Another contention raised against the application of the group of companies'' theory is that the theory creates a general agency relationship amongst the multiple companies in a group structure which defeats the purpose of the corporate group structure that exists to create separate legal entities as envisaged under the principle of company law. This implies that the theory is in direct contravention of the company law and relies more on the partnership form of business in India.

f) *Breach of Limited Liability Principle:* The implementation of the group of companies'' theory creates a complex situation wherein the company undergoing arbitration is stuck between the contrasting principles of arbitration law and company law. This author feels that arbitration should remain a vehicle for the resolution of disputes that originates due to issues of law and/ or facts and should not create a proper law of its own so as to add to the array of issues pending resolution.

g) *Fluctuating Meaning of 'Claiming through or under':* Another facet of this doctrine points out that the term 'persons claiming under or through' have been misunderstood and has been given different meanings. The Chloro control case[16] supplied the meaning to the phrase to mean that the nonparties 'claiming through or under' ought to have and prove, both, in fact, and law, a legal relationship with the participant in the arbitration. Nevertheless, in the City of London v. Sancheti[17], the court rejected the argument that a non-signatory asserting a claim "through or under" a party to an arbitration agreement could not be bound by "a mere legal or economic link" to the agreements in question. The meaning of the phrase "claims through or under" was constrained by this decision.

Furthermore, the High Court of Singapore declared that the execution of an arbitral ruling against a non-signatory would "be antithetical to the intrinsic logic of the consensual underpinning of a contract to arbitrate." Singaporean and British courts both have the same viewpoint. This rationale might also be used to support the admission of a non-signatory who is reluctant in arbitration, which requires more careful consideration and analytical rigour.[18] Not only

16 Chloro Controls India Private Limited v. Severn Trent Water Purification Inc., (2013) 1 SCC 641

17 The Mayor and Commonalty & Citizens of the City of London v. Ashok Sancheti, [2008] EWCA Civ 1283

18 Chinmayanand Chivukula ''Group of companies'' Doctrine in the Amazon-Future Dispute: Analysis under Indian Law' India Corp Law, (December 28, 2022, 9:00 PM), https://indiacorplaw.in/2022/02/group-of-companies-doctrine-in-the-amazon-future-dispute-analysis-under-indian-law.html

the group of companies'' doctrine has been facing hurdles in the form of inconsistent approach adopted by Courts, but also the phrase 'person claiming through or under' has been applied differently by the courts in diverse jurisdictions.

To change the definition of "party" under Part I of the Arbitration Act to "a party to an arbitration agreement or any person claiming or through or under such party," the 246th Law Commission Report proposed amending Sections 2(1)(h) and 8 of the Arbitration Act. Commensurate with the recommendation, the legislature amended Section 8 of the Act, however, failed to carry out the similar changes in Section 2(1)(h) of the Act. This failure resulted into a paradoxical situation wherein the party "claiming via or under" may perhaps be referred to arbitration, but they would not be permitted to apply for relief under Section 9 of the Arbitration Act. This creates an inequality of rights amongst the parties to the agreement and the persons claiming through or under them.

h) *Civil and Common Law Divide:* The common law system used in India places a strong emphasis on the parties' active participation. So how can the legal system of a nation where parties are major players coexist with a philosophy that disregards the urge to acquire their consent? The "group of companies'" theory is *inappropriate for India* since it is better suited for countries with common law traditions than those with civil law traditions.

i) *Preference to traditional contract law principles:* Moving further, certain opponents continue to agree to the stance adopted by US courts in refusing to accept the group of companies'' doctrine based on the justification that contract law governs the interpretation of an arbitration agreement's terms, limiting their examination of the legal implications of non-signatories to the conventional theories of agency, corporate, and contract law. The "Group of companies'" theory is based on the idea that permission can be demonstrated in many ways since in this case, it is implicit and tacit. As a result, only nations that acknowledge implied consent via behaviour would be able to adopt the "Group of companies'" theory into their legal system. Moreover, Bernard Hanotiau, a renowned author and practicing arbitrator, advocated to abandon the "Group of companies'" approach, urging a strict commitment to conventional legal principles and procedures because they are completely capable of addressing contemporary global business activity.

j) *Preference to arbitral estoppel rather than the group of companies'' doctrine:* The opponents' reason that only France is actively involved in employing the group of companies'' doctrine; whereas most of the other jurisdictions prefer equitable estoppel theory which allows a non-signatory to force a signatory to resolve their dispute in arbitration on an unconsensual basis since the latter is far more instrumental and also satisfies the requirement of implied consent. In addition, since the signatory seeking to enjoin the non-signatory need only demonstrate that the non-signatory benefitted in some manner by the contract,

a showing of implied agreement under direct-benefit estoppel is likely more flexible than one under the "Group of companies'" doctrine. He does not have to provide evidence that the party participated in the contract's creation, performance, or cancellation. In fact, a party may gain from the contract's conclusion, performance, and termination without taking part in any of those processes.

This demonstrates that direct-benefit estoppel is a more effective way to bind non-consenting non-signatory parent corporations that were not involved in the contractual process but nonetheless profited from the terms of their subsidiary's contract[19]. Meanwhile the equitable estoppel sometimes referred to as closely intertwined estoppel bars the non-consenting signatory from declining to arbitrate with the non-signatory's contentions owing to the fact that these claims are intricately linked to the underlying contract and that the two parties share a connection with each other.

k) *Practical Ambush of Signatory Parties:* Each party to an arbitration agreement provides consideration when they each give up their separate right to go to court in exchange for the ability to use arbitration. However, when one of the signatories to an arbitration agreement is abruptly obliged to arbitrate against consenting non-signatories' claims, that contract and the consequent equilibrium suffer considerably. In fact, a consenting non-signatory tries to compel a signatory to arbitrate the claims of the latter on the closely related estoppel doctrine. The non-signatory party ambushes the signatory who is acting independently in the situation. It must go through a process that it had not anticipated. Because the mutual advantages it obtained through arbitration were abruptly changed by the enjoining of another party, i.e., the non-signatory, the agreement lacks consideration.

l) *Disrespect of Party Equality:* The idea of justice, in international arbitration as in any system of adjudication, is fundamentally based on the concept of equitable treatment[20]. According to Article 18 of the UNCITRAL Model Law, each party must be given a "full" chance to state their position and must be treated equally[21]. However, when a third party is enjoined in an arbitration procedure, whether such non-signatory also receives rights similar to the signatories in an arbitration agreement. Whether the non-signatories get the opportunity to nominate their arbitrator when they join the proceedings in the middle of the arbitration proceedings wherein the tribunal is already constituted. Well, we

19 Volume 3, Alexandre Meyniel, That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts with Respect to the Group of companies' Doctrine, 18-55, The Arbitration Brief

20 Scherer, Maxi and Prasad, Dharshini and Prokic, Dina, The Principle of Equal Treatment in International Arbitration (September 3, 2018) https://ssrn.com/abstract=3377237 or http://dx.doi.org/10.2139/ssrn.3377237

21 G. Born, International Commercial Arbitration, Second Edition 2014, Chapter 15: Procedures in International Arbitration, p. 2171

all know that the non-signatories are devoid of such rights and this constitutes flouting of party autonomy on the part of non-signatories. It implies that joinder of non-signatories to an arbitration agreement not only constitutes as an infringement of party autonomy on the part of signatories but also on non-signatories. In other words, party autonomy is contravened upon implication of non-signatories. This leads to a disregard to the principle of equality of treatment in international commercial arbitration.

m) Enforcement Issues: With the businesses operating at global level, cross-border enforcement of arbitral awards is really a thorn in one's side. A crucial instrument in ensuring cross-border enforcement of arbitral decisions is the New York Convention, which was established with the goal of recognising and enforcing arbitral judgements made in other contracting states. While the UNCITRAL model legislation allows the arbitration agreement's terms to be communicated orally or through the behaviour of the parties, the New York Convention, which has 168 signatories and has been literally incorporated into a number of national laws, does not include any such exemption. There is a clear necessity for a formal agreement between the parties in accordance with the New York Convention. This creates a discrepancy between the doctrine's theory and its practical implementation, especially when it is used to enforce laws across countries.

n) Incorrect Application: Upon taking a deep dive into the group of companies'' doctrine, this author has observed that when the doctrine was originated, it was heavily criticized to have expanded the horizons of consent to another level through ascertainment of the consent of not only the signatories but also the non-signatories. Now in a double-quick time the doctrine is further facing criticism in overlooking the same third condition of the doctrine that was never welcomed at the first place. This presents a confusing scenario because those who first opposed the expanded meaning of the expression 'consent' should be satisfied that the tribunals and courts have not given much emphasis to this part of the doctrine but that is definitely not the case. What the author have concluded from this conundrum is that this group of companies'' theory has since its origin, created confusions and vigorous debates around the globe and nothing else. Not one country except the country of its origin i.e., France is in favour of the theory; hence why India is extending its support to the doctrine amidst such hostility when no other nation is in support of the same. This cross-fire has created a truckload of obstacles for the Indian commercial undertakings.

o) Parties in their own right: What does this 'parties in their own right' phrase imply? A basic approach implies that the non-signatory parties shall get to enjoy all the rights as exercised by the signatories such as: nominating their arbitrator, placing their signature, etc. When thinking about the requirement of putting signatures, it puzzles the author as to where shall the non-signatory put its signature- on the arbitration agreement or the underlying contract or

somewhere else. Moreover, if the non-signatory parties are given their chance to be 'parties in their own right', then does that ensure party equality?

p) Practical Standpoint of Industrialists: Enforcement of law follows acceptance since forceful application of law is void ab initio in any jurisdiction. In India, the group of companies'' doctrine was introduced by way of Supreme Court judgment in *Chloro Controls case.* Since then, this doctrine is like a pendulum moving forth from one end to the other as signified by its erratic application. This has been a source of worry for the businessmen, both domestic as well as international.

6. CONCLUSION

The process of any arbitration is built on its legitimacy directly results from the parties' agreement. Without such consent, the arbitration suffers from a risk of being considered illegitimate and invalid. The recurring thematic representing the arbitral process builds itself on party autonomy, to which effect a party must not be obligated to refer to arbitration any disagreement that they have not consented to settle through arbitration. Consent is therefore the essential tenet underlying the entire arbitration system. As a matter ofprinciple for pragmatic application, consent ensures the legitimacy of the process and influences decisions about its characteristics and organization. Courts across jurisdictions have consistently insisted that consent is a necessary requirement for participating in arbitration.[22] However, under the notions presented in this research, unrelated parties to an arbitration agreement can become involved in the arbitration process either willingly or unintentionally.

Non-signatories to arbitration agreements are often unwillingly involved in disputes between signatory parties. To relieve parties of the uncertainty, attempts have inclined to develop a set of straightforward and criteria to establish whether or not a non-signatory to a business arbitration agreement should be obliged to arbitrate with signatories based on the facts.[23] This restricted luxury of exemption to a non-signatory from not meeting the requirements specified in covenants is in furtherance of such attempts. However, balance remains key in these circumstances where the available remedies to non-signatories present itself to parties with a fair opportunity of being excluded from the arbitration.

The growing trend in both international arbitration and Indian arbitration law towards allowing non-signatories to be included as participants making the terms of an arbitration agreement enforceable against them is an encouraging action towards this re-evaluation of the concept of consent. However, the differences in the understanding of established tests and conditions that must be taken into account before utilizing the group of companies doctrine, and rendering the arbitration

22 *Supra.* At 1

23 Léonor d'Albiousse, *To arbitrate or not to arbitrate – The pertinent question for non-signatory third parties - France*, Clyde & Co. (April15, 2023, 7:15 PM), https://www.clydeco.com/en/insights/2022/03/to-arbitrate-or-not-to-arbitrate-france

agreement enforceable against non-signatories presents further difficulties. For instance, while it is possible for an arbitration award to be imposed against an unrelated party, this raises concerns about due process and principles of natural justice. The solution to this in the wider context would be to proceed with caution and thoroughly examine, where there are several contracts between various parties and involvement of non-signatories in a singular, composite arbitration is desired, the facts of each case on their own merits.

It is important to note that consent has traditionally been the essential element of party-initiated arbitration, but disparity in how party status is interpreted based on jurisdictional variations can undermine the legitimacy of arbitration. The current legal trend has allowed for an extended conversation to take place about which takes precedence where contractual theories and consent is disputed.The extent to which the onus to prove that the non-signatory had given consent and had a specific purpose in the arbitration may become an inflection point to determine whether the non-signatory can be forced to participate or whether they can force others to participate. Bydetermining certainty over jurisdictional and factual circumstances involved, courts must prioritize finding genuine consent to arbitration, as is required by the fundamental principles that underpin arbitration, rather than implying it.

India introduced one such international arbitration doctrine i.e. the Group of companies doctrine so as to avoid multiplicity of proceedings and resolve commercial disputes effectively. However, the doctrine contradicts already established legal principles like separate legal entity which forms the basis of company law throughout the world. It is for this reason that though the need for the doctrine was felt but it was not recognised in another jurisdiction. Courts of other jurisdictions held that though the group of companies were a single economic entity in commercial sense, but it formed separate legal entity in legal sense and relied on other legal principles like the principle of implied consent, piercing of corporate veil, etc. to bind non-signatories. The Indian courts could have also adopted the same approach. Further, the way the doctrine was introduced in the Indian jurisprudence has faced its own share of criticism. The interpretation of the term 'claiming through or under' to mean third parties merely associated with the signatories, rather than the usually accepted substituted parties shows the desperate attempts to include the doctrine in Indian law. Such an interpretation enlarged the scope of the doctrine more than it originally intended. The SC used the doctrine to not only bind the non-signatory parties to arbitral proceedings, but also used it to enforce an arbitration award against third parties which were not even made parties to the arbitration proceedings. Such a wide interpretation of the doctrine runs against the principles of natural justice and basic legal principles.

Thereby, it is recommended that though the Indian judiciary should support the legislature's pro-arbitration stance however, it must be cautious of the means used. Need to recognise Group of companies doctrine has been questioned by various scholars when the non-signatories can be made bound by other theories, such as theory of implied consent or piercing of corporate veil, not in contradiction with

other established legal principles. Further, the interpretation of the doctrine via 'claiming through and under' could have been avoided for its far-reaching consequences.

In conclusion, this author agrees with Justice Surya Kant' s stance that the group of companies'' theory is deeply rooted within the Indian jurisprudence and the current existential crisis faced around various jurisdictions has no relevance in Indian context when dealing with domestic arbitral disputes; however, when facing arbitral disputes in international context, this crisis impacts the Indian commercial undertakings negatively.

The Challenges in Protecting the Rights of Crime Victims and the Evolving Role of Judiciary: A Critical Study

Mr. Pankaj Chhuttani* & Mr. Gaurav Mittal**

ABSTRACT

A Crime has far-reaching effects in society than what merely meets the eyes, especially for the one who is at the receiving end of it that is the "victim". The victim as an individual living in the society, the repercussions of any act that violates his right to live, reverberates through the world at large. In such cases, giving due recognition to the condition of the victim following the crime and providing him or her every chance to recoup becomes as essential as ensuring that justice is carried out with adequate admonishment to deter anybody from committing an offence.

When the judiciary fails to do the same what may happen is that the aggrieved may resort to taking law into his own hands which would then culminate in social unrest. This is where the rights of the victims come into the picture. A victim who is devoid of his rights may in every possibility either suffer throughout his or her life or end up turning into a criminal if not provided with the correct means to seek justice and get him or herself heard. The Indian judiciary evolution has been multi-dimensional over the years owing to the numerous amendments that have paved the way for a system that was predominantly focused on retribution to one that recognises the agonies of the victims.

Nonetheless, the changes are headed towards creating a more robust and pragmatic environment for them that not only addresses the dormant issues but constantly strives to rebuild all that has been broken. This paper focuses on the developments and roadblocks that have shaped the victim's rights since the evolution of the concept of the victim in the last decade and onwards.

Keywords: *Evolution, Rights of Victim, Victim, Compensation, Indian Judiciary.*

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INTRODUCTION

Victims of crime get legal representation, medical care, and financial recompense in other nations. Victims are seldom given any consideration in India's criminal justice system. More attention and care must be paid to victims and their rights throughout investigations and prosecutions in India. As an additional measure, it is important to have a mechanism in place to provide restitution or compensation for victims of crime, especially those who have suffered a major loss.

Although the Constitution of India and the criminal law of India which is the IPC and CRPC both provide protections for victims, the criminal courts act as if they are unaware of them. In the Best Bakery case, it was shown that victims' rights and interests may be recognized and protected under Indian law. Rights to justice and fair treatment, restoration, recompense, and relief have all been recognized. India has a long way to go before it truly adopts the concept of victim rights and switches its focus from the guilty to the victim, even though many nations have made progress toward ensuring that victims of crime receive the justice they are owed.[1]

THE EVOLUTION OF THE CONCEPT OF VICTIM

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights as a result of acts or omissions that violate criminal laws operative within the Member States, including those laws that prohibit or provide for the punishment of persons who commit or facilitate such acts or omissions."

Under this Declaration, a person may be deemed a victim regardless of whether or not the perpetrator is recognized, arrested, prosecuted, or convicted, as well as whether or not there are any family relationships between the offender and the victim. Families and dependents of victims, as well as bystanders who were hurt while trying to help victims or prevent further victimization, are also included in the definition of "victim" where applicable. The provisions herein shall apply without regard to any person's race, color, sex, age, language, religion, nationality, politics, views, cultural beliefs or practices, assets, familial status, birthplace, ethnicity, national origin, handicap, or lack thereof.

To the extent that a victim's rights are at stake in a legal case—for example, because of a violation of those rights or because of some other criminal misfortune—they play a pivotal part in the case. Despite this, the situation is different in India; victims have fewer rights than the guilty and fewer avenues open to them for seeking redress.[2]

1 Victimology, *"A Necessary Advancement In Human Rights,"* CPJ Team, https://cjp.org.in/victimology/#:~:text=The%20victim's%20right%20act%20of,the%202009%20amendment%20of%20Cr.

2 Chandana Pradeep, *"Concept of victim justice : is it an aspiration for progressing society"*, Ipleaders, https://blog.ipleaders.in/concept-victim-justice-aspiration-progressing-society/

The term "victim justice" refers to the process through which victims of a crime are allowed to seek redress in a court of law and have their rights upheld, rather than only serving as "bystanders" to the proceedings. This approach is crucial because it gives victims a forum to speak out about the harm they've suffered at the hands of the criminal and helps the perpetrator feel some accountability for their actions.

Before 2009, there was neither definition of a victim nor any focus of law on sufferers of crime. The Criminal Procedure Code (Amendment) Act, of 2008, which brought about notable modifications and introduced the notion of a victim, went into full effect in 2009 and completely transformed the Indian criminal justice system. It was mainly the effect of recommendations made by the Malimath Committee and the influence of the UN Declaration of Justice for Victims of Crime, 1985.[3]

The victim is defined in Section 2(a) of the Criminal Procedure Code: "The term "victim" refers to any individual who has incurred damages as a result of the alleged criminal behaviour of the accused, and it also includes the victim's guardian or legal heir". This definition seems limited as compared to the UN declaration's concept of victims, which treats a person as a victim in two situations: i) a victim of crime and ii) a victim of abuse of power. This definition further gives stresses the basic human rights and the violation of those fundamental rights by any person.[4]

SOME KEY ASPECTS OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2008

1. A rape victim can, on receiving permission from the court, engage an advocate to assist with the prosecution.
2. The recording of rape victim's statements shall be carried out by female police officers at the victim's home or a location of choice and the victim's parents, legal guardians, or immediate family members be present, if possible.
3. As per the 2008 amendment, the concept of *"victim"* has been expanded to include the victim's guardian or legal heir.
4. The investigations into victims of child rape or child abuse are done within three months of when the relevant police officers gathered the information.
5. In case the trial or investigation is related to Sections 376 to 376D IPC, the investigation shall be completed within two months of the commencement of the trial of the witnesses.
6. In rape cases, the prohibition on printing or publishing proceedings can only be lifted provided that the names and addresses of the parties are kept secret.

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3 Murugesam Srinivasan, *"Victims and the criminal justice system in India"*, https://www.researchgate.net/publication/477848931_Victims_and_the_criminal_justice_system_in_India_Need_for_a_paradigm_shift_in_the_justice_system

4 Yukta K., *"Rights of Victims in Indian Criminal Justice System,"* Legal Service India, https://www.legalserviceindia.com//legal/article-5591-rights-of-victims-in-indian-criminal/-justice-system.html

7. Most states have already implemented victim compensation programs when the notion was included in the Criminal Procedure Code. These schemes provide financial support for those who have lost a loved one or been wounded as a direct consequence of criminal activity.
8. The ability to appeal has been extended to victims in cases where they feel their rights have been violated, such as when the accused is found not guilty, they are found guilty of a lesser charge, or they are awarded insufficient compensation.

A GLEAM OF HOPE AFTER THE 2013 AMENDMENT

Five years after these changes were integrated into the legislature, another pivotal reformation awaited the criminal laws. Regarding sexual offences, numerous substantial modifications to the substantive and procedural law have been implemented. The Criminal Law Amendment Act of 2013 made the following modifications:

a) Insertion of section 166-A prescribes punishment for public servants disobeying direction under the law while investigating cases of certain specific cognizable offences and section 166-B which prescribes punishment for non-treatment of victims of any offence defined under Section 326, 375 ad 376 (acid attack and rape) by anyone in charge of a public or private hospital.

b) Sections 354A, 354B, 354C, and 354D of the IPC recognise sexual harassment, voyeurism, disrobing, and stalking as distinct offences.

c) Insertion of sections 370 and 370A regarding human trafficking in general of a trafficked person by enumerating measures to counter the perils of human trafficking including trafficking of children for exploitation in any form including physical exploitation or any form of sexual exploitation, slavery, servitude, or the forced removal of organs.

d) Insertion of Section 376A regarding *"inflicting an injury that causes the person's death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death."*

e) The definition of aggravated rape was improved, and the provision's scope was expanded to cover rape committed by a person in a dominant position, by a member of the armed forces deployed in an area, rape committed in the context of community or sectarian violence, or a woman incapacitated and punishment was also improved.

f) The victim's compensation has been increased to cover medical and rehabilitation costs, and the sentence has been increased to twenty years, with the possibility of an additional life sentence in cases of *"gang rape"*.

g) Sentences for rape convicts have been increased to include life-term and death sentences.

h) The legislature also added Section 376E for repeat offenders, which set forth harsher punishments for individuals found guilty under it. In this section, the death penalty was added to the list of penalties along with life in prison without the possibility of parole.

i) Increasing the sentence under section 509 IPC for saying or doing something that is meant to outrage a woman's modesty from 1 year to 3 years together with a fine.

j) Protection from the disclosure of the victim's identity has also been extended to victims of repeat offenders.

k) Wider interpretation of the term 'Rape' to include non-penetrative sex in addition to other forms of penetration to any extent, inclusive of body parts and objects.

l) After receiving information about crimes such as disrobing, voyeurism, rape, etc. the police, and women officers must record the statement at a place of the choice of the victim post which the district court must take the victim's statement immediately after the application is moved by the police. If the victim is impaired, the help of interpreters should be sought and the statement recorded in video mode.

m) Prosecutors are using the victim's taped statement as proof that he is using his right to cross-examination.

n) Due care has to be exercised so that rape victims or victims of sexual offences who are under the age of 18 are protected against confrontation by the accused.

o) The penalty for rape has been increased.

p) Punishment for gang rape of a child under the POSCO Act has been enhanced from 20 years to life in prison and a fine.

q) The penalty for disrobing u/s 354-B IPC was increased from 3 years imprisonment to 7 years with a fine.

r) The rape trial must proceed daily and be finished within two months of the charge sheet being filed with the court.

s) The amendment prohibits the use of previous sexual experiences when evaluating the victim's consent, as well as the use of evidence or inquiries during the victim's cross-examination regarding their overall immoral nature or prior sexual relationships.

t) The burden of proof for consent now lies with the accused. Further explanation to Section 375 IPC added the definition of consent as unambiguous voluntary consent indicating the woman's willingness through words, gestures or any form of verbal or non-verbal communication to participate in the sexual act. According to the definition, it is clear that silence or the absence of a 'no' from women cannot be construed as a 'yes'.

u) When taking evidence from disabled people, the courts should use interpreters, and record statements through camera and such evidence will be regarded as

oral evidence and admissible in court.

v) The assistance of interpreters is to be taken by the Courts to collect testimony from the physically disabled persons, while statements are to be recorded in video form and such material is to be considered oral evidence and will be admissible in courts.

w) A ban has been put on the two-finger test on rape victims because it violates their right to privacy.

x) Before the amendment, Section 114-A of the Act was replaced with a new section that in a rape prosecution under section 376(2) (a) to (n) IPC, sexual intercourse of the accused must be established and if the woman who claims to have been raped testifies in court that there was no consent from her side to the sexual act in issue, then the court will assume that there was no consent at all.

THE CRIMINAL LAW AMENDMENT ACT, 2018: ANOTHER ENDEAVOUR TO MEND

Despite the reformations effected by the Criminal Law Amendment Act 2013, the nation witnessed an increase in the number of sexual offences against women and children at an alarming rate. Amongst the very many occurrences of crimes against women and children, there were two such incidents which generated extensive criticism in a global sphere.[5]

In 2018, in the Kathua rape case, the nation witnessed widespread reprobation in which an 8-year-old Muslim girl from Kathua near Jammu and Kashmir, was abducted, raped and killed by seven men and a juvenile. In the Unnao rape case, a 17-year-old girl was gang raped by 5 men in Unnao, Uttar Pradesh, India and later was burnt alive by the accused men for approaching the police. These circumstances urged the Indian judiciary to promulgate the Criminal Law Amendment Act, of 2018.[6]

The new amendment was made to the Indian Penal Code, Indian Evidence Act and Code of Criminal Procedure. According to the Amendment Act, 2018, the minimum sentence for rape was increased from 7 years to 10 years of rigorous imprisonment which can be extended to life imprisonment. In the case of raping a girl under the age of 16 years, the sentence was increased from 10 to 20 years of imprisonment extendable to life imprisonment. Likewise, in the instance of raping a girl under the age of 12 years, punishment has increased with a minimum of 20 years of imprisonment possible life sentences or the death penalty. Moreover, the punishment was enhanced to life in jail or the death sentence for gang rape of a girl less than 12 years old.

5 Prime Legal, "How Evolved is Victimology in India: Victim Compensation in Indian Criminal Legal System", https://primelegal.in/2022/10/15/how-evolved-is-victimology-in-india-victim-compensation-in-indian-criminal-legal-system/

6 Dr Pawan kumar M. & Vivek K., "*Criminal Justice Delivery System andbbb Rights of Victim: Need for Introspection*", NBU, https://ir.nbu.ac.in/bitstream/1234567890/3051/1/September2016_03.pdfnnn.

ROLE OF COURTS IN PROTECTING THE RIGHTS OF VICTIMS

The emphasis on victimology has increased significantly as Indian criminal jurisprudence has evolved. There have been cases where the courts have been making observations and statements on victims' rights and carefully handling such delicate matters. Some of them are as mentioned below:

The Supreme Court in *Mangal Singh v. Kishan Singh*[7], held that there is an injustice to the victim if the trial is delayed and such delay harms the parties to the case as well as the society at large. In many cases, much suffering is inflicted on the victim, and the victim may suffer more than the accused. In *Parvinderjit Singh v. State (UT Chandigarh)*[8] the court found that to protect the victim and allow the investigation to be unhindered, the accused can be arrested thereby restricting his liberty.

In *Rattiram v. State of M.P.*[9] the court ruled that the victim, in addition to the accused, has the right to a trial in which his or her innocence may be shown. In *Delhi Domestic Working Women's Forum* v. *Union of India*, To implement the Supreme Court's directives for helping rape victims, the Criminal Injuries Compensation Board had to be established, as per Art. 38(1) of the Constitution of India.

In the case of *Nipun Saxena v. Union of India*[10], it was observed by the Supreme Court that it is important that NALSA set up a committee to create "Standard Rules and Procedure for Victim Compensation in Cases of Sexual Assault and Acid Attacks." Subsequently, in 2018, the "Compensation Scheme for Women Victims, Survivors of Sexual Assault and other Crimes" was finalised. Following the acceptance of this scheme by the court it is currently applicable all over the country.

In *Sathyavani Ponrani v. Samuel Raj*, the Madras High Court ruled that victims have a constitutionally protected right to be heard by the prosecution, and that trial courts cannot refuse any victim this opportunity. It was further held that there is nothing to prevent the victim from having a lawyer of his choice and allowing him to handle the case by aiding the prosecutor wherever necessary and stated that *"As the victim seeks to assist the prosecution there cannot be any prejudice since what is sought to be made is only to assist the prosecution and not to replace the prosecution. Moreover, because of the huge inflow and pendency of cases at times, it may not be possible for a public prosecutor to concentrate fully on a single case"*[11]

In the case of *Mallikarjun Kodagil v State of Karnataka*[12], the Apex Court felt the need for a 'Victim Impact Statement' based upon which the kind of rehabilitative support that the victim requires depending upon the severity of the wrongful act and also to award appropriate punishment to the offender. In *Krishna Lal Chawla Vs. State Of*

7 AIR 2009 SC 1535.

8 2009 AIR SC 502.

9 (2013) 12 SCC 316.

10 (2019) 2 SCC 703.

11 Decided by Madras High Court on 7 July 2010.

12 (2019) 2 SCC 752.

U.P.[13] the Courts impose on trial courts and judges the responsibility of protecting against cumbersome litigation to preserve the liberties guaranteed by Article 21 of the Constitution and to prevent parties and courts from losing money and unnecessary time.

In a very recent judgement in the case of *Joseph Stephen & Ors. v. Santhanasamy & Ors.*, a bench of the Supreme Court observed that "The victim has a statutory right of appeal under Section 372 proviso which is absolute and it is not a requirement for obtaining special leave to appeal like subsection (4) of Section 378 Cr. P.C", therefore making the victim's right to appeal against the order of acquittal an absolute right.

Further, in *Jaswinder Singh (Dead) Through Legal Representative v. Navjot Singh Sidhu And Ors.* while hearing review petition has laid down importance on victimology taking note of the "defenceless and unprotected state of the victim" by observing that victim's rights be equally protected like accused. The bench stated that "….a disproportionately light punishment humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a relatively minor punishment as the system pays no attention to the injured's feelings. Indifference to the rights of the victim of crime is fast eroding the faith of the society in general and the victim of crime in particular in the criminal justice system".

In *Karan* v. *State NCT of Delhi*[14], Hon'ble High Court of Delhi reiterated the purpose behind the enactment of Section 357(3) Cr.PC was to ensure that our system recognises the victim's suffering. Further, the Court observed that "Victims are unfortunately the forgotten people in the criminal justice delivery system. The criminal justice system is meant for doing justice to all – the accused, the society and the victim. Justice remains incomplete without adequate compensation to the victim. Justice can be complete only when the victim is also compensated." The Court made it mandatory to file a 'Victim Impact Statement' to arrive at the quantum of compensation which will be paid by the convict for the emotional trauma, physical injuries and even for funeral expenses if needed.

COMPENSATION AS A REHABILITATIVE MEANS

Although the concept of compensation has gained more attention and recognition over time, with extensive changes supplementing the already existing provisions under the justice delivery system, a Central Victim Compensation Scheme 2015 for purpose of standardization of minimum compensation that each state is required to provide to victims of specific crimes like acid attack, rape, human trafficking, and women murdered or injured in cross-border shootings will be compensated under the Centre's guidelines.[15]

13 Criminal Appeal No. 283 of 2021 (Arising out of S.L.P. (Crl.) No. 6432 of 2020).

14 Crl. Appeal No. 352/2020 was decided by the Hon'ble Delhi High Court on 27.11.2020.

15 Dr Pawan Kumar M. & Vivek K., "*Criminal Justice Delivery System andbbb Rights of Victim: Need for Introspection*", NBU, https://ir.nbu.ac.in/bitstream/1234567890/3051/1/September2016_03.pdfnnn

The scheme also provides compensation for those affected by cross-border firing, bombings or IED explosions as well as terrorism and Naxal violence. As of today, Victim Compensation Scheme (VCS) has been established across states. The fund was established with an initial collection of Rs. 200 crores. The purpose of the scheme was to assist and expand the existing VCS under the States and UTs while motivating them towards implementing the VCS, minimizing conflicts in compensation amounts notified by the different States and UTsand catering to the financial needs of victims of crime, especially sexual offences.

Under the scheme, the minimum compensation amount for Acid Attack victims is Rs.3 lakhs, while for rape, death, permanent disability and physical abuse of minor victims be compensated for. 2 Lakhs. The amount of compensation would be increased by 50% over the amount given if the victim were under the age of 14. The disparity in compensation amounts among the States persists, though. The Supreme Court found it necessary for the National Legal Services Authority (NALSA) to develop a new programme in the case of *Nipun Saxena* v. *Union of India*. The model standards for victim compensation for women who have been the victims of crimes including sexual assaults, acid attacks, and other crimes are being developed by a committee.

This led to the 2018 completion of the NALSA Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes, which, once authorized by the Court, became effective across India. A gang rape victim would get between Rs 5 lakhs and Rs 10 lakhs under the scheme. Victims of rape or other sexual violence will be eligible for compensation of at least Rs 4 lakhs and up to Rs 7 lakhs.

The victims of acid attacks would receive a minimum compensation of Rs 7 lakhs and a maximum payout of Rs 8 lakhs in cases of facial damage. Despite the existence of such mandatory provisions relating to victim compensation, the outcome has not been novel or as helpful to the harmed and their families as it could have been because a sizable portion of the fund is still underutilised due to the sparse distribution of the compensation money as well as non-uniformity and non-compliance on the part of States to follow the Centre’s direction.

CHALLENGES IN THE CRIMINAL JUSTICE SYSTEM

Irrespective of the fact that several sweeping changes have made their way into the Criminal Justice System there are still many issues that remain unresolved and the victim has to encounter such problems at every stage of the criminal proceedings. Some of them are noted as under:

1. The police department’s role in our justice system is the primary and most vital determinant as to the fate of every crime yet there is callousness and not adequate sensitization among the police officers towards treating the victims with dignity and care.
2. A dearth of women judges in the courts all over India carries a negative message to the society at large which looks up to such institutions for fairness and equality.

3. The laws introduced under the various amendments are most of the time implemented in a letter rather than in spirit among law enforcement agencies.
4. Equal involvement of victims at every stage of the legal procedure is still an unfulfilled task that needs to be carried out with commitment.
5. Rape survivors especially those belonging to the backward classes face challenges in registering FIRs and have to encounter many inconveniences getting themselves heard as the police refuse to register their complaints.
6. At times, registration of FIRs takes over 6-7 months which further adds distress to the already helpless victims.
7. Victims who survive abuse or assaults have to endure ridicule, pressure, and harassment at the hands of the police.
8. Despite the laws making it mandatory for female officers to take down the report, yet when it comes to the reality a victim has to go through the uncomfortable situation to speak of the details of the assault to male officers
9. The legal procedure is long and expensive as a result most victims give up on reporting the crime.
10. A victim still has no significant involvement in the current justice system but to report a crime. Thereafter it is the police department that has exclusive on who's control over the investigation process falls and unless and until the police deem the victim's participation necessary the victim has no part in the investigation process.
11. The victim's grounds for appeal under Section 372Cr.PC is limited only to the accused's acquittal, a conviction for a lesser offence, or the imposition of insufficient compensation. As a result, even if a Trial Court sentences or fines the offender, the victim has no legal remedy to pursue an appeal.[16]
12. The victim has been given the right to appoint counsel of choice for which the court's permission is to be sought although mostly it is the state who appoints the prosecutor as a fit authority who advocates on behalf of the victims. Moreover, the lawyer involved has a restrictive role to play and has to perform his duties as per the court's direction and in so far as his assistance is required by the public prosecutor.
13. Rehabilitation of the victim post-trauma is an ignored aspect of the justice delivery mechanism and is not enforced with as much rigour and seriousness as other things such as enhancing the punishment or compensating the victims. Rape and Domestic Abuse survivors find it difficult to lead a normal life without receiving adequate trauma counselling and rehabilitative service as a means to cope with the challenges that follow any incident of violence and abuse.

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16 Parvinder Kansal v. State of NCT of Delhi, arising out of S.L.P.(Crl.) No.3928 of 2020.

14. The lack of appropriate provisions for victim protection to ensure their safety from intimidation and threats is another impediment. There is however provision for witness protection in India.
15. The courts are not laying down enough stress on implementing the Victim Impact Statement which acknowledges the consequences of crime faced by the victim in deciding the appropriate degree of punishment as well as a penalty to be imposed on the perpetrators.
16. No provision for victim advocates to support crime victims by assisting them in filling out necessary legal forms, finding relevant resources, providing emotional assistance as well as sharing important information on victims' rights.
17. No effort is made towards the interest of the victim and he or she is hardly heard when an accused is released on bail.

CONCLUSION

Over a decade or more has gone by since victims' rights have gained momentum but the progress has taken place at a very steady pace. Yet with each passing year crime rate has seen grown in leaps and bounds. The Hathras Gang rape case, the Gonda acid attack case and everyday incidents of such brutal acts are proof that no matter how strict the punishment gets, it is extremely difficult if not impossible to deter criminals from committing the crime.

A few among the thousands of cases get a timely redressal, while many other hapless victims and their families tie their hopes to the Indian Judiciary and wait for their turn to get justice. The evolution of the concept of the victim has been significant so far, nonetheless, there are pitfalls on the path which need to amend to make the road to justice a less treacherous one. The Indian Criminal Justice System awaits a more wholesome reformation in the form of an independent Victim Protection Law that would recognize the victim as a missing link and an often-ignored part and re-approach them with sensitivity and seriousness.

Critical Appraisal of Surrogacy (Regulation) Act, 2021

Dr. Kritika & Ms. Purnima Gupta***

"All love begins and ends with motherhood, by which a woman plays the God".

Robert Brown

ABSTRACT

The Modern globalized world have seen the importance of Surrogacy and therefore it becomes imperative to regulate and remove the ambiguities and controversies faced by the public.Surrogacy is a method or exercise whereby a women voluntarily conceives and gives birth to a child and hand over the baby to another couple. Due to lack of any legal framework for regulating Surrogacy in India and exploitation of Surrogate mothers, exploitation and abandonment of babies born out of Surrogacy, import of human embryos and gametes, The Surrogacy Regulation Bill, 2020 was approved by both LokSabha and RajyaSabha in a very progressive way. It is very pertinent to understand and analyze the shortcomings of the said act as it involves numerous issues related to registration, contractual relations of parties to Surrogacy, Commercial and altruistic Surrogacy, other loopholes of the Act. This Paper will attempt to analyze critically the various provisions of the Bill.

Keywords: *Surrogacy, The Surrogacy Regulation Act, 2021.*

INTRODUCTION

With the advent of science and technology the perspective of motherhood has changed completely. Being a gift of nature, sacred and sacrificial approach, the motherhood has not remained an indivisible instinct. Undoubtedly, India is a worldwide avenue for '*Reproductive Tourism*' backed by United Nations study (2012) and is popularly known as thfertility tourism market. Surrogacy industry is estimated to be $400 million which has been generated from 3000 specialty surrogacy clinics all over India[1]. India

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1 https://nhrc.nic.in/sites/default/files/Report_NHRC_Surrogacy_24122018.pdf visited on 15.7.2022

is the most sought surrogacy destination for childless couples in the world because of its liberal laws which are not yet codified, low and cheap cost, and easy availability of surrogate mothers.

There is so much growth if reproductive science that bearing of seed is only a vessel, a nursery to be sprouted where its sapling is transported to different other soils. Also Held in **P Geetha's Case**[2] that the "law must appreciate the dichotomy of this divine duty i.e the split motherhood".

HISTORY

Various attempts have been made from 2008 and 2014 to pass legislation regulating surrogacy but unfortunately nothing got materialized. The pitfalls of Surrogacy unregulated industry was highlighted in the Supreme Court by Activist and lawyer Jayashree Wad. Though she was unable to get relief from the Court. As a result, the Surrogacy (Regulation) Bill, 2016, was presented and got passed by the Lower House of Parliamenti.eLokSabha, which did not receive the approval of RajyaSabhaand thus, a Parliamentary Committee was set up to scrutinizeits provisions. The committee suggested some progressive changes to be made in 2016 Bill which were culminated in the 102nd report in 2017. Despite this, the recommendations made by the Parliamentary Committee were turned a blind eye to and the 2019 bill was the exact copy of 2016 Bill. To prevent the surrogate from taking any financial benefits for accepting Surrogacy, paid i.e commercial surrogacy was forbidden and altruistic surrogacy was only permitted. Such a restriction deprives women of their reproductive autonomy and reinforces traditional social values that women's decision and work in the private sphere having no monetary value. The RajyaSabha did not pass the Bill yet again, a Select Committee was designed to recommend desired changes to the statute. Another bill The Surrogacy (Regulation) Bill, 2019 was announced and was approved in Lower House also known as LokSabha and was later send to the Select Committee[3] who made some changes and introduced Surrogacy (Regulation) Bill, 2020[4]. The most important development which took place was the approval of latest Surrogacy (Regulation) Bill 2020 which says that '*willing*' female can become a surrogate.

Dr Harsh Vardhan quoted on the bill: "The Bill is aimed at ending the exploitation of women who are lending their womb for surrogacy and protecting the rights of children born through this. The Bill will also look after the interests of the couple that opts for surrogacy, ensuring that laws are protecting them against exploitation by clinics that are carrying this out as a business."

2 P. Geetha V. Livestock Development Board Ltd. 2015 SCC Online Ker 71.

3 The latest Bill incorporated with all the recommendations of the Select Committee with the Union Cabinet's approval of 15 major changes suggested by the 23-member Committee, was introduced on 26-2-2020, in the Lok Sabha by the Ministry of Health and Family Welfare.

4 Surrogacy (Regulation) Bill, 2020 which seeks to prohibit commercial surrogacy and permits only altruistic Surrogacy in India

"THE SURROGACY (REGULATION) ACT 2021"

The law became operative on 25th January 2022. It intends to outlaw commercial surrogacy and permitting Altruistic Surrogacy only. According to this Act, In commercial surrogacy[5], the surrogate mother is being rewarded for the services undertaken in addition to repayment for her medical,health, insurance and other expenses. In altruistic surrogacy[6], other than the medical costs and insurance coverage during the 9 months of Pregnancy, the surrogate mother receives no cash payment,sum or reward. In 2002, India approved commercial surrogacy, which paved the path for a booming surrogacy market there. *The primary causes were a lack of legal regulations and their absence from implementation. Among the many difficulties faced by surrogate mothers were exploitation, unequal treatment, and unhealthy living conditions.* When it became clear that surrogacy had become a thriving sector in India, there was a great deal of discussion concerning the competing interests of the many stakeholders. The state has a responsibility to safeguard the interests of the unborn child while simultaneously preventing the surrogate's exploitation. On the other hand, every woman has the right to parenting and the freedom to choose her own reproductive options. Surrogacy laws in India have had difficulty striking a balance between these competing interests.

Highlights of the Bill:

1. The first section of the Act outlines the five reasons why surrogacy may be used:
   a) where there is a need for gestational Surrogacy for intending couple or mother on medical Grounds;
   b) where it is used only for charitable determinations;
   c) It is not employed for business goals, nor is surrogacy or the surrogacy process commercialized;
   d) It is not employed to give birth to kids for the purpose of prostitution, sale, or any other kind of exploitation; and
   e) any other disease or requirement as may be specified by the board regulations.

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5 According to Section-2(g) of THE SURROGACY (REGULATION) ACT, 2021, it means it means 'Commercialization of surrogacy services or procedures or its component services or component procedures including selling or buying of a human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by giving the payment, benefit, reward, fees, remuneration or any kind of monetary incentive to the surrogate mother or her representative or her dependents, except the medical expenses *and such other prescribed expenses* incurred on the surrogate mother and the insurance coverage for the surrogate mother'

6 According to Section-2(b) of THE SURROGACY (REGULATION) ACT, 2021, it is defined as 'The surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses *and such other prescribed expenses* incurred on surrogate mother and the insurance coverage of the surrogate mother, are given to her dependents or the surrogate or her representative

The subsequent section of the Act outlines the eligibility measures for intending couples who need to obtain two certificates issued by the appropriate authority:

a) Essentiality Certificate mentioned in Section 4(*iii*)(*a*)
b) Eligibility Certificate mentioned in Section 4(*iii*)(*b*).

When a couple meets the requirements below, the relevant official will provide them a separate eligibility certificate. Sec. 4(iii)(c)

The following conditions must be met in order to grant a certificate of essentiality:

(i) A District Medical Board certification of a health indication in favour of one or both intended parents, the intended woman, or the intended couple for gestational surrogacy.

(ii) A Magistrate's court decision granting parental rights and custody of the surrogate child.

(iii) Insurance coverage for postpartum delivery difficulties for the surrogate is now available for 36 months, as opposed to the 16 months it was in the previous edition.

A**certification of eligibility** is needed from the relevant authority and the surrogate mother must meet with the following requirements:

(i) no woman, other than a woman who is perpetually married, who is the mother of her own child, and who is between the ages of 25 and 35 on the day of implantation, shall assist in surrogacy by donating her egg or oocyte or in any other way, or act as a surrogate mother;

(ii) The appropriate authority is being approached by the willing woman along with the consented substitute mother; no woman may act as such by providing her own gametes. Also, a willing woman may participate in surrogacy and serve as a surrogate mother in accordance with the provisions of this Act.

(*iii*) A female is only allowed to be a surrogate mother once.

(*iv*) Surrogate motherisn't allowed to give her gametes for surrogacy; lastly

(*v*) Certificate by a registered medical practitioner of medical and mental fitness for undergoing surrogacy procedure.

Other important highlights are:

1. "Registration of surrogacy clinics"- The relevant authority must conduct surrogacy or itsconnected treatment within 2 months or 60 days of the relevant authority's date of appointment "Certificate of Registration," which has a three-year expiration date and is renewable.

2. A National and State Surrogacy Board must be established, with 10 renowned members chosen by the State and the Central Government, as well as representatives from the Executive Branch, State Legislative Assemblies, and the Parliament. Boards are required to advise the Central Government on surrogacy policy development, monitor and review the Act application or its

working rules and regulations, establish conduct code for surrogacy clinics, and oversee the working of the Surrogacy Board in State and other organizations created in accordance with the Act.

3. Penalizes anybody who violates the law by engaging in commercial surrogacy, promoting it in any way, misusing the surrogate mother or child, trading human embryos or gametes for surrogacy purposes, or engaging in any type of sex selection for the purpose of surrogacy. The punishment could be imprisonment upto 10 years and Rs 10 lakh fine.
4. If altruistic surrogacy is not followed, the offender may be sentenced to jail to up to five years, as well as a fine of up to five lakh rupees, for the first offence, and up to ten years jail and compensation upto ten lakh rupees for any successive offences.

Critical appraisal of the bill:

1. **No Pay or reward for the services**: The bill allows only altruistic Surrogacy[7] and commercial Surrogacy[8] is totally banned: By restricting the surrogate's ability to receive financial remuneration for her services, the surrogate is impairing her right to choose her own reproductive options and reinforcing societal norms that view women's domestic work as having little economic worth.Also it affects the women's fundamental right to reproduce under A-21 of the Indian Constitution[9]. To deliver a child for someone out of compassion in very far in today's modern times and will force the surrogate mother to go through physical and psychological distress. Finding a friend or relative will risk the relationship during surrogacy and post birth as both parties are ware about their identities. It will also reinforces the patriarchal behavior of the society and will tend to control the autonomy of people with reproductive organs. The total prohibition of commercial surrogacy also eliminates the surrogates' legal source of money, which reduces the number of women who willfully become surrogates. In result, this action will indirectly prevent couples from becoming parents from having children. Additionally, there is no involvement of a third party in altruistic surrogacy, which could guarantee prompt recovery of medical and other incidental expenses during the surrogacy operation. The parties can take each other for granted in case of Altruistic Surrogacy.
2. Surrogate only once in a lifetime: The limitation of being a surrogate once in a lifetime will limit the income of those females whose life depends on the money she gets from it. If a woman willingly accepts the Surrogacy proposal

7 Supra Note 6

8 Supra Note 5

9 Article-21 of the Indian Constitution states: "Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law"

and is assured of a safe delivery with other amenities and baby is also assured of a safe home, the why there is a limit on Surrogate mother to deliver only once.The booming industry made lot of women dependent on her.

3. Close relative/ friend: In today's modern times, it is almost impossible to find a close relative for Surrogacy. Also it will lead to domestic violence and physical and mental abuse, as family might pressurize the female to become surrogate for the other family members.
4. The 5 years of waiting period for married couples hinders their right to think of their family earlier.
5. The age-limits prescribed for males and females in the Act reinforces the patriarchal values that males have to be older than females. The Act also remains silent on the procedure to be followed if only one of the parents is eligible as per the clause and the other is not.
6. Equality Clause: The bill is highly prejudiced and archaic as against the very canons of 'equality'. It differentiates between married and unmarried couples, heterosexual and homosexual couples, single and double parents etc.
7. The children with disabilities have been discriminated against: The Act considers such children with physical and special needs as childless. It further encourages considering surrogacy if the couple has a child with a life-threatening disorder. This clause directly violates the right of the children with the disability, thus denying them treatment with dignity.
8. The act also invades the right to parentage for the LGBT community and single fathers given to them under A-21 of the constitution of India .It's a blatant slap on the face of LGBT community where they form around 15 percent of the total population and single fathers wanting to have a child. This law unleashes the other laws passed in favour of LGBT community like banning S-377 of IPC, 1870 and granting Right to privacy[10] to them.
9. The act lays down criminal sanctions including imprisonment or fine for offering Commercial surrogacy, even intending couples or any other who wish to have child through any means that are not 'altruistic surrogacy' are subject to criminal sanctions. It means that Surrogacy clinics along with willing surrogate mothers cannot lawfully offer even altruistic surrogacy services to single parents, lesbians, gays, bisexuals, transgender couples, live in relationship due to criminal sanction.

10 In K.S. Puttaswamy Vs. UOI on 26th September 2018: 9 Judge bench held that Right to privacy is fundamental right of every person under article 21 of the Constitution of India. The court further held that sexual orientation is an essential attribute of privacy and that discrimination based on sexual orientation is deeply offensive to the dignity and self worth of the individual. The judges opined that equality demands that sexual orientation of each individual to be protected on an even platform. They further stated that the right to privacy and "the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Arts 14, 15 and 21

CONCLUSION

India became a hub for Transnational Surrogacy since 2002 as Commercial surrogacy was legalized in India. The main reason was absence of rules and regulations, cheap and low services in low cost services in fertility centres, and abundance of poor women availability who are willing to provide this service[11].

The case which started this discussion into public forum is disputed case of Baby Manjicase[12]. Through this case the ethical side of the Commercial or paid surrogacy was brought to the scrutiny of general public.Also the Surrogate women were exploited, had been put in poor living conditions and unethical treatment.

Infertile couples, heterosexual couples, homosexual couples, disabled and incompetent adults, and other senior people are the surrogacy industry's most sought-after clients. Despite all odds Surrogacy has been a very lucrative business for our medical industry which in turn has enormous potential to increase the country's foreign exchange revenues. The banning of Commercial Surrogacy has adopted need-based outlook rather than a rights-based methodology, thereby failed to provide the right to parenthood and the autonomy to the women which she deserves. The prohibition of commercial surrogacy has also brought about its own set of problems. In an unequal society, the compensation system may allow for the exploitation of intended parents and surrogate mothers.

One could contend that the state needs to safeguard the child's birthright and put an end to the exploitation of vulnerable women who participate in surrogacy. But the existing Act doesn't strike a balance between these two interests.

The banning of commercial surrogacy will do more harm than benefiting the female surrogates, instead the focus must be on regulating and improving the situation.The main motive of the government is to curb the exploitation against women and children and for that the state is banning the activity completely which is very much similar to Transplantation of Human Organs Act, 1994 which imposed complete ban on commercial organ donation. As a result Black Market cropped up where middle men/agents got the financial benefits and minted lot of money. The women would lose both income which will give her a new identity and access to prenatal and post natal care same as that of kidney donation.

We can sum up by saying that surrogacy is the "union of science, society, services, and person that makes it a reality"

"The barren gets a baby, the broken gets a bonus"

11 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6195148/ visited on 15.7.2022

12 Baby Manji Yamada V. UOI, 29th September 2008

Implications of Big Data for Competition Law Enforcement: An Analytical Study

Mr. Rafique Khan & Mr. Pranay Prakash***

From the multiplearticles floating on internet covering the pro/anti-competitive implications of data and tech, it becomes ample clear that big data has a multitude of impact on the competition regime across the globe. Due to difference in opinion regarding the definition of big data it becomes very difficult to come out with a uniform set of guidelines to address this issue. To be able to better appreciate this situation let us consider the example of FDI policy or the rules and regulations which governs it, the threshold as to what is FDI might differ across jurisdictions but the definition more or less remains the same which is not the case with big data[1]. This is primarily because what is big for a one enterprise might not be back for another. Thus, there is no clear agreement in literature regarding what all are or could be the potential implication of big data on the successful implementation of competition or antitrust laws. However, the role of competition law enforcement authority's not at all debated because the primary purpose with which such an authority is established is more or less the same that is

- To facilitate fair market competition
- To promote healthy competition
- To prevent accumulation of market power

This article is an attempt to make a systematic study of the potential implications of big data on competition law enforcement and to highlight the pro-competitive benefits of big data (if any) and thereby leading to the conclusion. The potential impact of big data on competition law enforcement can be categorised for the sake of systematic analysis a structured understanding under the following heads

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1 Robert Ginsburg, How big data should be used to make FDI decisions, FDI Intelligence (April, 7, 2020, 4:00AM), https://www.fdiintelligence.com/article/75332.

COMPETITION TOOLS

With the advent of big data and its usage in the market several traditional concepts of competition law like the definition of relevant market and geographical market seems to be losing their texture. This is so because the digitalization of the marketplace has altered the conception or notion attached with these definitions. Furthermore, new concepts have evolved like "zero pricing" which have rendered several significant tests like the SSNIP test (small but significant and non-transitive increase in price) to fall short in capturing any anti-competitive practice in the market.

- *Identifying relevant market for antitrust purposes*

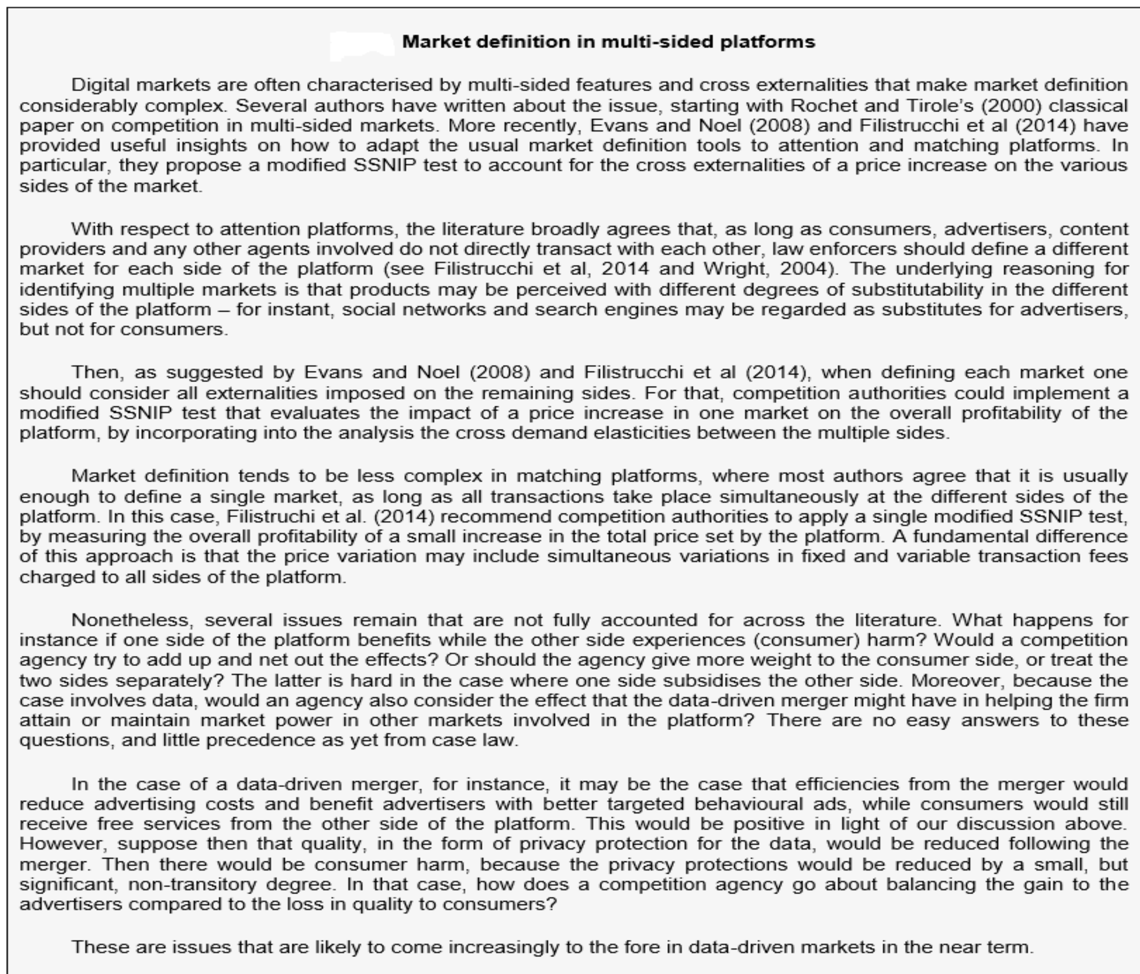
It is nonetheless a daunting task to identify relevant market inside the big data ecosystem. To be in a position to better appreciate this point, let's consider the example of Apple Inc., it is a multi-sided platform which operate on various fronts like Apple iOS, iTunes, iCloud, Apple Store etc. and it also works in a closed symbiotic relationship with other players like Google, Facebook or LinkedIn. These multi-sided platforms have posed a serious problem before the competition authorities and have mandated immediate adaptation of traditional approaches like ok the SNNIP test and hypothetical Monopoly test to meet the end objectives of competition law that is to ensure fair market playfield to all the players. Though the concept of multi sided platforms is not new but it becomes very difficult to identify the multiple sides of a platform particularly when these platforms engage in non-monetary transactions in exchange of data. For instance, traditional platform like a newspaper operates as a multi sided platform where in it disseminates news and advertisements charging the price from both the readers as well as the advertisers and now consider the case of Google which provides for many services free of cost that is free of monetary cost hence it becomes very difficult to assert what are the multiple sides of this platform. Due to this in order to identify multi-sided platform nearly looking into the monetary nature transactions would not be sufficient and even the non-monetary transactions involving any flow of data are also to be captured during the scrutiny.

- *Assessing market power*

The traditional view of market power is that when an enterprise is in a position to significantly dictate the entry and exit norms in the market and the share it holds in the market in terms of consumer base and production scale is of considerable proportion so much so that the withdrawal of this enterprise can collapse the entire market in which this enterprise operates.[2] But the big data has posed a serious threat in assessing market power because the traditional approach seems to be obsolete this is so because there exist companies which provide zero price services to consumer in exchange for data. Which in many cases have made the enforces to underestimate the degree of market power that they have? Thus, the earlier approach of assessing the market power in terms of price shares seems to be inadequate and thus the non-price dimension is also to be considered as some services may be available at zero price but what the

2 Alexandre de Streel, Big Data and market power 97-112 (Bruylant Publishers 2018).

consumer is paying in return is not money but the valuable data, therefore a transaction is taking place. In a joint report by French Authorite de la Concurrence and German



Market definition in multi-sided platforms

Digital markets are often characterised by multi-sided features and cross externalities that make market definition considerably complex. Several authors have written about the issue, starting with Rochet and Tirole's (2000) classical paper on competition in multi-sided markets. More recently, Evans and Noel (2008) and Filistrucchi et al (2014) have provided useful insights on how to adapt the usual market definition tools to attention and matching platforms. In particular, they propose a modified SSNIP test to account for the cross externalities of a price increase on the various sides of the market.

With respect to attention platforms, the literature broadly agrees that, as long as consumers, advertisers, content providers and any other agents involved do not directly transact with each other, law enforcers should define a different market for each side of the platform (see Filistrucchi et al, 2014 and Wright, 2004). The underlying reasoning for identifying multiple markets is that products may be perceived with different degrees of substitutability in the different sides of the platform – for instant, social networks and search engines may be regarded as substitutes for advertisers, but not for consumers.

Then, as suggested by Evans and Noel (2008) and Filistrucchi et al (2014), when defining each market one should consider all externalities imposed on the remaining sides. For that, competition authorities could implement a modified SSNIP test that evaluates the impact of a price increase in one market on the overall profitability of the platform, by incorporating into the analysis the cross demand elasticities between the multiple sides.

Market definition tends to be less complex in matching platforms, where most authors agree that it is usually enough to define a single market, as long as all transactions take place simultaneously at the different sides of the platform. In this case, Filistruchi et al. (2014) recommend competition authorities to apply a single modified SSNIP test, by measuring the overall profitability of a small increase in the total price set by the platform. A fundamental difference of this approach is that the price variation may include simultaneous variations in fixed and variable transaction fees charged to all sides of the platform.

Nonetheless, several issues remain that are not fully accounted for across the literature. What happens for instance if one side of the platform benefits while the other side experiences (consumer) harm? Would a competition agency try to add up and net out the effects? Or should the agency give more weight to the consumer side, or treat the two sides separately? The latter is hard in the case where one side subsidises the other side. Moreover, because the case involves data, would an agency also consider the effect that the data-driven merger might have in helping the firm attain or maintain market power in other markets involved in the platform? There are no easy answers to these questions, and little precedence as yet from case law.

In the case of a data-driven merger, for instance, it may be the case that efficiencies from the merger would reduce advertising costs and benefit advertisers with better targeted behavioural ads, while consumers would still receive free services from the other side of the platform. This would be positive in light of our discussion above. However, suppose then that quality, in the form of privacy protection for the data, would be reduced following the merger. Then there would be consumer harm, because the privacy protections would be reduced by a small, but significant, non-transitory degree. In that case, how does a competition agency go about balancing the gain to the advertisers compared to the loss in quality to consumers?

These are issues that are likely to come increasingly to the fore in data-driven markets in the near term.

Figure 2

Bunderkantellamt published in 2016 remarked clearly that even though and enterprise offers a few services for free but what it is getting in return of giving away the service is free of any monetary cost is big data which in turn is an important source of market power particularly when the data can be used as an entry barrier.[3] Finally, to point out towards a very specific feature of digital economy that is that the competitors don't compete in the market but instead they compete for the market.

3 Miranda Cole, The Bundeskartellamt Publishes a Paper on Big Data and Competition, Covington Competition (March 3rd, 2020, 6:35 PM),https://www.covcompetition.com/2017/11/the-bundeskartellamt-publishes-a-paper-on-big-data-and-competition/.

To exemplify this analogy let's consider the example of Facebook, as soon as it entered the market the first commercial move it took was to eliminate its arrival that was Myspace which was a very popular social media platform back then. So, what is required on the part of competition law enforcement agencies is to property assess the market power and the assessment should not be mainly on the basis of monetary transactions but also in terms of non-monetary transactions like exchange of data, this is crucial from the point of view of promoting contestability in the market which in turn will provide competition pressure to the dominant companies thereby motivating them to pursue the pursuit of improving the product quality.

MERGER REVIEW

The notion of big data analysis, for executing mergers existed long back before it was discussed and debated in public. It was primarily due to cross border transactions particularly the one in which Google acquired DoubleClick and WhatsApp acquired by Facebook, when the concept of usage of Big Data analytics for the purpose of executing mergers became a topic of general public attention and hence came under the scrutiny of competition or antitrust law regulating authority as well as competition practitioners.

These transactions posed a serious threat to the existing framework of regulating competition in the market as these mergers increase the risk of globalisation of the market and hence became one of the turning points for the policy makers to seriously revamp and streamline the existing set of regulations in the light of these developments.[4] These restructuring measures can be categorised under the following heads.

- *The privacy dimensions.*

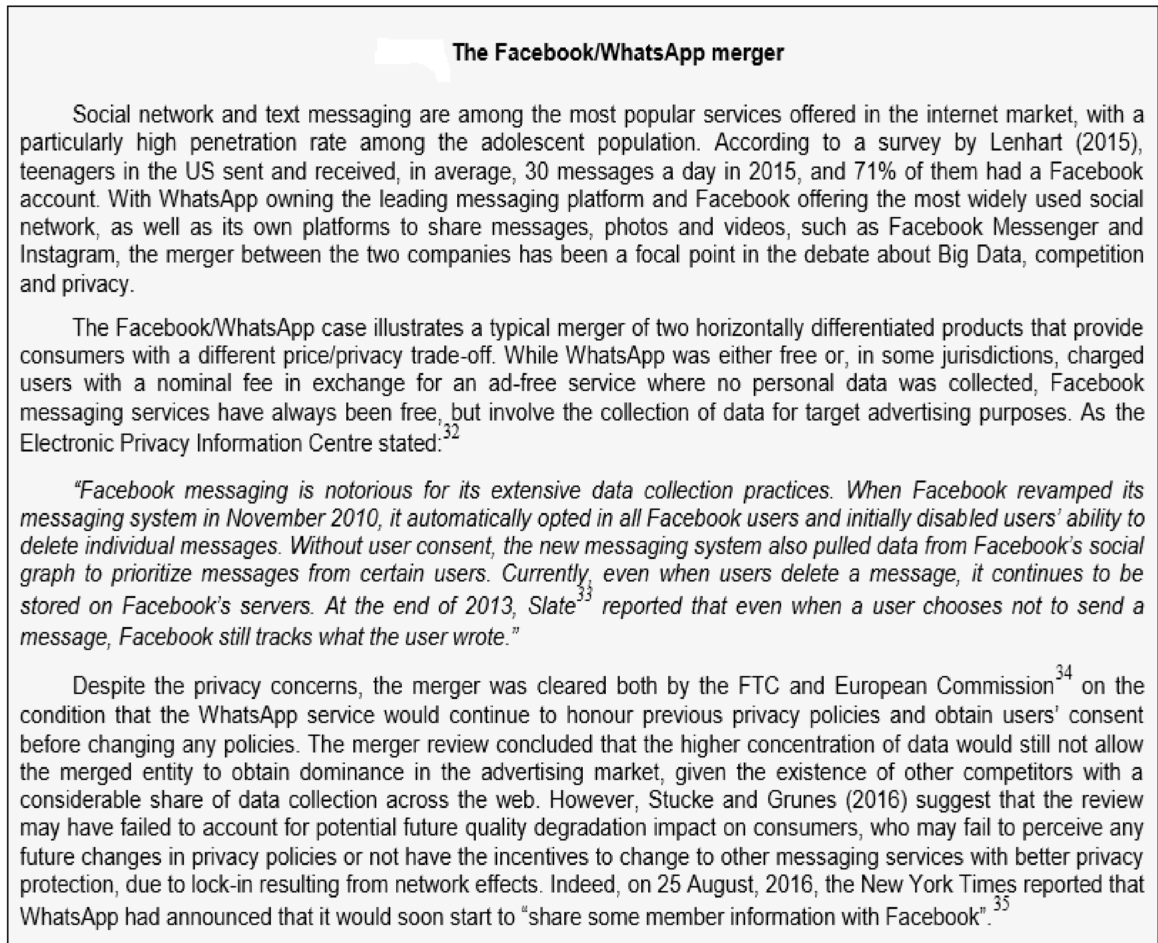
The big tech companies generally have the treasure of huge amount of consumer data which in turn facilitates targeted advertisement and other activities which helps them in gaining an edge over their competitors.[5] Thus, the privacy aspect is one of the pivotal considerations for the policy makers when any effort is made to streamline the existing set of frameworks to tackle the current advancements and to maintain free and fair market competition. The first instance in which a merger exercise raised privacy concern was that in the case of Google and Double Click merger[6] where in Pamela Jones Harbor of the US federal trade Commission that is FTC raise the concern that this merger word ultimately deprives the consumer meaningful privacy. The merger was ultimately cleared by federal trade Commission, primary because of

4 Willard Mwemba, Merger Regulation and the Digital Economy; Are Competition Authorities Up to the Task?Kluwer Competition Law Blog (April 29th, 2020, 2:00 PM),http://competitionlawblog.kluwercompetitionlaw.com/2019/08/01/merger-regulation-and-the-digital-economy-are-competition-authorities-up-to-the-task/.

5 Xiao Z, Xiao Y, Security and privacy in cloud computing, 15 IEEE Trans on communications surveys and tutorials 843–59 (2013).

6 David Lawsky, Google closes DoubleClick merger after EU approval, Reuters (April 7, 2020, 2:00PM),https://www.reuters.com/article/us-google-doubleclick-eu/google-closes-doubleclick-merger-after-eu-approval-idUSBFA00058020080311.

the lack of evidences to substantiate the argument. Similar issue was raked open the case of Microsoft's announcement of a joint venture with Yahoo.



The Facebook/WhatsApp merger

Social network and text messaging are among the most popular services offered in the internet market, with a particularly high penetration rate among the adolescent population. According to a survey by Lenhart (2015), teenagers in the US sent and received, in average, 30 messages a day in 2015, and 71% of them had a Facebook account. With WhatsApp owning the leading messaging platform and Facebook offering the most widely used social network, as well as its own platforms to share messages, photos and videos, such as Facebook Messenger and Instagram, the merger between the two companies has been a focal point in the debate about Big Data, competition and privacy.

The Facebook/WhatsApp case illustrates a typical merger of two horizontally differentiated products that provide consumers with a different price/privacy trade-off. While WhatsApp was either free or, in some jurisdictions, charged users with a nominal fee in exchange for an ad-free service where no personal data was collected, Facebook messaging services have always been free, but involve the collection of data for target advertising purposes. As the Electronic Privacy Information Centre stated:[32]

"Facebook messaging is notorious for its extensive data collection practices. When Facebook revamped its messaging system in November 2010, it automatically opted in all Facebook users and initially disabled users' ability to delete individual messages. Without user consent, the new messaging system also pulled data from Facebook's social graph to prioritize messages from certain users. Currently, even when users delete a message, it continues to be stored on Facebook's servers. At the end of 2013, Slate[33] reported that even when a user chooses not to send a message, Facebook still tracks what the user wrote."

Despite the privacy concerns, the merger was cleared both by the FTC and European Commission[34] on the condition that the WhatsApp service would continue to honour previous privacy policies and obtain users' consent before changing any policies. The merger review concluded that the higher concentration of data would still not allow the merged entity to obtain dominance in the advertising market, given the existence of other competitors with a considerable share of data collection across the web. However, Stucke and Grunes (2016) suggest that the review may have failed to account for potential future quality degradation impact on consumers, who may fail to perceive any future changes in privacy policies or not have the incentives to change to other messaging services with better privacy protection, due to lock-in resulting from network effects. Indeed, on 25 August, 2016, the New York Times reported that WhatsApp had announced that it would soon start to "share some member information with Facebook".[35]

Figure 2

➢ *Notification threshold in Big Data mergers*

In this age of data being fuel or the primary driving force behind the digital platforms, simply evaluating the consequences of a merger in terms of monetary value is likely to let a few important aspects escape from under the door.[7] This is so because simply looking into monetary dimension of a transaction one cannot get the actual picture of the impact of the merger on the market competition. Latest consider the example of Facebook-WhatsApp transaction[8] where in WhatsApp did not had enough turnover

7 I*d.*

8 Bram Visser, The Facebook: WhatsApp merger case. European Commission's lucky break or proof of impermeable system of merger control? Research Gate (Jan 3rd, 2020, 3:10 AM), https://www.researchgate.net/publication/326059828.

so as to trigger the notification threshold so as to bring this merger under the scanner of antitrust regulating authority and in terms of monetary value it's simply appeared that Facebook acquired small size digital platform of social media networking for an amount of USD 19 million. In this regard a very apt remark was made by the European competition commissioner Margaret Vestager

"The issue seems to be that it's not always turns over that makes a company an attractive merger partner"

Due to this issue, the dimension of merger review not in terms of monetary value of the transaction but also in terms of the data being exchanged also needs to be incorporated as an important criterion if the end objective of establishing competition or antitrust Commission i.e. to ensure fair competition for the greater good is to be attained. On these lines many countries including the US and Mexico are already engaged in reviewing the existing structure of antitrust regime to incorporate this dimension while Germany seems to be a step ahead as it had already published a Draft amendment to the Act against Restraint of Competition which proposes to incorporate certain other factors while reviewing a merger besides which it also seeks to set a new threshold limit.

Abuse of dominance

There exists a direct co relationship between the amount of data controlled and productivity gains. Due to this when large amount of data in a particular relevant market is concentrated in the hands of a few it may alter the dynamics of the market giving greater power in the hands of the player who holds the greatest amount of data. This aspect of big data and its impact on competition law can be further appreciated by going through the following two aspects associated with it.

- *Exclusionary conduct*

The act of a market player to timely collect, store and analyse big data can lead to data-driven exclusion of other players in the market. This is also done by entering into exclusive agreements pertaining to data sharing with a third party. The above-mentioned conclusion is based on several extensive studies that are conducted by reputed organisations such as the joint report published by Authorite de la Concurrence and Bunderkantellamt (2016) wherein they reiterated that data can be exploited to facilitate foreclosure of the market. This proposition can be exemplified by considering the example of a supplier who is in a situation of vertical integration in the market and it uses is the data in the upstream market to obtain undue advantage over the other suppliers. The president of Bunderkantellamt, Andreas Mundt remarked,

> "… it is essential to examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected."

It is interesting to note that none of the competition or antitrust regime across the globe has incorporated an element of privacy right violation, and it is due to this

that this still remains an area of open question awaiting answer which are:

Under what scenario the control over the private data of an individual can help a market competitor to have an edge over the other competitors existing in the market? if the answer to the above-mentioned question is affirmative… this will lead us to the second question

Can such an access to the data lead to the foreclosure of the market?

- *Essential facility doctrine*

This is one of the most common doctrines of antitrust laws across the globe as per which if market competitor has access to certain essential facilities which are very important for other players to exist in the market but they lack the capacity to reproduce such a facility. This makes it more or less mandate on the player who is in control of that facility to open it to all the players. One of the most debated issues in the realm of competition law is as to whether this doctrine can be applied to big data as well. Some of the very prominent Anti-Trust practitioner like Lerner, Balto and Lane have argued against the incorporation of this doctrine in evaluating the merits of big data. These authors argued that data is not crucial for success of a company as there are instances where in a new player with limited data, I was able to establish itself in the market because the idea that it sprouted in the market was innovative in itself.

"The history of digital economy offers an example like slack, Facebook, Snapchat and Tinder where a simple insight into customer needs stablish entry and rapid success despite established network effect."

On the other hand, those who are in the favour of incorporating this doctrine argue on the ground that big data provides for essential strategic inputs and hence sustainably framing the business model which in turn can be the mantra for the success of failure of a start-up.

Collusive practices

This is one dimension where in the impact of big data on competition law cannot be asserted in its true sense this is particularly because the existing framework of antitrust laws is neither streamlined not sufficient. To understand this let us consider a very layman analogy, suppose a fisherman goes to the sea to catch a fish but the size of fish is smaller than the loops in the net, despite every effort to catch the fish the fisherman comes back home empty-handed.

Was it a flaw on the path of fishermen or it was the fishing net that was to be blamed?

Almost similar is the situation faced by competition law enforcement agencies wherein they try to catch the fish but the existing framework in itself is not that abreast so as to have catch hold of the big fish. Big data alone is not enough to produce an impact that is big enough to affect market competition rather it is a group of technologies ranging from artificial intelligence, machine learning, data analysis etc. which when acts in concert with each other produces some significant impact.

Digital cartel

The concept of digital cartelisation came into existence before long back when the big data wasn't big enough. The earliest case of digital capitalisation which is quite famous is the US airline case where in it was accused of using consumer database to make repeated tariff announcement and fast price change. The case ended after three use of extensive investigation when the department of justice of The United States of America and the US airlines came to a legal settlement. Due to which no legal president was set.

Consumer protection

According to a survey conducted by an US based Pew Research Centre in 2014, "91% of the adults in the survey agree or strongly agree that consumers have lost control over how personal information is collected in use by the companies".[9]

- *Inappropriate use of the word free*

In the United States of America, the Free Trade Commission has issued guidelines concerning use of the word *free* wherein, if the enterprise is engaging in any non-monetary transaction with the customer, it won't be allowed to use the word free simply because of the non-monetary transaction taking place. For instance, it a particular sale purchase agreement so that in order to get a particular product free of monetary cost one must fill in a questionnaire providing answers to certain personal questions. This guideline does not apply to zero-price internet products.[10]

Pro-competitive impacts of big data

There may be many competitions related issue associated with the big data and the technologies it relies upon but no one can deny the fact that big data is the future and its needed in almost every walk of life not only for sustenance of human race but also for its betterment. As big data is often criticized for facilitating targeted delivery of content but it a few people talk about its positive aspects when it comes to a social welfare scheme of government.[11] Big data can not only help in proper delivery of welfare good but at the same time help in stabilizing the imbalanced calculus of equity. The present world is filled up with examples where ii an innovative start-up, was able to establish itself in the market which is already flooded with a plethora of players only on the basis of proper collection of data suitably analysing the same.[12] Big data not only facilitates innovation but also provide an extra room for suitably developing new products keeping in view the choice and preferences of

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9 Max N. Helveston, Consumer Protection in the Age of Big Data, 93 Washington University Law Review 859 (2016).

10 I*d.*

11 D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 Geo. Mason L. Rev. 1129 (2016), *available at* https://scholarship.law.ufl.edu/facultypub/803/.

12 Supra note 7.

the customer thereby saving the additional cost that could have been incurred for research and development of the same. The proponents of pro-competitive impacts of big data often argue that it is not the big data that poses serious threat to competition law enforcement agencies rather it is the lack of efficiency of competition law and enforcement agencies that are unable to project or tap any anti-competitive practices which are happening due to extensive technological development and data reliance.[13] The pro-competitive impacts of big data can be summarised under the following heads:

- *Helps in cutting cost*

One of the most important advantages of big data is that it helps in cost reduction. This reduction in cost is reflected in the final pricing of the commodity or services as the case may be. Thereby percolating down the benefit to the and customer. This further increases the competition in the market as more and more competitors focus on improving the quality at the same time controlling the price of the commodity. Another aspect of this is that is likely to increase the purchasing power parity of the customer which in turn would reflect in the gross domestic production or GDP as its popularly called. Thereby significantly contributing towards economic growth of the country.

- *Increasing efficiency*

As the efficiency and the foreseeability of human is limited due to which many times decisions are taken which leads to heavy losses to the overall organisation. Big data supplements machines that runs on artificial intelligence in complimenting the human decision making by providing for a data analysis which is based on a number of factors which are beyond normal human capability of processing information. For example, if you are travelling towards the airport and use Google map to estimate the approximate time of arrival, the chances of you getting delayed and missing the flight it would significantly decrease thereby helping in saving, time money and other business opportunities.

- *Improves pricing*

No one can deny the fact that even in the most developed economies across the globe income disparity is a reality. Due to this simple factor not, everyone is in the position of having same access two essential goods and services. Big data helps in customisation of the product to cater the needs of each and every state of the society. To be in opposition to better appreciate this fact let us consider the example of insurance companies, medical insurance is nothing short of an essential commodity in today's world but not each and every individual has the same potential when it comes to the payment of monthly premium. To overcome this huddle insurance companies come up with individual specific plans which not only helps in improving the quality of service but also increase the customer base.[14]

- *Increasing competitiveness*

In the earlier part of the article the focus was on the anti-competitive impact of the

13 I*d.*

14 Supra note 2.

big data but as it goes by the general senses, there are two sides to a coin and big data is no exception to it. The current antitrust jurisprudence is filled with a number of cases where in a new entrant in the market utilised the limited amount of data it had about the consumer in order to innovate and soon became a well-established player in the market. Thus, big data even acts as a tool which helps small businesses in anchoring safely in the market which is already filled with huge sized dominant players.

➢ *Focus on local preferences*

Big data allows the enterprises zoom into local customer preferences and come out with customised products to be better able to cater the needs of the local market. In this sequence the example of McDonald's coming up with products like Mc Aloo Tikki and eliminating beef options from the Indian menu seems to be perfect. It is all possible because big data facilitates the enterprises to look into local customs and traditions while launching or for that matter even developing the product.

➢ *Increases sales and loyalty*

The obvious effect of big data analytics is that it helps in reducing the chances of taking any commercially unviable decisions, thereby decreasing the chances of any potential loss. Since with the help of big data it becomes very easy for the enterprises to develop tailored products to harmonize the supply and demand side of the market this helps in achieving the loyalty of the customers as they are able to get personalized service.

➢ *Hiring the right employees* [15]

This is perhaps not the very broad way of looking at the competitive impacts of big data but this is a significant factor. There are instances where in the recruiting companies scan the candidates resume and the LinkedIn profile to match the keywords that are mentioned in the job description. This helps the enterprise in recruiting the best of the potential by having a better insight about the candidate not only on how his experience looks on the paper but also in the field.

CONCLUSION

It remains unclear as to how the antitrust enforcing agencies plan to go about with the above-mentioned issues. But there can be no denial to the fact that and immediate action starting write from stream line in the existing framework and updating it to accommodate the advancement that are taking place every day both in the terms of technology as well as alteration of traditional definitions. Assistant Attorney General Bill Baer in the poster price fixation case (by sellers on Amazon Marketplace) made a remake that,

"we will not tolerate anti-competitive conduct whether it occurs in a smoke-filled room or over the internet using complex price algorithms".

15 Chaitanya Pattapu, Why Use Big Data In Recruitment Process, Telview (May 1, 2020, 3:00PM), https://blog.talview.com/big-data-analytics-in-hiring-changing-tradition.

This remark has again redirected the focus of the world community on the implication of big data on competition law enforcement.

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Role of Media in Democratic Society: An Analysis

*Mr. Rishi Bhargava**

ABSTRACT

The media plays a crucial role in a democratic system and is considered the cornerstone of democracy. Without the media, democracy would be an empty exercise, incapable of fulfilling its purpose. Eliminating the media would prevent democracy from meeting the expectations of the people, rendering it meaningless. Therefore, the media is indispensable to a true democracy and its significance in a democratic setup cannot be underestimated. Its primary responsibility is to present only the unvarnished truth to society, without any bias or prejudice. The media should only fear God[1], and not manipulate facts. The media's role in a democratic society has multiple dimensions, and this research paper attempts to examine and analyze them.

Keywords: *Media, Justice, Democracy, Society, Role.*

INTRODUCTION

The media is an indispensable component of democracy, serving as its backbone by providing unbiased information and empowering the public through knowledge. The media covers a wide range of topics such as political affairs, cultural events, global occurrences, criminal activities, government policies, sports, entertainment, environment, science, technology, and development. No aspect of life is left untouched by the media. In a democratic system, the media plays a crucial and complex role as it informs voters who then form their opinions and choose their government based on the information presented by the media.

The people also make up their mind as to which people the power should be vested in. The media identifies the problems in a society & serve as a medium for deliberation. The media is also considered as a watchdog and is relied upon for uncovering errors and wrongdoings by those who are in power. It is therefore a reasonable assumption that the media adheres to certain objective, fair and ethical standards while performing

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1 Altheide DL, Michalowski RS (1999) Fear in the News: A Discourse of Control. The Sociological Quarterly 49: 475-503

their functions. It is on this assumption that the views projected by the media are true, and objective that the democracy thrives upon.

The media plays a crucial role in fostering a democratic culture that goes beyond the political system and becomes deeply ingrained in the public consciousness over time. The media serves as a platform for people to share their experiences, learn, and stay informed about the events occurring in their society. Through constructive political debates hosted by the media, multiple options and policies are presented, which can lead to development. Additionally, the media operates in a transparent public space, and therefore has a greater impact compared to a person who makes a statement or decision in private. The media to function effectively and efficiently, it must be objective. So also the journalist should necessarily be an impartial and unbiased observer who is not engaged or connected in any way with events or the issues; but merely records them impartially. This requisite can be considered as the most indispensible founding stone for a healthy media industry to exist in the democracy[2].

ROLE OF MEDIA IN DEMOCRATIC SOCIETY

"The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power; because they control the minds of the masses."

—Malcolm X

The critical role that media plays in a democratic society. Without a free and independent media, democracy cannot exist in its true form. The media acts as a watchdog, ensuring transparency and accountability of the government and other powerful institutions in society.

One of the fundamental functions of the media in a democratic society is to present the truth to the public. The media should report facts without any bias or influence from external sources. This is essential for ensuring that citizens are well-informed and can make informed decisions based on accurate information.

Another important dimension of the media's role in a democratic society is its ability to act as a forum for public debate and discussion. The media provides a platform for diverse viewpoints and perspectives to be heard, allowing citizens to engage in meaningful dialogue and exchange of ideas.

Additionally, the media plays a crucial role in promoting transparency and accountability in government and other institutions. Through investigative journalism and reporting, the media can expose corruption, abuse of power, and other forms of wrongdoing, thereby holding those in power accountable.

Overall, the media's role in a democratic society is multifaceted and essential. It ensures that citizens are informed, engaged, and able to hold those in power accountable. Without a free and independent media, democracy cannot exist in its true form, and the freedoms and rights of citizens would be at risk.

2 Sivakumar S. Halsbury s Law Monthly, February 2022.

THE ROLE OF THE MEDIA AS AN UNBIASED INFORMER.

For a democracy to function effectively in any nation, it is imperative that the media is granted freedom to operate without constraints. The media should have the ability to report freely, comment fairly, and when necessary, criticize without fear in the interest of the public.

According to Hohfeld every right has a corresponding duty. There can be no right which is not correlated with the corresponding duty. Similarly the media is no exception, and has rights as well as duties. All the time only the rights and powers of the media are focused upon; however there are very duties imposed upon the media. The duty is to act as an informer of the society. This is a very demanding, taxing, and a very intricate duty imposed upon the media. It is on this information that the public formulates the public opinion or the crosscurrent of the public opinion flows. On the other hand it is very important that media stick to their duty, because if they fail in their duty the democracy will suffer heavily. The failure of the media to fulfill its duty with autonomy in a democratic nation may lead politicians to act in a manner resembling or even exceeding that of a dictator, as accurately stated by Benito Mussolini, "Democracy is a kingless regime infested by many kings who are sometimes more exclusive, tyrannical and destructive than one, if he be a tyrant".[3] The fear of being exposed will keep the politicians on their toes and they will be accountable to some extent. This will prevent them from being rash, corrupt, as they will realize that if they behave in such way their days in powers will be numbered. So the media while playing a role of an informant also acts as a deterrent check on the tyrannical or the corrupt aspirations of the politicians or any other public figure.

The primary responsibility of the press is to provide impartial information to the public. In fulfilling its role, the media must ensure that the information it disseminates is unbiased. It is crucial to understand that the press's duty is not just to report but to report without bias. Biased reporting can undermine the essence of democracy, while unbiased reporting can facilitate its growth and success.

It therefore becomes essential to understand the concept of the term unbiased. Any information will be deemed to be unbiased only if it fulfils the following criteria:

(i) Information should be true, and it should be verified to be true.

True information means that the facts or the interpretation of those facts are in existence. Any facts or the interpretation thereof which does not exist is said to be untrue or false. If the information is untrue or false then it is liable for two consequences. One, that the agency of media who gives false information will be caught in a network of libel or slander. The other grave consequence which is more dangerous is that the foundations of the democracy will be shaken as the public will not be able to know and understand the real facts. The other aspect of this criterion is that the information should not only be true but should pass the test of verification. That means the

3 Wåhlberg Anders, Sjöberg L (2000) Risk perception and the media. Journal of RiskResearch 3: 31-50.

information which the media passes on to the public should be supported by evidence. The media cannot project the information based upon some vague assumption or wishful thinking.

(ii) The information should be projected in public interest.

The very cause for the media to survive is to protect the public interest. Therefore, any information gathered, collected, disseminated, or broadcasted by the media should serve the public interest. The media's existence and function revolve solely around the protection of public interest, and it should refrain from divulging information that serves its self-interest. Regardless of the news's nature, the media should present it in a manner that benefits the public. When reporting sensational news, the media should ensure that it does not disturb peace and tranquility. It is crucial for the media to recognize its crucial role as an informant and prioritize safeguarding public interest at all times. The media's purpose and survival depend solely on securing, promoting, and protecting public interest.

(iii) Information to be imparted in good faith that is without any malice

This standard is a supplementary and complementary aspect of public interest. As an informant, the media has a duty to impart information in good faith. Any malicious intent must not taint the dissemination of information. The media must not communicate any news that is rooted in jealousy or hatred. Neither should it report on a matter with spiteful intentions, nor cover news recklessly solely to gain popularity. The various media channels should refrain from engaging in unethical and unjust competition to be the first to report the news. This behavior may lead to providing an incorrect version of the issue, causing harm.

(iv) Reporting the incidence as it occurs without coloring it with one's own opinion.

The media is only an agency to report the incidences, issues, or events; so the media should report the matter only as it occurs. The media should report the bare fact without giving its own view, allowing the viewers to formulate their own independent views. The media enjoys such a capricious position that sometimes it only changes the angle of the news whereby the whole focus of the news changes. This aspect of either highlighting or to downplay any issue should be avoided by the media. It should refrain from imparting its own opinions or ideas when reporting the news. The media's responsibility is solely to present the facts and not to act as a judge, passing judgment on the issue at hand. Unfortunately, past experiences demonstrate that the media has a tendency to present news in a way that aligns with its preferred public perception.

(v) To impart the news impartially.

This aspect is the most important ingredient of free media. Free media means that the media should report the matter without any favoritism. It should not happen

that the news reporters report the news for some consideration. In the cases where the news which is actually an advertisement, but is disguised as a news item, is misleading the public who believes it to be news; is virtually misguiding the public. Hence the news agency or media who adhere to such practice will not be considered as a free media, irrespective of the fact that there was no external compulsion on it to do so. If the media continues to project news based on the considerations it receives, the democratic spirit will crumble. In this scenario, the media would only report on news that aligns with the preferences of the wealthy individuals. As a result, people who rely on the media as a source of information may begin to act in accordance with these biased reports, causing themselves to miss out on the benefits of true democracy.

The media is only an instrument of imparting the news; so it should impart the news in an unbiased manner. It should not tilt the balance in the favour of any one; on the contrary it should only inform the public of any issue or event. The media should not take any side or express it own opinion in front of the public, otherwise the public will tend to feel that the view of the media, is rational and correct. If this happens, then the media will not be an agency of imparting information, but will perform the role of a dictator. As there is no place of a dictator in a democracy, it will collapse. The role of the media is only to give information and not to assess it. But unfortunately the media generally expresses its opinion or evaluates the situation. In the recent case of JNLU students protested with anti-India slogans; and one of the students was arrested by the police. Some Media Channels trying to project his innocence stated that the arrested student was not shouting any anti India slogans, conveniently forgetting that he was the very part of the same protest where the anti-India slogans were being given. This is just an instance to show how the media is capable of projecting the news tainted by its own opinion. One has to take a note of the fact that the media is not empowered with power to adjudicate; but its role is only to impart information in an unbiased manner.

MEDIA'S ROLE AS AN EDUCATOR

In India, the media has an increased responsibility due to the combination of illiteracy and the public's reliance on media. Illiterate individuals may blindly follow old traditions and beliefs, which can lead to societal injustice and harm. For instance, the belief that a son is a blessing while a daughter is a curse has led to female foeticide, which has significantly impacted the male-female ratio. The media launched a campaign to combat this practice, emphasizing that a girl is no less valuable than a boy. The media campaign played a crucial role in shifting the public's perception of a girl child, ultimately reducing instances of violence against them.

The media performs vital role in educating the masses in the following ways:

(i) Education through information.

Lack of information results into ignorance and securing or getting information promotes education. This means that information is very vital for education; and that many a

times education depends upon information. The most valuable role of the media is to educate the public through information. The media serves as an important source of education for the masses, especially for the underdeveloped or illiterate sections of society. The media provides various types of information that impart education in some way or another. For instance, when the media provides exit poll analysis or reports on the budget bill, it educates the public on matters such as the formation of the government or financial issues. Other channels of media, such as radio and press, also play a significant role in educating the masses. While the primary function of media is to provide information, the secondary function is to educate the public. This is particularly important for those who are remotely located or lack access to traditional forms of education.

(ii) Bring awareness regarding individual's right.

The media enables the individuals to know their rights. India is not very developed in the educational aspect, because of which many people are unaware of their rights. It is the media who makes the people aware of their rights. The media is responsible for such a high percentage of voting, as the people were made aware of the importance of the constitutional right to vote. The media is also responsible for enlightening the weaker sections about their rights, like the women, children and the senior citizens. Media has played a tremendous role in the empowerment of women, and uplifting the status of them. The children are also made aware of their rights by the media.

(iii) By way of advertisements

One can say that the era of advertisements prevails today. Advertisements also promote education regarding the product, commodity etc, however education through commercial advertisement is limited. Apart from the commercial advertisements there are certain advertisements such as jaago grahak jaago, in respect of consumer courts or the advertisements bringing out the ill effects of vices such as smoking or drinking. Such advertisements play a meaningful role in educating the masses.

It is through media that people become aware of so many aspects of life of which they are normally ignorant.

Media's role as a mentor.

In a country like India the media is expected to play the role of a mentor. The job of the mentor is to educate the ward, and make him independent. The mentor should bring the ward to such a state from where the ward can take a decision on his own. Similarly the media plays a role of a mentor. It should only uplift the status of the individual and make him independent of formulating his own opinion. The media should not put its opinion in the mouth of the public. In other words, the media must not make the people believe what it wants the people to believe, but should make the individual capable to think independently. Only when a person will start thinking independently, it can be said that a society is enjoying democracy; otherwise

the democracy will be a farce. For a mentor it is very easy to influence the ward or psyche the ward and make the ward believe that his mentor is right. But a good mentor never does like that. He makes the ward capable of thinking independently. The role of the media shall also be the same. The media should present all the true facts and it should throw light on all the aspects equally. After doing so it should give equal representation to all sides and put forth all the merits and demerits of the issue; and only then allowing the citizens to make their choices independently.

The media being the mentor of the masses should emphasize on the following aspects;

i. Foster the spirit of brotherhood among the masses

ii. Develop and encourage the spirit of religious tolerance among the masses.

iii. Inculcate in the masses the spirit of nationalism.

iv. Encourage the people to part with the old beliefs and superstitions.

v. Make the youth aware of political, scientific developments which are happening around.

The media is a powerful instrument of influencing the masses, and hence is considered to be an influential mentor. But the media has to take care that while mentoring its wards; it should not distract them from their main objectives of development. The role of the mentor is difficult as well as delicate.

Democracy is meaningless without a free, neutral and active media.[4] So the media carries with it a very huge responsibility in a democratic setup which it has to fulfil very carefully without any bias toward anyone by bringing out the real facts before the public.[5]

ROLE OF THE MEDIA AS A GUARDIAN OF THE SOCIETY

In a democracy, the media serves as a protector of public interest. Those in power are prone to engaging in corrupt activities, as famously stated by Lord Acton, "Power corrupts and absolute power corrupts absolutely." For the media to remain independent, it must be willing to disagree with the government when it believes that the government is acting in its own self-interest instead of serving the public. Under these circumstances the media, instead of just singing high praises of the government, should unflinchingly oppose the arbitrary action of the Government.[6]

Publicity is the best antidote for the arbitrary rule. This fact was valued even in the ancient societies in the 17th century. Many renowned philosophers have expressed

4 Zillmann D (2002) Exemplification Theory of Media Influence. In: Bryant J, Zillmann D (eds) Media Effects: Advances in Theory and Research. 2'nd edition. Lawrence Erlbaum, Mahwah, New Jersey

5 Dr. Bharti Das, Importance of Independent Media in Democracy, Scholar s Voice: A New Way ofThinking Vol. 2, No. 1, January-June 2011, 43-49.

6 Gunther R, Mughan A (eds) (2000) Democracy and the Media: A Comparative Perspective. Cambridge University Press

that publicity and openness is the best way to protect the community against the tyrannical and arbitrary rule. The excessive use of the unwarranted or oppressive power can be controlled by exposing it to the public. Montesquieu the famous French political philosopher has opined that the abuse or misuse of power can be deterred by publicity. It is inherent in human nature that a human being likes to hear only praises; and does not like it when he is criticized for his actions. Not only this, but criticism acts as a check on his wrong and corrupt actions. As far as the public officers are concerned, expositions of their actions bring the public s discontentment which acts as a check on their arbitrary actions. In the role of the publication of the government or its officer s errors[7] the press plays an important role.

Now days the significance of the press has been widely acknowledged and in almost all societies the press has been commonly referred to as the "Fourth Estate." The press and the media have become extremely important in the democratic set up. The media provides the check and balance without which government cannot effectively function.

The media acts as a guardian of the society as it protects the rights of the people. Media through information and education makes the individual aware of his rights. In the cases where the individual s rights or liberties are infringed the media highlights such cases and hence the individual is secured of his rights and liberties. Actually the task of protecting and securing the individuals rights and liberties is done by the Indian Judiciary. However in the cases where the individual s right is infringed and such infringement is projected by the media; this publication acts as a deterrent check on the authorities who have attempted to infringe the right and thus it is stated that the media guards the individual s right. The judiciary acts as a guardian only in those cases which come before the court. But in the case of media this limitation is not applicable. On the other hand the media can operate sue motto and can expose the infringement of a right or liberty of any individual in the society. It does not wait like the courts for the individual to approach it for the publication of the infringement of that right.

In the classic case of Nirbhaya, it was only because of the media s efforts, that her right to file a First Information Report was secured. When that unfortunate incidence happened, and both the victims were thrown out of the bus, an attempt was made to file First Information Report; however the police refused to file the report. However when the media picked up the story and secured the support of the people not only from Delhi, the police who refused to file the First Information Report, now filed the same. This incidence and many others of such nature prove the fact that because of the media s vigilance it acts a guardian of the society. The role of the media to act as a guardian of the individual s right helps the society in attaining justice.

7 Stephen Holmes, "Liberal constraints on private power?" in Judith Lichtenberg (ed), Democracy and the Mass Media," Cambridge: Cambridge University Press, 1991. pp. 21-65.

A vigilant media will analyse the government s action, organize debates, gather the opinion of the people, and communicate the suggestions of the people to the government.

There is no doubt that the media has a very responsible role to play in a democratic system.

CONCLUSION

Democracy cannot prevail without either media or judiciary, as both organs are indispensible for proper functioning. The judiciary should ensure that all the legal rights of the accused or convict should be protected. Our judiciary ensured this recently when it heard Kasab s plea for mercy even in the night to ensure that any of his right is not prejudiced.

The media should also take the inspiration from judiciary s sense of duty and implement the following aspects in criminal trials to avoid any prejudice to any of the parties involved in the case

i. The media should report the facts as they exist, without coloring or twisting or turning them.

ii. It should confine to reporting of the facts only and should not project any opinion regarding the facts.

iii. It should not to try to create sensation by showing the concerned clips repeatedly.

iv. It should not to make any imputation which may in any way tarnish the image of the judiciary.

v. It should ensure that while reporting the media is not violating any of the right of fair trial of the accused.

If the media strictly adheres to the above guidelines, then the media will play a pivotal role in enforcing the democracy in the true sense.

A Critical Analysis of Arbitration as a Solution to Judicial Pendency

Mr. Sunil Kumar & Dr. Aman Malik***

ABSTRACT

One of the most overworked courts in the world right now is the one in India. The Minister of Law was questioned about the total number of cases pending before the Supreme Court, High courts, District, and all subordinate courts during the "Question Hour" of the 2020 Winter Session of Lok Sabha (House of People). It is astonishing to learn that there are currently 40 million cases pending in all of the aforementioned courts. Since the Independence, some of these matters have been ongoing before the courts. Justice delayed is justice denied, according to the well-known legal axiom that has made Indian courts infamous. The government has made numerous attempts to improve this condition but to no avail. The poor state of the Indian courts has caused people to feel hopeless and to lose faith in the justice system of the nation. Arbitration stands out as being the finest method for taking the initial step in the right manner among the many approaches that may help solve the issue. In order to start "Mission Unburden," this article analyses the problem and offers a practical plan for using arbitration techniques.

Keywords: *Arbitration, Judicial Pendency, Alternate Dispute Resolution, Redressal.*

INTRODUCTION

Based on its strong judicial activism, efficient application of the principle of separation of powers, and propensity for never disappointing the populace on critical social issues, the Supreme Court of India holds the title of being the strongest court in the world. But if one tries to look more closely, it is far from flawless. The Supreme Court and all of its lower courts are institutions that are severely harmed by corruption, convoluted and duplicated procedures, a lack of transparency, and, worst of all, a massive backlog of unresolved cases. The biggest threat to the operation of a court system is the backlog of cases since it prevents any court from rendering decisions in a timely manner. People lose faith in the nation and its values if justice isn't delivered when it's needed. A strong democracy ultimately depends on the trust

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and confidence of the populace, and if those are undermined, serious issues will arise for the future of the nation. Before developing a practical solution model, it is important to properly assess the depth of the problem at hand.

REASONS FOR PENDENCY

The main issues causing the lag in the resolution of legal matters are listed below.

(A) Judicial Officers

In India, a Supreme Court judge hears 2600 cases per year on average, compared to 65–80 cases annually for judges in the United States or Canada.[1] Judges at all levels continue to use the same standard number of disposals. Therefore, it is not possible to challenge the judges' functioning or performance in regard to case resolution. There are clear consequences when there is one judge for every 72,441[2] people. Since more than ten years ago, the government has promised to increase the number of courts, but thus far, no action has been taken. The judicial system is forced to make do with the existing sanctioned strength because it is not possible to pay for the ideal number of judges that are needed. However, the system has also fallen short of authorised strength. Therefore, the open positions in the judiciary also add to the backlog of cases.

(B) Complex structure of Rules and Procedures

The longest handwritten constitution of any sovereign state in the world is one of the most notable characteristics of the Indian Constitution. There are 22 parts, 395 articles, and 8 schedules in it.[3] Any legislation drafted after the Indian Constitution is influenced by it. Like every other act, regulation, or order made in India, it is an extremely long and intricate document despite being beautifully written. The country's procedural laws, the Civil Procedure Code of 1908 and the Criminal Procedure Code of 1973, are antiquated laws with very little flexibility and effectiveness. In order to boost their billable hours and profit from the lengthy nature of the cases, practicing attorneys frequently conspire to secure an additional date during the court hearing. The courts are rife with corruption, from high-profile judges to the law clerks who handle confidential material.

1 Ankit Panda, *30 Million Pending Cases: Fixing India's Overburdened Judiciary*, The Diplomat https://thediplomat.com/2016/04/30-million-pending-cases-fixing-indias-overburdened-judiciary/ (last visited Sep 23, 2022).

2 Aakanksha Mishra, *The Inevitability Of Reforming Oral Arguments In Our Courts*, Daksh (2021), https://www.dakshindia.org/the-inevitability-of-reforming-oral-arguments-in-our-courts/ (last visited Sep 23, 2022).

3 Constitution of India: List of All Articles (1-395) and Parts (1-22), Clear IAS (2014), https://www.clearias.com/constitution-of-india/ (last visited Sep 23, 2022).

(C) Adjournments for unnecessary reasons

The ongoing delays in the cases at hand are a significant contributing factor to the case backlog. The right of Indian citizens to prompt justice is recognised as a fundamental right in the constitution. The Supreme Court of the nation has established a number of precedents in the Criminal jurisprudence to ensure that inmates awaiting trial had their cases resolved quickly.[4] It is noteworthy that the Supreme Court's novel interpretation of Article 21[5] in Hussainara Khatoon v. Home Secretary, State of Bihar[6] gave rise to the writ of Habeas Corpus.This does not guarantee that a decision will be rendered on time, only that the accused's trial will begin. There are no conclusive rulings or legislation regarding expedited trials in civil cases. There are deadlines in the Civil Procedure Code of 1908[7] for serving summonses and submitting written statements, but there are no deadlines set to guarantee that the case would be decided in a reasonable amount of time.

STATISTICS RELATING TO THE PENDENCY

All of the aforementioned subpoints discuss the primary causes of the case backlog. According to the accompanying line graph, from 2002 to 2016, there were more cases pending in the High courts and Subordinate courts, respectively.[8]

There were 2,000,000 pending cases in the High courts and 10,000 000 in the Subordinate courts in 2002. The number of cases pending in the High Courts increased by about 94 percent in 2015, and the number of pending cases in the Subordinate Courts increased by about 157 percent. Similarly, from 2015 to 2020, there was a roughly 33 percent increase in the number of High Court cases that were pending and a roughly 35% increase in cases pending in Subordinate Courts. According to the aforementioned figures, the rate of cases remaining pending in High Courts and Subordinate Courts, respectively, grew by 158 percent and 245 percent between 2002 and 2020.

PSYCHOLOGICAL EFFECT OF THE PENDENCY

When there is a disagreement, Indians avoid going to court. The prevailing consensus is that avoiding the courts is a preferable strategy for obtaining justice. Everyone is aware of corruption, politics, and justice system delays, so alternative methods are always preferred. A non-profit organisation issued a report in 2017 that identified several worrying points. Only 10% of Indians, it was claimed, were likely to seek legal assistance. The three main causes were pricey legal action, difficult processes, and excessive delays.[9] The social well-being of people suffers from a lack of belief in

4 Machander v State of Hyderabad 1955 AIR 792 1955 SCR (2) 524,

5 INDIA CONST. Art. 21.

6 Hussainara Khatoon v. Home Secretary, State of Bihar, 1979 AIR 1369, 1979 SCR (3) 532.

7 The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India).

8 Supra Note 1.

9 Aarefa Johari, *The Indian justice system is too slow, too complex and too costly, says new study*, SCROLL.IN, https://scroll.in/article/866158/the-indian-justice-system-is-too-slow-too-complex-and-too-costly-says-new-study (last visited Sep 23, 2022).

fairness. The protection the resulting civilization offered was the very reason why people first began to colonise. In the current meaning, such protection is requested from the courts when an individual or public right is harmed. Citizens will lose faith in the state itself if the courts itself fail to uphold justice. According to the precedent set above, if there are 40 million cases outstanding before the courts, the judicial system is at risk of imploding under the weight of its workload.[10] The time for quick fixes to provide respite or at the very least buy some time for the legal system to reclaim its position and pace is when we are one step away from being in a state of civil war.

THE SOLUTION

By creating several committees and implementing various strategies to help address the issue of pendency, there have been numerous attempts to improve the state of the Indian courts. The government established a panel in 2000, led by Justice V.S. Malimath, a former chief justice of Kerala and Karnataka,[11] that made several recommendations for reforms, including increasing the number of judges in all courts, timestamping the dates that arguments concluded and judgments were issued, and implementing the "Arrears Eradication" scheme. With the launch of the Justice App, a smartphone application created particularly for judges across the nation to assist them track ongoing cases, there have been significant technological breakthroughs. In order to facilitate quicker resolution, the procedural norms have occasionally been altered and the strength of the judges has occasionally increased. Despite all of these changes after 2000, the real problem has not been addressed. We must make sure that a solid legal system is operating concurrently with this issue's resolution. Such a complicated legal issue can be solved by applying the severability theory. Arbitration is the most appropriate option when seeking for a quick, simple, yet efficient approach to settle disputes. In nations like Canada and the USA, an arbitration mechanism is used to settle any civil disputes with a value under a certain threshold. This has been put in place to guarantee a quick and affordable resolution, which lessens the pressure on the courts. By applying this technique, a portion of the issue can be cut off and fixed without impacting the functioning of the system as a whole. This will prove to be a sound initial move, and it will result in a paradigm shift in the way situations are handled.

10 How to Start Resolving the Indian Judiciary's Long-Running Case Backlog - Carnegie Endowment for International Peace, https://carnegieendowment.org/2021/09/09/how-to-start-resolving-indian-judiciary-s-long-running-case-backlog-pub-85296 (last visited Sep 23, 2022).

11 The Malimath Committee's recommendations on reforms in the criminal justice system in 20 points - The Hindu, https://www.thehindu.com/news/national/the-malimath-committees-recommendations-on-reforms-in-the-criminal-justice-system-in-20-points/article61493071.ece (last visited Sep 23, 2022).

(A) Arbitration – The History

The Panchayat was given control of India's judicial system during the Vedic era. The town's oldest residents made up the Panchayat, which met once a week to handle topics of public concern. In the tribal region of Rangpur, Lok Adalat was founded by Shri. Harivallabh Parikh, one of the prominent Gandhian social workers. Lok Adalats were developed based on the ADR and panchayati concepts. More than 50,000 cases have been successfully resolved by the Lok Adalat system since its inception.[12] Due to this, it became legally recognised in 1987 under the Legal Services Authorities Act.[13] Under the Land Acquisition Act, Andra Pradesh's Kurnool and Mahboobnagar districts acquired millions of acres of land in 117 villages in 1974. The building of a hydroelectric plant close to these villages resulted in the displacement of almost 40,000 residents. Before their cases were finally resolved through Lok Adalats, they had been lingering for ten years. As a result, Indian citizens have always turned to ADR techniques because they developed alongside the society that relied on them to address its legal problems. The nation encourages resolution through a number of ADR clauses, including arbitration, negotiation, consultation, and mediation. With the arrival of the British Empire, arbitration began to develop in India. The Model Law and the UNCITRAL Arbitration Rules served as the foundation for the Arbitration Act of 1966, which has since undergone various revisions.

(B) Arbitration: History in India

India consistently encourages both domestic and international trade and investment. In order to facilitate its commercial implementation, ongoing efforts are made to enhance arbitration in the nation. The statute has recently undergone changes in an effort to set time restrictions, reduce court intervention, and institute a more reasonable cost regime. Insolvency, family, and criminal cases are not covered by the Arbitration Act, nor are conflicts where tribunals have been established. A contract or agreement relating to the commercial dispute that will be submitted to arbitration must contain an arbitration provision. The basis for the court's ability to interfere in the proceedings is a list of issues. Previously, if the parties didn't agree on arbitrators, the court was required to step in and do so. The most recent modification establishes the Arbitration Council of India, an independent body made up primarily of individuals appointed by the federal government. This Council develops policies and guidelines for the development, operation, and maintenance of uniform professional standards in arbitration. It also rates arbitral institutions and accredits arbitrators. The Arbitration

12 The Economic Times (May 15, 2016), "National Lok Adalat settles over 50,000 pending cases", retrieved fromhttps://economictimes.indiatimes.com/news/politics-and-nation/national-lok-adalat-settles-over-50000-pending-cases/articleshow/52272930.cms?from=mdr

13 Pursuant to the constitutional mandate in Article 39-A[xviii] of the Constitution of India the Legal service Authorities Act was enacted to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society and to organize Lok Adalats to secure that the operation of the legal system promotes justice on the basis of equal opportunity.

Act should be amended by legislation to broaden the authority of the Arbitration Council and eliminate the participation of the courts in arbitral procedures. This would assure the effectiveness of arbitration in India and relieve the courts of the load of handling arbitration disputes.

PLAN FOR 'MISSION UNBURDEN'

Enacting laws mandating that civil disputes up to a specified financial threshold be sent to mandatory arbitration and that the arbitration council be given control over the resolution of all such disputes would be the first step in resolving the issue.

As a mandate, all new cases must be submitted to the Arbitration Council. Around 14 million civil cases are currently pending in the nation's High courts and Civil courts. Whichever of these passes, the Arbitration Council should be informed of the requirements for the new Arbitration policy. The Supreme Court has accepted civil disputes because they must either have a significant monetary value or contest the legality of a certain law's substantive interpretation. Therefore, arbitration cannot be used in these instances.

An efficient plan that ensures simple transfer and prompt disposal should be developed in order to effectuate such a paradigm change. Under the presumption that the suggested law has already been passed, the suggested course of action is as follows.

(A) Step-I

Prepare

1. The Arbitration Council should hire the necessary number of experts to prevent understaffing and inefficiency. This may include legal professionals, IT professionals, managers, law clerks, etc.
2. There should be an online form for filing cases with the Arbitration council. A ready arbitration agreement should be used in conjunction with this form.
3. All courts should get instructions from the Arbitration Council on how to set up the appropriate facilities.
4. It should be mandated that each court appoint a committee to compile a list of all active civil cases and identify those that come under the monetary guidelines.
5. The required number of arbitrators and a list of available arbitrators should be forwarded to the Arbitration Council once it is known how many cases will be submitted for arbitration.
6. After carefully reviewing each of these lists, the Arbitration Council should approve them all and declare the courts to be "Mission Unburden-Ready."

(B) Step-II

Announce and Educate

1. Radio, television, emails, texts, and newspapers should all be used to spread

the word about the Mission Unburden plan to individuals all around the nation. The campaign should be simple to understand and advertised in various regional languages.

2. The citizens should be informed of the procedure for handling any upcoming civil cases.
3. All law schools should be instructed to ask their students to organise educational camps and send interns to courts to assist with preparation as part of their legal aid cells.[14]
4. Every court should also have a grievance cell set up to help in cases of disagreements.

(C) Step III

Management of Arbitrable Pending Civil Cases

1. The authorised case lists ought to be organised according to the institution's founding date. It should be set up according to "FIRST IN, FIRST OUT" (Adjudicate the oldest cases first)
2. All cases covered by "Mission Unburden" shall get notices from the courts directing them to register with the arbitration programme on the websites created for it. Links to this website should also be present on all local court websites.
3. Cases that don't register should be told to be thrown out.
4. It should be encouraged that all matters be handled online and within the allotted time frame.

THE WAY FORWARD

If "Mission Unburden" is successful, the number of cases will be reduced by at least 25%. Despite the fact that it doesn't entirely resolve the problem, this will provide the legal system with the required boost. After the Indian courts have produced the desired results, the following actions might be followed to further address the issue.

1. According to data from a review of criminal cases in the nation,[15] traffic and police challans accounted for 38.7% of institutions and 37.4% of all pending cases before the Subordinate Judicial Services in the High Courts under consideration over the past three years. Tribunals established in the nation pursuant to Article 323 B have always demonstrated effective and prompt case resolution. A traffic tribunal may be established by the Legislature under the same clause, which would greatly reduce the load on criminal cases.

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14 No 11, SCHEDULE III of Rules of Legal Education, 2008 issued under The Advocates Act, 1961

15 Rukmini S, *Traffic cases clog lower courts; 1 crore cases pending*, THE HINDU, August 15, 2014, https://www.thehindu.com/news/cities/Delhi/Traffic-cases-clog-lower-courts-1-crore-cases-pending/article60343445.ece (last visited Sep 23, 2022).

2. The operating hours of all Indian courts are 10 a.m. to 5 p.m. Anyone who works in the legal system is aware that judges start their shifts one hour later and finish them one hour earlier. Instead, two shifts—the morning shift and the afternoon shift—could be used for the courts. Schedule the oldest patients for the morning shifts.
3. All around the country, law students are always looking for internships. When it comes to law, experience is the best teacher. Law students are looking for employment, and the courts are constantly swamped with responsibilities. In order to organise and declutter the courts, the courts should develop an internship programme and hire interns.

CONCLUSION

The world's largest democracy is currently in the most difficult situation. It need assistance from its people since it is run by and for the people. The nation is experiencing an unrecognised emergency as a result of political pressures. It can only be fixed if all of its citizens band together, acknowledge the issue, and decide to find a solution. In "Mission Unburden," time is of the essence. Without delay, the task needs to get started. Additionally, the deadlines for each milestone should be set in advance. In order to reduce costs, it is standard practise to hire fewer people, overwork them, micromanage them, and derogate them. To control this, a code of conduct should be made public. All duties should be adequately defined, for instance, a worker should be assigned a certain amount of pending cases to process each day. This will guarantee that no one is overworked and that everything is finished on time. The state has made numerous attempts to assist in the problem-solving process, but its solution is now a requirement and not an option.

Dairy Industry: An Emerging Industry of India & Labour Welfare

Mr. Vikram Pratap & Prof. Dr. Reema Agrawal***

INTRODUCTION

The Indian Dairy Industryis one of the world's largest and fastest growing sectors, and India is the world's second largest producer of Dairy products by volume, producing over 13% of the world's total milk production, and also has the world's largest Dairy Group. The industry plays an important role in the socio-economic development of the country by providing employment opportunities to millions of people, especially in rural areas. It is also an indispensable source of nutrition for the Indian population, especially children, who depend on dairy products for their daily nutritional needs.[1]

The Dairy Industry in India also faces several challenges such as low milk productivity, inadequate infrastructure, and the lack of quality feed and breeding services. However, the government has been taking steps to address these challenges through various initiatives such as the National Dairy Plan and the Rashtriya Gokul Mission.Finally, the Dairy Industry in India is an emerging industry with significant growth potential. However, to ensure sustainable development, the industry needs to address challenges related to labour welfare and provide better working conditions and Social Security benefits to its labourers.

OPERATIONAL DEFINITIONS

- **Dairy Farming –**

Dairy farming is a type of agriculture that is focused on producing milk. This is different from raising animals to produce meat. Milk can be used to produce dairy products, including cheese. Species commonly used are cows, buffalo, goats, sheep and camels.

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1 Ministry of Food Processing Industries Govt. of India Retrieved from (on date 27.03.2023) https://www.mofpi.gov.in/sites/default/files/OpportunitiesinDairySectorinIndia.pdf

• **Dairy Industry–**

The Dairy Industry involves using electrical power and manpower to process raw milk into products such as Milk Powder (SMP), Butter, Cheese, Yogurt, Condensed milk, Ghee, and ice-cream, using processes such as chilling, pasteurization and homogenization. Typical by-products of dairy industries include Buttermilk, Casein, Lactose powder, whey powder and their derivatives.

EMERGING STATUS OF INDIAN DAIRY INDUSTRY

As the country consumes almost all of its milk production, India was neither an active importer nor exporter of Dairy products before the year 2000. However, since the implementation of the Operation Flood program the situation has changed significantly and the import of Dairy products has come down to very small quantities. Since 2001, India has become a net exporter of Dairy products and after 2003 India's Dairy imports have declined while exports have grown rapidly. Yet the country's share in global Dairy trade still remains at a modest level of 0.3 and 0.4 percent for exports and imports, respectively.

This is due to direct consumption of liquid milk by producer households as well as demand for processed Dairy products which has increased with increasing income levels, leaving little Dairysurplus for export. Nevertheless, India continues to export specialty products such as casein for food processing or pharmaceuticals. The Indian Dairy sector is also different from another Dairy producingcountries as India places its emphasis on both cow and buffalo milk. In 2010, the government and the National Dairy Development Board prepared a National Dairy Plan (NDP) that proposes to nearly double India's milk production by 2020. The scheme will strive to increase the country's milk productivity, improve access to quality feed and improve Farmers' access to the organized market These goals will be achieved through activities that focus on increasing cooperative membership and expanding the network of milk collection facilities across India.

Despite its huge production volume, India is facing a supply gap for milk due to the rising demand from the growing middle-class population. Estimates show that Indian Dairy production is growing at a rate of about four percent per year, yet consumer demand is growing at about twice the rate. Apart from rapidly increasing demand for milk and Dairy products, other factors such as increase in cost of animal feed and low availability of Dairy farm labour in rural areas have also increased the cost of production. On the other hand, the strong pressure from the European Union to open up its market as well as the proposed free trade agreement with Australia and New Zealand could also put India's Dairy sector at risk. In order to sustain the growth of your Dairy Industry, several areas need attention. First, the cost of production has to be reduced by increasing the productivity of animals, through improvements in animal health care and breeding facilities and management of Dairy animals. Second, the Indian Dairy Industry needs to further develop proper Dairy production, processing and marketing infrastructure, capable of meeting international quality

requirements. Third, India can focus on buffalo milk-based specialty products, such as mozzarella cheese, to meet the needs of target consumers.

- **Operation Flood Era**[2]

India's Dairy sector witnessed spectacular growth between 1971 and 1996; This period was known as the Operation Flood era. An integrated cooperative program aimed at the development of the Dairy Industry was implemented in three phases, with the National Dairy Development Board designated as the implementing agency by the Government of India. Its main objective was to provide an assured market round the year to rural milk producers and to establish linkages between rural milk production and the urban market through modern technology and professional management. Operation Flood has been considered as the world's largest agricultural development program and has been credited with transforming India into the world's largest milk producer.[3]

The development program that lasted for 26 years eventually helped India emerge as the world's largest milk producer. As part of the programme, around ten million farmers were enrolled as members of around 73000 milk cooperatives.[4] Since the implementation of this programme, milk production has increased from 21 million tonnes in 1970 to about 69 million tonnes in 1996, at a compound growth rate of 4.5 percent. By 1996, milk cooperatives captured a major share of the Indian Dairy market – butter 96%, pasteurized liquid milk over 90%, milk powder 59% and processed cheese 85%. India was perceived as a major threat in the world of Dairy. In retrospect, this was no easy task.

INDUSTRY STRUCTURE, PRODUCTION AND CONSUMPTION

1. Industry Structure[5]

While it is estimated that about 40 to 50 percent of Indian Dairy farmers are employed by the organized sector, about 65 percent of milk consumption (in liquid or processed forms) in India is done on the farm or by the unorganized sector, including local milk vendors, wholesalers, Retailer and Manufacturer himself. Of the total milk distributed by both organized and unorganized sectors combined, about 46 per cent of milk is consumed in liquid form and

2 Tikku, D. "Indian Dairy Sector and the National Dairy Development Board: An Overview." Address made at the International Workshop of Livestock and Livelihoods: Challenges and Opportunities for Asia in the Emerging Market Environment, Anand, India, November 2022.

3 Goswami, B. "Can Indian Dairy Cooperatives Survive in the New Economic Order?" Paper presented at the WTO Public Forum "How Can the WTO Help Harness Globalization", Geneva, Switzerland, October 4-5, 2007. Retrieved from http://www.wto.org/english/forums_e/public_forum2007_e/session11_goswami_e.pdf.

4 Karmakar, K. G., & Banerjee, G. D. "Opportunities and Challenges in the Indian Dairy Industry." Technical Digest, 2021:9, 24-27.

5 Karmakar, K. G., & Banerjee, G. D. "Opportunities and challenges in the Indian Dairy Industry." Technical Digest, 2021:28-29.

the rest is processed into various milk products like butter, curd and milk powder.

India's milk processing industry is small compared to the large amount of raw milk produced every year. About 55 per cent of the milk produced is consumed by the producer family. Of the rest, two-thirds are sold in informal markets and 15-16 percent of the total milk produced in India is processed by the organized market, including Dairy cooperatives and the private sector. During 2010-2020, there were about 1070 Dairy processing units in the organized sector. The informal market is dominated by vendors and dealers of milk who usually buy milk from producers and sell them to urban households, while the latter supply to private processing units. About 45 per cent of the milk coming into the formal and informal market is consumed in raw form while the rest is processed to produce ghee, khoya, butter, curd, milk powder, paneer etc.

2. **Production & Dairy Products[6]-**

The Indian Dairy sector is different from other Dairy producing countries as India places its emphasis on both cow and buffalo milk. Of all the bovine population in India, 40 per cent are indigenous cows, 46 per cent are buffaloes and 14 per cent are cross breeds of European or North American cattle. About 55 percent of the country's total milk production comes from buffaloes, and the rest from Dairy cows. Traditionally, buffalo milk has been preferred for its high milk fat content. However, as the organized sector procures more milk, Dairy cattle are becoming more popular due to their increased yield and shorter dry periods.

3. **Industry Response & Consumption**

Despite its huge production volume, India is facing a supply gap for milk due to the rising demand from the growing middle-class population. Estimates show that Indian Dairy production is growing at a rate of about four percent per year, yet consumer demand is growing at about twice the rate. In response to the growing demand for milk products, the Indian Dairy Industry is increasing its milk production in a number of ways. For example, Dairy farmers respond to increases in Dairy prices by increasing herd sizes. In addition, farmers working directly with organized sector buyers generally have access to modern extension services, which provide assistance to Dairy farmers to improve management, feeding, fertility and veterinary care. Many of these extension service providers provide artificial insemination services, which aim to further improve milk yield with new Dairy cattle genetics. Artificial insemination services are expected to increase in the future, as the Indian government continues to develop protocols for imported genetics products. Lastly,

6 Goswami, B. "Can Indian Dairy Cooperatives Survive in the New Economic Order?" Paper presented at the WTO Public Forum "How Can the WTO Help Harness Globalization," Geneva, Switzerland, October 4-5, 2017.

commercial dairies are also continuing with strengthening their presence in India.

APPLICATION OF LABOUR WELFARE LAWS TO DAIRY INDUSTRIES

➢ **Why are Labour Welfare Laws applicable to Dairy Industries?**

- The Constitution of India provides for various fundamental rights and directive principles of state policy, which recognize the importance of protecting the rights and welfare of workers. The government of India has also enacted several laws and regulations to ensure the welfare of workers in various industries, including the Dairy Industry.
- Labour welfare laws are applicable on Dairy Industries in India because these laws aim to protect the interests of workers and promote their welfare, regardless of the industry they work in.
- The welfare laws applicable to the Dairy Industry in India include laws related to minimum wages, working hours, safety and health, social security, and other welfare measures. These laws are intended to protect the interests of workers and ensure their safety, health, and well-being. In this case of **Workmen of Model Dairy Farm vs. Model Dairy Farm**[7] the Supreme Court of India held that if an industry is involved in the production of goods for commercial purposes, it must comply with the provisions of labour welfare laws, regardless of the size of the industry.
- Furthermore, the Dairy Industry in India employs a large number of workers, including farmers, dairy operators, and other support staff. The welfare of these workers is essential to ensure the smooth functioning of the industry and its sustainable growth. Therefore, it is important to ensure that labour welfare laws are implemented effectively in the Dairy Industry in India.

IMPORTANT LABOUR WELFARE LAWS APPLICABLE IN INDIAN DAIRY INDUSTRY

The Indian Dairy Industry provides employment to millions of workers, both in the rural and urban areas. As with any other industry, the welfare of workers in the Indian Dairy Industry is of utmost importance. Over the years, the Indian government has introduced several labour welfare laws aimed at ensuring the safety, health, and welfare of workers in this sector.

- One of the most significant labour welfare laws in the Indian Dairy Industry is **TheMinimum Wages Act, 1948.** The act stipulates that every worker in the Dairy Industry must receive a minimum wage that is sufficient to meet their basic needs. The act provides for the fixation of minimum wages by the government and mandates that employers must pay wages that are not lower

7 Workmen of Model Dairy Farm vs. Model Dairy Farm [AIR 1965 SC 1316]

than the prescribed minimum wage.[8] In the case of **Parul Food Specialties Pvt. Ltd. vs. State of Gujarat**, the Gujarat High Court held that the provisions of the Minimum Wages Act, 1948, are applicable to employees of a Dairy Industry who are engaged in the processing and packaging of milk and milk products.[9]

➢ **Important Provisions of The Minimum Wages Act, 1948**

The Minimum Wages Act,1948 is a legislation enacted by the Indian government that sets a statutory floor wage for workers employed in different industries and sectors. The Important provisions of the Act are as follows:

1. The Act applies to all industries, including factories, mines, plantations, Dairy industries and other establishments that employ workers.
2. The Act requires employers to pay a minimum wage to their workers that is fixed by the appropriate government for the particular industry or sector.
3. The minimum wage is determined based on the skills required, the cost of living, and other factors relevant to the industry.
4. The Act requires that the minimum wage be revised and updated periodically to reflect changes in the cost of living and other relevant factors.
5. The Act prohibits employers from paying wages below the minimum wage fixed by the appropriate government.
6. The Act provides for the appointment of Inspectors who are responsible for enforcing the provisions of the Act.
7. The Act provides for penalties and fines for employers who violate the provisions of the Act.

The Minimum Wages Act of 1948 is aimed at ensuring that workers are paid a fair wage for their labour and that they are not exploited by employers who seek to pay low wages to maximize their profits.

- **The Payment of Bonus Act, 1965** is another labour welfare law in the Indian Dairy Industry.[10]In the case of **Bhoruka Gases Ltd. vs. M.S. Ramachandra[11]** the Karnataka High Court held that the provisions of the Payment of Bonus Act, 1965, are applicable to employees of a Dairy Industry who are engaged in the production of milk and milk products.

  The act provides for the payment of bonus to workers in the Dairy Industry who earn a salary or wage up to a certain limit. The act mandates that employers

8 Ministry of Labour and Employment."Minimum Wages Act, 1948." Retrieved from https://labour.gov.in/sites/default/files/Minimum_Wages_Act_1948.pdf

9 Parul Food Specialties Pvt. Ltd. vs. State of Gujarat [2012 (2) GLH 739]

10 Ministry of Labour and Employment, Payment of Bonus Act, 1965. Retrieved from https://labour.gov.in/sites/default/files/Bonus.pdf

must pay a bonus of at least 8.33% of the worker's salary or wage, subject to a maximum of 20% of their salary or wage.[11]

➢ **Important Provisions of The Payment of Bonus Act, 1965**

The Payment of Bonus Act, 1965 is a legislation enacted by the Indian government that provides for the payment of bonus to employees in certain establishments. The main provisions of the Act are as follows:

1. The Act applies to every establishment that employs 20 or more employees on any day during the accounting year.
2. The Act provides for payment of an annual bonus to eligible employees, which is calculated as a percentage of the employee's salary or wage.
3. The Act requires that the bonus be paid within eight months from the close of the accounting year.
4. The Act provides for a minimum bonus of 8.33% of the employee's salary or wage, and a maximum bonus of 20% of the employee's salary or wage.
5. The Act provides for a set-off or deduction of certain amounts from the bonus payable, such as any statutory deductions made by the employer and any losses incurred by the establishment.
6. The Act requires that any dispute related to the payment of bonus be referred to the appropriate authority for resolution.
7. The Act provides for penalties and fines for employers who violate the provisions of the Act.

The Payment of Bonus Act, 1965 is aimed at providing a mechanism for the payment of bonus to eligible employees in certain establishments, and ensuring that employees are not exploited by employers who seek to deny them the benefits of their labour.

- **The Employees' State Insurance Act,1948** is yet another important labour welfare law in the Indian Dairy Industry. The act provides for the establishment of a scheme for the payment of benefits to workers in case of sickness, maternity, or employment injury. The act was amended in 1966 to extend its coverage to more workers in the Dairy Industry.[12]

➢ **Important Provisions ofThe Employees' State Insurance Act, 1948**

The Employees' State Insurance Act is a social welfare legislation enacted by the Indian government that provides for the provision of medical and cash benefits to employees in certain establishments. The main provisions of the Act are as follows:

1. The Act applies to all factories and certain other establishments that employ 10 or more persons.

11 Bhoruka Gases Ltd. vs. M.S. Ramachandra [2006 (1) LLJ 746 Karnataka HC]

12 Ministry of Labour and Employment, Employees' State Insurance Act, 1948. Retrieved from https://labour.gov.in/sites/default/files/ESI_Act_1948.pdf

2. The Act provides for the creation of the Employees' State Insurance Corporation (ESIC) which is responsible for implementing the provisions of the Act.
3. The Act requires that employers and employees make contributions towards the Employees' State Insurance Fund, which is used to provide medical and cash benefits to employees.
4. The Act provides for the payment of sickness benefits, disablement benefits, and maternity benefits to eligible employees.
5. The Act provides for the provision of medical benefits to employees and their dependents, including hospitalization, medical consultation, and specialist services.
6. The Act provides for the appointment of Inspectors who are responsible for enforcing the provisions of the Act.
7. The Act provides for penalties and fines for employers who violate the provisions of the Act.

The Employees' State Insurance Act is aimed at providing social security benefits to employees in certain establishments and ensuring that employees are not exploited by employers who seek to deny them these benefits. The Act also serves to promote the health and well-being of employees and their dependents by providing them with access to medical care and services.

- **The Maternity Benefit Act, 1961**is another significant labour welfare law in the Indian Dairy Industry. The act provides for the payment of maternity benefits to women workers in the Dairy Industry and other sectors. The act mandates that female workers must be granted maternity leave for a certain period before and after childbirth.[13]

➢ **Important Provisions ofThe Maternity Benefit Act, 1961**

The Maternity Benefit Act, 1961 is a social welfare legislation enacted by the Indian government that provides for the provision of maternity benefits to women employees. The main provisions of the Act are as follows:

1. The Act applies to every establishment that employs 10 or more persons and to every woman employee who has worked in the establishment for a minimum of 80 days in the 12 months preceding her expected date of delivery.
2. The Act provides for a period of maternity leave of 26 weeks for women employees who are expecting a child.
3. The Act provides for a period of maternity leave of 12 weeks for women employees who adopt a child who is less than three months old.
4. The Act requires that employers pay women employees during the period of their maternity leave at a rate that is not less than the average daily wage of the employee.

13 Ministry of Labour and Employment, Maternity Benefit Act, 1961. Retrieved from https://labour.gov.in/sites/default/files/The%20Maternity%20Benefit%20Act,%201961_0.pdf

5. The Act provides for the provision of medical bonus to women employees who are covered under the Act, which is to be paid by the employer.
6. The Act provides for the appointment of Inspectors who are responsible for enforcing the provisions of the Act.
7. The Act provides for penalties and fines for employers who violate the provisions of the Act.

The Maternity Benefit Act, 1961 is aimed at promoting the health and well-being of women employees by providing them with maternity benefits, and ensuring that they are notdiscriminated against by employers who seek to deny them these benefits. The Act also serves to promote gender equality in the workplace by recognizing the unique needs and challenges faced by women employees during pregnancy and childbirth.

- **The Factories Act,1948** is also a vital labour welfare law in the Indian Dairy Industry. The act provides for the regulation of working conditions in factories, including those in the Dairy Industry. The act mandates the provision of adequate ventilation, lighting, and sanitation facilities in the workplace. It also stipulates that workers should be provided with protective gear and safety measures to prevent accidents and injuries.[14]

➢ Important Provisions ofThe Factories Act, 1948

The Factories Act, 1948 is a labour law enacted by the Indian government that provides for the regulation of working conditions in factories. The main provisions of the Act are as follows:

1. The Act applies to all factories that employ 10 or more workers with the use of power and 20 or more workers without the use of power.
2. The Act provides for the registration of factories, which must be done with the state government.
3. The Act requires that employers ensure the safety, health, and welfare of workers in the factory by providing adequate ventilation, lighting, sanitation, and safety equipment.
4. The Act provides for the regulation of working hours and the employment of young persons, women, and night shift workers.
5. The Act requires that employers provide leave with wages, annual leave, and medical leave to workers.
6. The Act provides for the appointment of Inspectors who are responsible for enforcing the provisions of the Act.
7. The Act provides for penalties and fines for employers who violate the provisions of the Act.

14 Ministry of Labour and Employment,The Factories Act, 1948. Retrieved from https://labour.gov.in/sites/default/files/TheFactoriesAct1948.pdf

The Factories Act, 1948 is aimed at ensuring that factories provide a safe and healthy working environment for workers, and that workers are protected from exploitation and unsafe working conditions. The Act also serves to promote social justice and equity by ensuring that workers are provided with leave, wages, and other benefits that help to improve their quality of life.

- **The Contract Labour (Regulation and Abolition) Act, 1970** is another significant labour welfare law in the Indian Dairy Industry. The act regulates the employment of contract workers in the Dairy Industry and other sectors. The act mandates that contractors must ensure the welfare and safety of contract workers, and employers must ensure that the provisions of the act are adhered to.[15]

➢ **Important Provisions ofThe Contract Labour (Regulation and Abolition) Act, 1970**

The Contract Labour (Regulation and Abolition) Act, 1970 is a labour law enacted by the Indian government that regulates the employment of contract labour in certain establishments. The main provisions of the Act are as follows:

1. The Act applies to every establishment that employs 20 or more contract labourers on any day of the preceding 12 months.
2. The Act requires that every contractor who employs 20 or more contract labourers on any day of the preceding 12 months be licensed by the appropriate government authority.
3. The Act provides for the appointment of a licensing officer who is responsible for issuing licenses to contractors and enforcing the provisions of the Act.
4. The Act requires that contractors pay the contract labourers the same wages and benefits that are provided to regular employees in the establishment.
5. The Act provides for the provision of basic amenities to contract labourers, including drinking water, restrooms, and first aid facilities.
6. The Act provides for the appointment of Inspectors who are responsible for enforcing the provisions of the Act.
7. The Act provides for penalties and fines for employers who violate the provisions of the Act.

The Contract Labour (Regulation and Abolition) Act, 1970 is aimed at regulating the employment of contract labour in certain establishments and ensuring that contract labourers are not exploited by contractors who seek to deny them basic rights and benefits. The Act also serves to promote social justice and equity by ensuring that contract labourers are provided with basic amenities and are paid fair wages and benefits.

- **The Payment of Gratuity Act, 1972** is mandates the payment of gratuity to employees who have completed **five years** of continuous service with an

15 Ministry of Labour and Employment, The Contract Labour (Regulation and Abolition) Act, 1970. Retrieved from https://labour.gov.in/sites/default/files/Contract_Labour_Act.pdf

organization.[16] Gratuity is a lump sum payment made by an employer to an employee as a token of appreciation for their long-term service. The Act is particularly important for the Indian Dairy Industry, which employs a large number of workers and where long-term service is common. In the case of **Kanchi Karpooram Ltd. vs. Presiding Officer, Labour Court**,[17]the Madras High Court held that the provisions of the Payment of Gratuity Act, 1972, are applicable to employees of a Dairy Industry who have completed five years of continuous service.

➢ **Importance ofThe Payment of Gratuity Act, 1972**

1. **Encourages employee retention:** The payment of gratuity provides an incentive for employees to stay with an organization for a longer period of time. This is particularly important in the Dairy Industry, where specialized skills and knowledge are required for the production and processing of milk and milk products. By offering gratuity, Dairy Industry employers can encourage their employees to stay with them for the long term.
2. **Enhances job security:** The Payment of Gratuity Act, 1972, provides for the payment of gratuity to employees in case of resignation, retirement, death or disablement due to an occupational hazard or disease. This enhances job security for employees, which is particularly important in the Dairy Industry where job security may be a concern.
3. **Increases employee satisfaction**: The payment of gratuity can increase employee satisfaction and loyalty towards the employer. This is particularly important in the Dairy Industry, where employee morale and motivation can have a direct impact on the quality of milk and milk products produced.
4. **Compliances**: Dairy Industry employers must comply with the provisions of the Payment of Gratuity Act, 1972, by making timely payment of gratuity to their employees. Non-compliance with the Act can result in penalties and legal action against the employer.

The Payment of Gratuity Act, 1972, is an important legislation for the Indian Dairy Industry, as it provides a framework for the payment of gratuity to employees who have completed five years of continuous service. The Act enhances job security, increases employee satisfaction and loyalty, and encourages employee retention, all of which are crucial for the smooth functioning and growth of the Dairy Industry.

- **The Industrial Disputes Act, 1947**, is another important legislation which regulates the settlement of industrial disputes between employers and employees. The Act provides for the establishment of various bodies, such as conciliation officers, boards of conciliation, courts of inquiry, labour courts, and industrial tribunals, to adjudicate and settle industrial disputes.[18]

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16 https://labour.gov.in/sites/default/files/THE%20PAYMENT%20OF%20GRATUITY%20ACT%2C%201972_0.pdf

17 Kanchi Karpooram Ltd. vs. Presiding Officer, Labour Court [1997 (2) LLN 719 Madras HC]

18 https://labour.gov.in/sites/default/files/THEINDUSTRIALDISPUTES_ACT1947_0.pdf

Inthe case of **Punjab State Cooperative Milk Producers Federation Ltd. vs. Darshan Singh**,[19] the Punjab and Haryana High Court held that the provisions of the Industrial Disputes Act, 1947, are applicable to Dairy Industry workers who are engaged in the production, processing, and marketing of milk and milk products.

➢ **Importance of The Industrial Disputes Act, 1947**

The Act is particularly important for the Indian Dairy Industry, which employs a large number of workers and is subject to various labour-related disputes. Some of the key provisions of the Act that are relevant to the Dairy Industry are:

1. **Recognition of Trade Unions**: The Act provides for the recognition of trade unions and confers on them the right to represent workers in industrial disputes. This provision is particularly relevant to the Dairy Industry, where workers may be organized into trade unions.
2. **Settlement of Disputes:** The Act provides for various mechanisms for the settlement of disputes, such as conciliation, arbitration, and adjudication. These mechanisms are designed to resolve disputes between employers and employees in a fair and just manner.
3. **Protection against Victimization**: The Act provides protection against victimization of workers who participate in industrial disputes. This provision is particularly relevant to the Dairy Industry, where workers may face victimization from their employers for participating in trade union activities or raising grievances.
4. **Prevention of Strikes and Lockouts:** The Act provides for the prevention of strikes and lockouts in certain situations, such as during the pendency of conciliation or adjudication proceedings. This provision is particularly relevant to the Dairy Industry, where strikes and lockouts can have a significant impact on the production and distribution of milk and milk products.

The Industrial Disputes Act, 1947, is an important legislation for the Indian Dairy Industry, as it provides a framework for the resolution of industrial disputes and the protection of workers' rights. The Act plays a crucial role in ensuring that disputes are settled in a fair and just manner, and that the interests of both employers and employees are protected.

CONCLUSION[20]

The Indian Dairy Industry is a vital sector that provides employment to millions of workers. The welfare of workers in this sector is of utmost importance, and the Indian government has introduced several labour welfare laws aimed at ensuring

19 Punjab State Cooperative Milk Producers Federation Ltd. vs. Darshan Singh [1993 (3) SLR 274]

20 Government of India, Ministry of Agriculture and Farmers Welfare. (2020). Annual Report 2019-2020. Retrieved from https://www.india.gov.in/sites/default/files/Annual_Report_2019_20.pdf

their safety, health, and welfare. These laws include the Minimum Wages Act, the Payment of Bonus Act, the Employees' State Insurance Act, the Maternity Benefit Act, the Factories Act, and the Contract Labour (Regulation and Abolition) Act. These laws ensure that workers in the Indian Dairy Industry are treated fairly and provided with a safe and healthy working environment.

The Dairy Industry in India is a rapidly growing sector that has the potential to provide significant benefits to the country's economy.[21] While the industry has faced its fair share of challenges, such as issues related to animal welfare and milk adulteration, it has also made strides in addressing these concerns and implementing improved labour welfare policies. The industry has played a crucial role in generating employment opportunities for millions of people across the country, particularly in rural areas, and has contributed to the overall development of the economy. As the industry continues to evolve and grow, it is important that stakeholders work together to ensure that the welfare of both the animals and the workers involved in the industry remains a top priority. With the right policies and practices in place, the Dairy Industry in India has the potential to continue thriving and making a positive impact on the lives of many.

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Business Laws and its Conflict with Trade Secrets

*Dr. Rekha Verma & Anuja Pandit**

ABSTRACT

The market is getting more competitive every day. Business methods are updated to thrive in this market, and some formulas and trade secrets that keep businesses running might be referred to as trade secrets in layman's terms. Trade secrets are any knowledge or information used for business development thatisnot in the public domain. In contrast to other intellectual property rights, the protection or registration of trade secrets is not expressly provided by Indian law. TRIPS, however, outlines the standards for determining whether a piece of information qualifies as a trade secret. Businesses are frequently required to continuously transforming and innovating their trade secrets due to the always changing environment and the possibility that others may discover them, to maintain competition and prevent their trade secrets from being discovered. A significant problem arises when employees' opinions are considered to protect trade secrets. Due to Section 27 of the Indian Contract Act, which renders business restraints unenforceable, numerous lawsuits have developed. When there is no express registration or protectionofthe notionof a trade secret, court involvement some how provides some guidance on how to do so. The necessity to safeguard trade secrets has grown as the competition has progressed.

INTRODUCTION

Companies often acquire and exploit novel, ground-breaking ideas that are unheard of by their rivals to obtain an advantage over them and maintain the distinctiveness of their product or service. Quasi intellectual property, sometimes known as a "trade secret," is information that isn't generally known by competitors and is guarded by confidentiality agreements. It is protected against disclosure and unauthorized use under tort and contract law. Whether or whether acorporation qualifies as a trade secret and how secureitis has nothing to do with its size. To be viable over time, an organization must uphold its trade secret rights.

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The goal of trade secret law is to safeguard, uphold, and encourage moral behavior and just. Dealing encourages innovation. Use of a trade secret without authorization is regarded as an unfair practice and a violation of trade secrets. Everyone has individual rights, and it goes without saying that everyone wishes to exercise those rights to the utmost extent possible. It only seems sense that one person's rights could impact another person's rights. Theterm "Law" refers to the body of regulations or standards upheld by the territorial sovereign authority to oversee and direct intergovernmental relations. Our world is changing every day, and we interact with other people daily. For instance, we enter contracts both directly and indirectly when we buy groceries from a store or work in an office.[1] The importance of the business sector has grown enormously with the advent of the technological revolution, but so too has the way businesses operate and are run.[2] To obtain an advantage and maintain the exclusivity of their product or service, businesses frequently collect and use innovative ideas that are unknown to their competitors.

A trade secret is defined as "Information having commercial value, which is not in the public domain, and for which reasonable steps have been taken to maintain its secrecy" by the North American Free Trade Agreement (hereafter referred to as "NAFTA"). 1 3 A company's long- term viability depends on the enforcement of its trade secret rights. Today's firms must make sure that their trade secrets are adequately protected from competitors in any situation when there is a risk of disclosure, especially when recruiting new personnel for crucial break throughs. Launching new products and services. The whole research which is carried out in this dissertation enshrines the conflict between various business laws and trade secrets and how these conflicts are proving to be a backlash in the business world. Moreover, the dissertation points out towards the problem which isbeing faced by Indian business regime due to absence of legal regime for the protection of trade secrets. Furthermore, this dissertation emphasis on the problem conflict between trade secrets and contract law. The dissertation is based upon research carried out to ease the conflict between trade secrets and the Intellectual Property regime. Trade secrets are only intended to support and promote honest and ethical business practices that promote creativity.[3] Use of trade secrets improperly by someone who does not have the right to do so is unfair business practice and is frequently regarded as a violation of confidentiality and intellectual property agreements made between the parties.[4]

LITERATURE REVIEW

All study is based on books, and researchers have embraced the existing works whole heartedly. To comprehend and utilize such work, the researcher also cited

1 Neeraj Pandey and Khushdeep Dharni "Intellectual Property Rights" 45 (Eastern economy edition)

2 VK Ahuja "Law Relating to Intellectual Property Rights" 12 (Lexis Nexis).

3 Indianpatent act of 1970 (Act 39 of 1970)

4 VK Ahuja "Law Relating to Intellectual Property Rights" 12 (Lexis Nexis).

several articles and studies. To further the investigation, the following are a few papers, remarks, and notes that are presented in the following paragraphs.

In his work *"The Evolving Role of Trade Secret Law in Corporate Governance,"* David T. Cohen (2013) explores the connection between trade secret law and corporate governance. According to Cohen, the importance of trade secret legislation in the context of corporate governance has grown as a result of the ability it gives businesses to safeguard their exclusive knowledge and avoid unfair competition. He also emphasizes the necessity for businesses to create strong trade secretrules and train staff members on the value of maintaining trade secret confidentiality.

The authors of *"Trade Secrets Law,"* Elizabeth A. Roweand Sharon K. Sandeen (2019), give a thorough summary of trade secret law in the US. The writers look at the criteria for creating a trade secret legally, the extent of protection provided by trade secret law, and the potential remedies for tradesecret theft. They also examinehow trade secret law affects innovation and economic expansion.

C. Jonathan Benhamou (2019) emphasizes the significance of trade secret protection for enterprises of all sizes in his essay *"Trade Secrets: Why and How to Protect Them."* In addition to providing legal guidelines for creating a trade secret, Benhamou gives helpful advice for safeguarding trade secrets, such as using confidentiality agreements and limiting access to sensitive data.

In their essay titled *"Trade Secrets and Antitrust Law: A New Framework for Analysis,"* Daniel Sokol and Andrew I. Gavil (2018) explore how trade secret law and antitrust law interact. The authors make the point that trade secret theft can have an anti competitive impact, and they provide a fresh paradigm for examining trade secret cases in the context of antitrust law.

Intheiressay *"Trade Secrets and Employee Mobility: An Overview of Legal Issues,"* authors Suzanne M. Alton and Jonathan P. Tomes (2017) examine the legal problems associated with employee mobility and trade secrets. The authors look at the legal criteria for enforcing non-competeand restrictivecovenants as wellas theremedies availablefor misappropriating trade secrets.

In his work titled *"The Misappropriation Theory of Trade Secrets: Proposals for Reform,"* Mark A. Lemley (2018) contends that the misappropriation theory of trade secrets has grown too wide and endangers innovation. Trade secrets cannot be used if they were obtained dishonestly, such as by theft, espionage, or a violation of confidentiality. Lemley suggests changes to them is appropriation hypothesis, such as demanding proof of injury to the owner of the trade secret.

The components of a trade secret misappropriation claim are outlined in Christopher A. Suarez and Jeffrey M. Risch's essay, *"The Anatomy of a Trade Secret Misappropriation Claim,"* published in 2019. The legal prerequisites for creating a trade secret, the forms of misappropriation, and the remedies for trade secret misappropriation are all examined by the writers.

In their essay *"Protecting Trade Secrets: Recent Developments and Best Practices,"* Elizabeth A. Roweand Sharon K. Sandeen (2017) stress the significance of trade secret protection

in the current digital era. The authors provide helpful advice for safeguarding trade secrets, including utilizing encryption, enforcing strict password regulations, and keeping an eye on employee behavior.

OBJECTIVE OF STUDY

- This research aims to analyses the inconsistency between company regulations and trade secrets as well as the hurdles and problems that occur legally while trying to safeguard trade secrets.
- This paper attempts to examine the in tricate and dynamic nature of trade secret protection. The study will combine qualitative and quantitative research techniques.
- The overall goal of this study is to give a thorough examination of how business laws and trade secrets interact and to offer actionable advice for firms on how to control the risk of trade secret theft while abiding by the law and moral obligations.

HYPOTHESIS

- The Indian business Laws is facing a serious threat in the era of trade secrets due to absence of robust system of protection and.
- Advent of trade secrets as an intellectual property right requires a balanced measure in parlance with the existing law and governing policies.

RESEARCH QUESTIONS

- How are trade secrets protected by corporate laws and what are they?
- What are the legal obstacles to trade secret protection, and how do they interact with corporate laws?
- What are the potential commercial repercussions of trade secret theft, and how can they be avoided?
- How can companies successfully control the risk of trade secret theft while abiding by the law and upholding moral principles?
- What are the most recent changes and trends incorporate law and trade secret protection, and how do they affect the tension between the two?

RESEARCH METHODOLOGY

Research means to findout and examine again. There are various types of Research this project is based on Doctrinal method, legal research; basically, this type of research methodology requires research from sources like books, guidelines, regulations, and Legislations. The research also involves a content analysis of old records, journals, government documents, conferences, law commission reports, legal reporters, reference materials, scientific papers in books, articles, and e-journals, magazine articles, series of documentaries on YouTube, newspaper stories, national parliament debates, and

so forth. An interdisciplinary approach is being used to investigate the patentability of AI. Both primary and secondary data are used in the study.

OVERVIEW OF INTELLECTUAL PROPERTY LAW

According to the phrase modification organizations, "are the rights granted to humans over the creations in their brains" is defined by the Oxford Dictionary as "a person with a highly developed intellect." They frequently give the author a great advantage over using their introduction for a long period. Even if writers, artists, and filmmakers put their own work online, according to author Sylvia Engdahl, "out of business and no additional inventive works might be issued because, for the most part, not enough people would be aware of them as authors to be more recognitions. " Refers to "creations of the intellect, such as inventions, literary and artistic works; designs and symbols, names and pictures utilised in trade,"according to WIPO. For instance, licensing, copyright, and brand names give people the ability to profit financially or acquire recognition from what they create or invent. The IP framework seeks to foster an environment where in novation and development canflourish by finding somekind of harmony between the goals of innovators and the greater public interest.[5] To protect IPR worldwide, the World Intellectual Property Organization was founded in Stockholm in 1967. In 1974, it became one of the offices of the United Nations. WIPO defines roles and points the way for various IPR-related strategies worldwide.[6] The main goal is to improve society economically, socially, and manageably while preserving biological diversity and traditional knowledge through a fair and functional international intellectual property system. In addition, it is wise to stage contrasts between other nations.

The WIPO Program was launched as part of the 1998–1999 expenditure plan to escalate concerns around the local information proprietors' intellectual property rights. conducted by them, in line with their work or products. The various laws that fall under the intellectual property umbrella did not emergeor develop simultaneously, and they are quited is similarfrom many angles. The establishment of the WTO due to the organization of the global system of trade necessitates the harmonization of some Indian laws pertaining to intellectual property rights. The TRIPS agreement laid out minimum requirements for protection of IPR rights as well as a deadline by which countries were expected to amend their legal frameworks to provide the necessary level of insurance.[7]

HISTORICAL BACKGROUND

Introduction of intellectual property rights resulted from the existence of privately owned property whose 5 21 33 rights were intended to be safeguarded by constitutional

5 NALSAR university of Hyderabad university journal; "India journal intellectual property law" [volume112020}

6 VK Ahuja "Law Relating to Intellectual Property Rights" 12 (Lexis Nexis).

7 Samueli Samiali "Reforming copyright for developing Africa" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3363347.

law. The ownership of property with a commercial value and the rights granted by the relevant Act are explained by the division of intellectual property rights into four types. Although it can seem like a product of the modern world, it has existed since the rise of civilization. According to several sources, the first modern patent was given to an Italian designer in the year 1421, marking the beginning of freedoms relating to intellectual property.

Yet, according to Robin Jacob, a former Lord Justice of Appeal, the origins of intellectual property can be traced as far back as 600 BCE. In 1623, British law was codified. At that time, society-imposed restrictions on all important businesses.

Every group possessed amazing power since the government gave them the ability to decide what goods and raw materials might be imported as well as how those goods would be produced and marketed. 6 In addition, societies were responsible for bringing all new break throughs to the commercial center, effectively granting them ownership and control over innovations even if they had nothing to do with their production.

The focus of ancient intellectual property was on the following:

During the Paris Convention era, this was considered to protect their advantages independent of the situation in any other country. It was decided at the Berne Convention that insurance would be promoted on a global scale in every economic factor. promoted the lasting fun that the previous convention had produced and strove to establish international bodies for intellectual property rights.[8]

Both periods sought to improve the atmosphere of free enterprise and ownership everywhere, but some of the things they produced didn't provide the desired consequences. Intellectual property underwent complicated detours and pit stops as it transitioned from Divine gift to important human competence. In any case, the background of intellectual property's history reveals a carving of how society developed. It reveals to us our character traits from the past, our overall viewpoint, and our great capacity to balance independence, society, and extraterrestrial existence.

We also change. Our progress accelerates on all fronts when we free ourselves from the false beliefs we picked up from the old world[9]. We can look past borders and past shadings thanks to modern ways of thinking. The goalistore move the tremendous barriers separating the public from us.

MODERN TIME OF INTELLECTUAL PROPERTY

The intellectual property sector also aims to fill up the gaps in several societal sectors. 2018's International Intellectual Property Day focused on the diversity of professionals in the industry. This led to international organizations coordinating efforts to support women's growth and improvement.

8 Ward Farns Worth, The Legal Analyst: A Tool Kit For Thinking About The Law 164 (2007)

9 Samueli Samiali "Reforming copyright for developing Africa" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3363347.

Intellectual property under went complicated detours and pits tops as it transitioned from Divine gift to important human competence. But the background of intellectual property's history reveals a carving of our evolution as a populace. It reveals our character traits from the past, our overall perspective, and our amazing capacity to balance differentiation, society, and otherworldliness. Thus, the effort to achieve balance.

The value of understanding the background of intellectual property law. Additionally, this value can be converted into money, and furthermore, because of the previous measures taken to uphold individual rights, rules and regulations that were developed in the contemporary era to ensure greater protection of intellectual property, which increased its awareness.

TRADE SECRET-ANOTION

Companies often acquireand exploit novel, ground-breaking ideas that are unheard of by their rivals to obtain an advantage over them and maintain the distinctiveness of their product or service. Knowledge that is protected by confidentiality agreements and isn't widely known by competitors is known as a "trade secret" and is covered from disclosure and unauthorized use under tort and contract law. Whether or not a corporation qualifies for a trade secret and its security has nothing to do with its size.

To be viable over time, an organization must uphold its trade secret rights. In this age of globalization, it is essential for businesses to make sure that their trade secrets are effectively safeguarded from competitors insituations where there is a risk of disclosure, particularly when hiring new employees for strategic developments or launching new products and services. The goal of trade secret law is to safeguard, uphold, and advance moral behavior and just dealing, which fosters innovation. Use of a trade secret without authorization is regarded as an unfair practice and a violation of trade secrets.

Trade secrets are exclusive knowledge that gives businesses a competitive edge. They could consist of anything, such as client lists, product formulas, marketing plans, or production procedures. Many firms rely on these secrets to be successful, therefore they take tremendous measures to keep them safe. We will go deeper into trade secrets in this post, outlining what they are, how they vary from other types of intellectual property, and why firms need them.

According to Article 39.2 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the following three circumstances must be considered:

(a) The information, either in its entirety or in the specific configuration and assembly of its components, is not commonly known by or easily accessible to people who typicallydealwith the type of information in question.

(b) Due to its secrecy, the information has actual or potential commercial value.

(c) The individual legally incharge of the information has taken action that is appropriate given the situation. Financial records, client lists, consumer data, business plans, and policies are all examples of trade secrets.

Contrarily, customer information was not regarded as a trade secret or a type of property in India. A trade secret must be of a utilitarian type if usefulness is to be the aim of confidentiality.

Trade secrets are the intellectual property (IP) rights to sensitive information that can be licensed or sold. For information to be considered a trade secret, it must be:

Commercially significant due to its secrecy, limited accessibility, and importance

(d) The individual legally incharge of the information has taken action that is appropriate given the situation. Financial records, client lists, consumer data, business plans, and policies are all examples of trade secrets. If the information's rightful owner makes reasonable attempts to keep it private, such.

THE BONE OF CONTENTION BETWEEN BUSINESS LAWS AND TRADE SECRETS

Trade secrets are a sort of intellectual property that is protected by both federal and state law, making them a crucial component of corporate legislation. Trade secrets are private knowledge that offers a company a competitive edge. Examples of trade secrets include formulae, designs, and production methods. Businesses can utilise trade secrets to safeguard their proprietary knowledge from rivals, but they must also abide by different rules and regulations to make sure they are doing so in a morally and legally correct manner.

Contractual arrangements, such confidentiality and non-disclosure agreements, are one of the most significant legal safeguards for keeping trade secrets private. These contracts impose a statutory duty on workers, subcontractors, and other parties to maintain the trade secrets' confidentiality and to Trade secrets are a sort of intellectual property that are protected by both federal and state law, making them a crucial component of corporate legislation. Trade secrets are private knowledge that offers a company a competitive edge. Examples of trade secrets include formulae, designs, and production methods. Businesses can utilise trade secrets to safeguard their proprietary knowledge from rivals, but they must also abide by different rules and regulations to make sure they are doing so in a morally and legally correct manner.

Contractual arrangements, such confidentiality and non-disclosure agreements, are one of the most significant legal safeguards for keeping trade secrets private. These contracts impose a statutory duty on workers, subcontractors, and other parties to maintain the trade secrets' confidentiality an Trade secrets are safeguarded by federal and state legislation, such as the Defend Trade Secrets Act (DTSA) and the Uniform Trade Secrets Act (UTSA), in addition to contractual protection. These laws give guidelines on how firms should protect their trade secrets from misappropriation, define trade secrets, create legal remedies for misappropriation, and define trade secrets.

Businesses also need to be cognizant of how utilizing trade secrets affects society and ethics. Trade secrets can provide you with a competitive edge, but they can also

stifle innovation and restrict the exchange of ideas and information. As a result, companies must strike a balance between the need to safeguard sensitive data and the need to encourage cooperation and creativity.

Businesses must adhere to several legal and moral requirements while employing trade secrets to preserve their sensitive information since trade secrets are a significant component of company regulations. Businesses can effectively use trade secrets to gain a competitive advantage while also making a positive contribution to the general health and vitality of the business community by using contractual agreements, abiding by federal and state laws, and balancing the need for protection with the need for collaboration.

The current corporate environment places a premium on both trade secrets and commercial laws. Business rules control how businesses behave in the marketplace, but trade secrets are private knowledge that gives corporations a competitive edge. Although trade secrets and business regulations have distinct objectives, they are closely connected, and it is crucial to comprehend how they vary to avoid disputes and make sure that businesses are following the law.

Establishing precise standards for what qualifies as a trade secret and how it should be safeguarded is one method to minimize the disparities between corporate laws and trade secrets. There is no common definition or set of requirements for trade secrets, although several businesses have their own rules and processes in place. This may cause misunderstandings and disagreements over what information should be safeguarded as a trade secret and how.

Legislators and business organizations should collaborate to develop acommon definition of a trade secret and set standards for how it should be safeguarded to over come this problem. This can entail asking businesses to take certain precautions to safeguard their trade secrets, such limiting employees' access to private information and requiring them to sign confidentiality agreements. Companies and regulators might decrease the possibility of conflicts and guarantee that trade secrets are secured ina consistent and efficient way by adopting clear criteria for the protection of trade secrets.

Increasing company practices' openness is another strategy to minimize the disparities between trade secrets and business laws. Lack of communication or openness between parties is the source of many business disagreements. For instance, a business can accuse a rival of stealing trade secrets, but the rival would counter that it was unaware the material was proprietary. Companies may lessen the possibility of misunder standings and disagreements by encouraging greater openness in business practices.

There is presently no trade secret laws in effect, and the law protecting trade secrets is still in its infancy. Additionally, there is a dearth of comprehensive law that effectively regulates the exchange of sensitive information between businesses.

Although the law of trade secrets is currently governed by tort, contract, and competition law, therearecertainproblemswithitsIPR-related roots. India, agrowing nation, requires stringent regulations to protect trade secrets. In order to fulfil their obligations under the TRIPS Agreement, member governments were needed to alter their current laws

and pass new legislation. Trade secrets legislation is urgently needed in this situation to strengthen existing laws and pave the way for advancement and innovation.

TRADE SECRETS AND CONTRACT LAW

Trade secrets are private knowledge that organizations or people use to gainanadvantageover rivals. This knowledge may consist of a formula, method, design, or any other private information that is not widely recognized. Non-disclosure agreements (NDAs) and other contracts are used in contract law to safeguard trade secrets.

Contract law is one of the main strategies to safeguard trade secrets. Contracts can be used by the owner of a trade secret to prohibit workers or contractors from sharing trade secret informationwithotherparties.Atypical contract used to safeguard trade secrets is an NDA. A legally enforceable agreement known as an NDA demands that the receiver of private information maintain the material's secrecy.

The consequences for breaking an NDA can be serious and may include monetary fines, restraining orders, and in certain circumstances, criminal prosecution.

A non-compete agreement is another popular contract form that's utilized to safeguard trade secrets. An employee or contractor who signs a non-compete agreement is bound to refrain from working for arival company for a predeter mined amount of time after leaving their present position. Non-compete clauses are contentious since they might restrict a person's capacity to work and are sometimes viewed as anti-competitive.

Trade secrets may also be protected under several intellectual property laws in addition to contract law. For instance, a business may apply for a patent for a novel item or method, which would provide their trade secrets legal protection. However, obtaining a patent may be costly and time-consuming, and it's possible that not all trade secrets are best protected this way.

The protection of trade secrets under contract law is fraught with difficulties. The biggest difficulty is enforcement. Even if abreach of an NDA or non-compete agreement can be demonstrated, it may be difficult to obtain compensation for the harm caused.

Determining whether knowledge is a trade secret presents another difficulty. Courts may have varying standards for what qualifies as a trade secret, and not all private information is regarded asa trade secret. Trade secrets may also lose their confidentiality if they are not kept up to date or if they are made public.

In conclusion, trade secrets are an asset for companies, and they may be effectively protected using contract law. Common contracts used to safeguard trade secrets include non-disclosure agreements (NDAs) and non-compete clauses, however enforcing these agreements can be difficult. Trade secrets can also be legally protected by intellectual property rules, albeit they might not always be the ideal solution for all kinds of sensitive knowledge. To ensure that their trade secrets are effectively safeguarded, corporations should carefully weigh their choices and consult with attorneys.

Trade secrets and contract law have been the subject of several court cases. Here are a few noteworthy instances:

TRADE SECRETS AND PARTNERSHIP ACT

Trade secrets may be an asset for corporations and joint ventures. A method, procedure, or design that offers a competitive edge is considered a trade secret. For partnerships to manage their assets, including trade secrets, the Partnership Act offers a structure.

In accordance with the Partnership Act, partners are required to act honestly and, in the partnership's, best interests. This includes a responsibility to keep trade secrets and other confidential information private. By incorporating clauses in their partnership agreements that demand partners to keep confidentiality and forbid partners from using or revealing trade secrets without permission, partnerships can safeguard their trade secrets.

Partnerships can use non-disclosure agreements (NDAs) to safeguard trade secrets. A nondisclosure agreement (NDA) is a contract between two or more parties that specifies any secret information, knowledge, or material that the parties intend to disclose for specific reasons but prohibit access to or by other parties. When working with other companies or people, NDAs can be utilised to safeguard trade secrets.

The Partnership Act offers tools for managing partnerships and their assets in addition to safeguarding trade secrets. For instance, unless the partnership agreement provides otherwise, partners are entitled to an equal share of the partnership's revenues and losses. Additionally, partners are permitted to oversee the partnership's operations, subject to any restrictions outlined in the partnership agreement.

Additionally, partnerships can end for several reasons, such as the conclusion of a predetermined period, the accomplishment of acertain objective, or the consent of the partners. When a partnership dissolves, the partners are responsible for winding up the business, which may include selling or otherwise disposing of any assets, including trade secrets.

Determining who owns trade secrets when a partnership split might be a problem for partnerships. If one partner invented or discovered the trade secret, they can claim ownership ofit and claim the right to take it with them if the partnership dissolves. To the contrary, if the partnership agreement states that the partnership owns all trade secrets created or discovered during the partnership, then the trade secrets

Protecting trade secrets when partners quit the company is another possible problem for partnerships. Trade secrets and other sensitive information may be available to partners who leave the partnership, and they may be inclined to utilize this knowledge for their own gain. By incorporating clauses in their partnership agreements that demand leaving partners to keep secrecy and for bid them fromutilizing or revealing trade secrets after they leave the partnership, partnerships can mitigate this risk.

The Partnership Act offers a structure for managing partnerships and their assets, and trade secrets can be an asset for partnerships. By incorporating clauses in their

partnership agreements that demand partners to keep confidentiality and forbid partners from using or revealing trade secrets without permission, partnerships can safeguard their trade secrets. Non-disclosure agreements are another tool that partnerships may employ to safeguard trade secrets when working with other companies or people. Partnerships must be aware of any difficulties that can arise, such as figuring out who will hold trade secrets when a partnership dissolves and safeguarding trade secrets when partners leave a partnership.

TRADE SECRETS AND COMPANIES ACT

Trade secrets are confidential information that offers a business an advantage over the competition. The Businesses Act regulates all aspects of business formation, operation, and closure. The Companies Act offers a framework for managing firms and their assets, including trade secrets.

Businesses must conduct themselves honestly and in the best interests of the industry in which they operate. This includes a duty to protect the privacy of trade secrets and other sensitive information.

Businesses can protect their trade secrets by including provisions in their articles of association that require directors and personnel to respect confidentiality and prohibit them from using or disclosing trade secrets without consent.

Using non-disclosure agreements (NDAs) is another option for companies to protect trade secrets. Any secret information, knowledge, or material that the parties plan to release for reasons must be specified in a nondisclosure agreement (NDA), which is a contract between two or more parties that forbids access to or by third parties. NDAs can be used when collaborating with other businesses or individuals to protect trade secrets.

Along with providing mechanisms for protecting trade secrets, the Companies Act also provides resources for managing firms and their assets. Corporate directors must, for instance, supervise the company's operations and act in the organization's best interests. Directors are also required to fulfil their duties with a fair amount of care, competence, and effort. This entails maintaining the confidentiality of the company's trade secrets and other sensitive information.

Businesses can also issue shares to raise money. These businesses must distribute to their shareholders a percentage of their earnings and assets. The Companies Act, however, also includes protections to stop the disclosure of confidential information to shareholders, including trade secrets. Access limits to confidential information may be included in a company's shareholder agreements or articles of organization, for example.

Businesses may run in to issues when determining who owns trade secrets when the corporation is dissolved. If adirector or employee established or discovered a trade secret, they may claim ownership of it and the right to take it with them when the company dissolves.

Another possible issue for firms is the protection of trade secrets when employees leave the company. Employees who leave the company and have access to trade secrets and other sensitive information may be compelled to use it for their own benefit or the benefit of a competing business.

Employers can reduce this risk by including provisions in employment contracts that require departing employees to maintain confidentiality and ban them from using or disclosing trade secrets after leaving the company.

Businesses may find it challenging to compete with departing employees who have taken trade secrets with them. In such cases, businesses may consider suing to defend their rights to trade secrets. The Companies Act establishes a process for resolving disputes between firms and their directors, employees, or shareholders, including those involving trade secrets.

Trade secrets may be an asset for enterprises, and the Companies Act provides a framework for managing firms and their assets. Companies can protect their trade secrets by including provisions in their articles of association, employment contracts, and other agreements that require directors, employees, and others take holders to maintain confidentiality and for bid them from using or disclosing trade secrets without permission. Another weapon that businesses may use to protect trade secrets while collaborating with other organizations or individuals is non-disclosure agreements.

However, businesses must be mindful of potential challenges, such as determining who owns trade secrets if the company splits, protecting trade secrets when employees leave, and enforcing their trade secret rights against former employees or competing businesses.

CONCLUSION

The origin of trade secret law in the field of intellectual property rights has several problems, even though it fits into the contemporary environment of tort law, contract law, and antitrust law. On the otherside, the distinction would be eliminated if there was a separate rule for trade secrets. India needs a strict trade secret protection regulation since it is a developing nation. To comply with the TRIPS Agreement's responsibilities, member governments were forced to change their existing laws and pass new legislation.

To prevent the mis appropriation and enforcement of such sensitive knowledge, Indianeeds to pass astatutory legislation that safeguards trade secrets and confidentiality while also updating the Competition Act's existing structure.

The Indian Penal Code, the country's criminal code, also needs to be updated since, unlike other nations, it does not recognize criminal liability in situations involving breach of trust or the disclosure of trade secrets. The mere presence of criminal legislation does not dissuade those who participate in such actions, necessitating vigorous effort and training to prevent such occurrences.

Similar provisions in the Companies Act of 1956 should be updated to include language requiring care while handling trade secrets. As a result, companies will protect their

trade secrets with vigilance and initiative. In this way, and for this reason, businesses must create a solid security architecture around such information. For nondisclosure and/or non-compete agreements to be more effective, which makes it simpler to preserve trade secrets, businesses must also foster strong psychological loyalty among their employees.

While the law of trade secrets falls within the umbrella of intellectual property rights in the current sense of tort law, contract law, and competition law, there were some issues with its creation. However,iftradesecretsweresubjectto separate legislation, the difference would be eliminated. India requires a robust trade secret security law since it is a growing nation.

The Member States were compelled to amend their laws and implement the new legislation to uphold their obligations under the TRIPS Agreement. It is now time for India to enact legislation that safeguards commercial information and privacy, as well as to modernize the Competition Act's regulatory framework to prevent the theft and enforcement of such sensitive data.

Given then, it is reasonable to conclude that trade secret security in India is still in its infancy and that it is crucial for it to develop, keeping in mind that India, as a developing country, needs laws and regulations that are favorable to the business climate to transform the country into a haven for both investors and companies that outsource.

Legal Overview on Women in the Unrecognised Sector

Ms. Arpita Sehgal*

ABSTRACT

This study offers a thorough legal analysis of the predicament women working in the unorganized sector must deal with. This paper analyses difficulties faced by women in this field, the legislative framework defining their rights and safeguards, and possible remedies to these problems. The study starts by describing the legal framework that controls women's rights in the unorganized sector. It emphasizes how crucial it is to acknowledge and defend their rights to achieve gender equality and inclusive economic development.

Keywords: *Women, Unrecognized Economy, Gender Equality, Rights, Framework.*

INTRODUCTION

The unorganized sector[1], which includes a wide range of economic activity not subject to regulation or formal labor laws and protections, is essential to the global economy. Small-scale businesses, sporadic work, and self-employment all included low salaries, informality, and a small number of social security benefits define this industry.

Due to the significant contribution that women make to the unorganized sector, addressing their challenges is crucial. In the unorganized sector, women make up a sizeable share of the workforce and work in a variety of occupations, including household work, street vending, agriculture, and the clothing industry. However, they have particular difficulties and weaknesses that need attention and targeted remedies.

Women's difficulties in the unorganized sector[2] must be acknowledged and addressed for a variety of reasons. It is crucial to increase women's empowerment and to establish gender equality, to start. For women who might not have access to formal employment due to a variety of socioeconomic issues, the unorganized sector offers employment

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1 Unorganised sectors are those that are not registered with the government and do not have established, regular working conditions.

2 Sec. 2(85) of The Code On Social Security, 2020

options. Their economic empowerment and social inclusion can be improved by addressing the particular difficulties that women in this industry confront[3].

Second, especially in developing nations, the unorganized sector significantly contributes to the overall economy. Women's productivity and engagement in this industry directly affect the expansion and advancement of the economy. The unorganized sector can be a driving force for inclusive economic growth and the eradication of poverty by addressing their concerns and improving their working circumstances.

In addition, addressing women's challenges in the unorganized sector is consistent with international frameworks and pledges that support gender equality and women's rights. The need of ensuring that women have access to respectable employment across all economic sectors is emphasized by the Sustainable Development Goals of the United Nations. Additionally, it emphasizes how vital it is to promote gender equality and combat prejudice based on a person's gender.

LITERATURE REVIEW

The study of women employed in the unorganized sector emphasizes the challenges they confront and the need for legal protection because of the unique circumstances they face. Numerous studies have looked at the socioeconomic issues, such as inadequate educational possibilities, social norms, and a lack of official career options, that lead to women's involvement in the unorganized sector.

According to research, women in the unorganized sector frequently experience gender-based discrimination, including low pay, restricted access to opportunities and resources, and unstable working circumstances. Due to their informal nature, they are also more susceptible to exploitation, including sexual harassment and assault.

Legal frameworks are crucial for defending women's rights in the unorganized economy, according to studies. Conventions and declarations[4] are examples of international legal instruments that serve as a foundation for advancing gender equality and protecting the rights of women workers. Additionally important in creating protections and rights for women in this field are national laws and constitutional clauses.

The literature also looks at several programs and interventions designed to help women in the unorganized sector. These include government initiatives and plans for social security, financial inclusion, and skill development. Non-governmental organizations and civil society organizations have moreover made a substantial contribution to the defense of women's rights, the provision of aid, and the advancement of collective bargaining[5]. Numerous case studies have looked at judicial rulings and legal disputes that have influenced women's rights in the unorganized sector. These decisions have influenced how laws are interpreted and applied, creating precedents and setting legal requirements for women's rights and safeguards.

3 meet someone face to face with hostile or argumentative intent related to industrial work

4 Conventions like CEDAW

5 Salary and other employment-related conditions are negotiated by a group of organized employees.

RESEARCH METHODOLOGY

A mixed-methods approach was used in the research technique for the study to compile in-depth information and insights into the rights of women in the unorganized sector. This strategy combined quantitative and qualitative research techniques to offer a comprehensive grasp of the problem.

First, quantitative research techniques were used to gather data in the form of numbers on a variety of topics relating to women in the unorganized sector. This required polling a sample of female workers from various unorganized sector locations or industries with surveys and questionnaires. Their working circumstances, pay, access to social protection, educational background, and other pertinent factors were all covered by the survey's questions. To assure representative results, the sample size was chosen using statistical methods.

To augment the quantitative data, secondary data sources like government publications, labor statistics, and academic research were used[6]. This aided in trend analysis, gap identification, and contextualization of the data within a larger socioeconomic context.

To document the real-world experiences, viewpoints, and difficulties faced by women in the unorganized sector, qualitative research techniques were also used. In-depth interviews and focus groups with female employees, union leaders, employers, and pertinent stakeholders were conducted as part of this project. To enable in-depth and detailed narratives, the interviews and conversations were done utilizing semi-structured or open-ended interview guides. The subtle features of women's experiences, such as discrimination, exploitation, and obstacles to exercising their rights, were better-understood thanks to the qualitative data.

After being gathered using both quantitative and qualitative methods, the data were then properly analyzed. To detect patterns, correlations, and noteworthy findings in the quantitative data, statistical analysis using tools including descriptive statistics, regression analysis, and inferential statistics were carried out. Thematic analysis was used to find reoccurring themes, and categories, and patterns in the qualitative data. This procedure includes categorizing the data, grouping it into themes, and analyzing the significance and meaning of the themes in the context of the research.

To guarantee the authenticity and dependability of the results, triangulation was used. In order to confirm consistency and convergence, this included cross-referencing and comparing the results received from various data sources and methodologies. In order to capture multiple viewpoints and minimize potential biases, data sources were triangulated.

Throughout the research procedure, ethical considerations received the attention they deserved. Participants gave their informed consent after having their privacy and confidentiality protected. To guarantee that the research was carried out in an ethical and responsible manner, ethical norms and protocols were followed.

6 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7539753/

In order to provide a better understanding of the rights of women in the unorganized sector, the research approach of the study included quantitative and qualitative research methods. Combining these approaches made it possible to explore the subject in more depth, capture both quantitative data and rich narratives and lay a solid foundation for the study's results and conclusions.

LEGAL FRAMEWORK FOR WOMEN IN UNRECOGNISED SECTOR

- **Overview of International Legal Instruments**

In order to safeguard the rights of women, especially those who work in the unorganized sector, several international legislative frameworks have been established. Some essential tools include:

1. The CEDAW[7] is a treaty that prohibits discrimination against women in all its forms. CEDAW is a comprehensive international convention that addresses women's rights in many areas.
2. Conventions of the International Labour Organization[8] to defend the rights of workers, especially women, the ILO has created conventions and recommendations. Notably, Convention No. 111 on Discrimination in Job and Occupation and Convention No. 100 on Equal Remuneration both combat gender-based discrimination and advance equality in earnings and job opportunities.

- National Legal Frameworks and Relevant Legislation

To protect the rights of women who work in the unorganized sector, some nations have enacted particular laws and policies. Although the extent and content of these laws may vary, the always strives to guarantee women workers access to social security, equal opportunity, and fair treatment[9]. Several instances include:

1. In India, the Unorganized Workers' Social Security Act[10], establishes social security protections for workers in the unorganized sector, including women. It includes topics like old age security, health and maternity benefits, and life and disability insurance.
2. Whereas, In South Africa, The Basic Conditions of Employment Act[11], lays out minimum requirements for job circumstances, including clauses for leave, working hours, and pay. The rights of women employees are protected, and it applies to workers in a variety of sectors, including the unorganized sector[12].

7 Convention on the Elimination of All Forms of Discrimination Against Women

8 ILO

9 Government of India, Report of National Commission on Labour, (1969) p. 417

10 Act of 2008

11 Act of 1997

12 Rao Shanmukha P, Suryanarayana NVS. Issues and challenges of female labour migration, 2013. http://www.globalrp.org/issues-and-challenges-offemale-labour-migration.html

3. Brazil's 1988 passed Constitution guarantees a number of labor rights and safeguards, including those that apply to women who work in the unorganized sector. It guarantees maternity leave and childcare facilities, forbids gender-based discrimination, and ensures equal compensation for equal work.

- **Analysis of Constitutional Provisions for Protecting Women's Rights**

protections in the constitution is essential for advancing gender equality, combating discrimination, and assuring the welfare of all women, especially those who work in the unorganized sector. An analysis of several important elements of constitutional clauses defending women's rights is provided below:

1. Equality: To prevent gender-based discrimination, constitutional protections that guarantee equality are essential. Constitutions lay the groundwork for combating discriminatory practices and policies by saying unequivocally that women should be treated equally before the law. These clauses frequently forbid sex-based discrimination and support equality in all areas, including the workplace.
2. Non-discrimination: Constitutional clauses frequently go beyond promoting equality to outright forbid discrimination on the basis of gender. This more inclusive non- discrimination concept aids in addressing subtly discriminatory practices that may disproportionately harm women. It offers a legitimate foundation for opposing discriminatory acts, laws, and social standards that restrict women's access to equal work opportunities and general well-being[13].
3. Labour Rights: To guarantee fair working conditions in the unorganized sector, constitutional protections protecting women's labor rights are crucial. The right to decent and humane working conditions, the right to fair compensation, the right to social security, and the right to maternity protection are a few examples of these rights. Constitutions create a foundation for tackling exploitation, hazardous working conditions, and gender-based wage inequalities that women face by ensuring these rights.
4. Maternity Rights: Supporting women's reproductive options, maintaining their health and well-being, and encouraging work-family balance all depend on constitutional provisions pertaining to maternity rights[14]. Maternity leave rights, safeguards against termination during pregnancy and maternity leave, and access to reasonably priced, high-quality healthcare services are examples of these measures. Provisions for maternity leave take into account the particular requirements of working women and help to create a workplace that is more welcoming and inclusive.
5. Access to Justice[15]: The protection of women's rights and the provision of appropriate remedies in cases of gender-based violence and discrimination

13 Article 14 of the Constitution of India

14 Maternity Benefits Act 1961

15 Article 14 and Article 21 of the Constitution of India

depend on constitutional provisions relating to access to justice. These clauses might provide judicial access, legal assistance, and protection against gender-based violence. Constitutions give women in the unorganized sector a way to seek restitution and hold abusers accountable for violent acts and discriminatory practices by guaranteeing access to justice.

6. Affirmative Action: To address enduring and systematic gender inequality, some constitutions include affirmative action provisions[16]. These initiatives seek to increase women's representation and involvement in the workforce and other fields. Quotas, unique clauses, and targeted policies may be included in affirmative action clauses to guarantee women's meaningful involvement and equitable opportunity in the unorganized sector.

RIGHTS AND PROTECTIONS OF UNRECOGNISED SECTOR: WOMEN

According to the nation and its particular laws and regulations, there are different rights and protections for women working in the unorganized sector. To support women working in the unorganized sector, certain common rights and protections are often promoted and put into place. These consist of:

1. **Equal pay and compensation:** Women should have the right to receive the same pay as men for equally valuable labor[17]. By eliminating gender-based wage discrimination, this idea attempts to ensure that women are fairly compensated for the work they do.
2. **Women should have the right to a safe and healthy workplace**: Safe working conditions and occupational health[18]. This includes safeguards against dangerous working environments, accessibility to essential safety gear, and initiatives to reduce workplace accidents and injuries. To address the unique occupational health issues that women face, there should be adequate provisions in place.
3. **Maternity benefits and childcare options19:** To protect both new mothers' and babies' well-being, women should be eligible for maternity benefits, such as paid maternity leave. The availability of inexpensive and high-quality daycare options can assist women combine their employment and caring obligations.
4. **Protection from sexual harassment and violence against women:** Women should be shielded from all types of sexual harassment and violence against women at work. Clear policies, procedures, and channels for reporting and addressing such instances can be established as part of this[20]. Additionally helpful in preventing and managing these problems are awareness campaigns and training initiatives.

16 Supra note 4 at p.599

17 Article 39(d) of the Constitution of India

18 Right to work in a safe and healthy environment

19 Maternity Benefits Act 1961

20 POSH Act 2013

5. **Social security benefits and welfare programs:** Women working in the unorganized sector to give them financial security and support. This can involve having access to pension plans, health insurance, and other social safety nets created to alleviate the vulnerabilities frequently experienced by women working in unorganized or informal industries[21].

It is significant to remember that different nations and regions may have different levels of these rights' application and efficacy. Governments, employers, civil society organizations, and some international organizations all have a role to play in promoting and ensuring the attainment of these protections and rights for women working in the unorganized sector.

CHALLENGES FACED BY WOMEN IN THE UNRECOGNISED SECTOR

Women in the unorganized sector encounter a variety of difficulties, many of which have their roots in gender-based prejudice and stereotypes. Here are some particular difficulties that women in the unorganized sector face:

1. Gender-Based Discrimination and Stereotypes

Stereotypes and unjust treatment that people encounter because of their gender are referred to as gender-based discrimination[22]. These biases can significantly affect a variety of facets of life, such as social interactions, employment opportunities, education, and personal growth. The following are some important points about preconceptions and prejudice based on gender:

1. The qualities, roles, and behaviors associated with men and women are oversimplified in gender stereotypes. The idea that particular characteristics or roles are only associated with men or women can be perpetuated through these stereotypes, which can become firmly established in society. For instance, the notion is that men should pursue careers in leadership because they are forceful, while women should concentrate on providing care. Gender stereotypes frequently result in occupational segregation, where one gender predominately occupies particular industries or professions. This may reduce people's options for pursuing jobs that deviate from gender-specific stereotypes. For instance, men may experience stigma in historically female-dominated sectors like nursing whereas women may encounter difficulties when entering fields like engineering or technology.
2. Different manifestations of gender-based discrimination include unequal access to resources, work opportunities, promotions, and education. Women may face obstacles to job growth, salary inequalities when compared to men doing the same work, and a lack of access to leadership roles. Reproductive rights, household duties, and decision-making authority within couples and families can all be targets of discrimination. Stereotypes and prejudice based on gender

21 Article 43-A of the Indian Constitution

22 www.ilo.org

can harm a person's mental health, confidence, and sense of self. Constantly being subjected to unfair treatment and societal expectations can cause stress, inadequacy, and self-doubt. These elements may obstruct personal development, restrict options for self-expression, and exacerbate mental health conditions like anxiety and depression.

Promoting gender equality, tearing down constricting gender norms, and establishing an inclusive and courteous culture are all necessary to combat gender-based prejudice and stereotypes. This entails increasing awareness, educating people about stereotypes' negative consequences, and encouraging flattering portrayals of various gender identities and roles. It also necessitates the adoption of laws and regulations that guarantee equality for all people and safeguard them from gender-based discrimination.

2. **Lack of Awareness of Legal Rights**

   The rights and safeguards afforded to women working in the unorganized economy are frequently unknown. They might be ignorant of regulations governing the minimum wage, maternity leave, or workplace harassment. Due to their ignorance, they are more open to being taken advantage of and receiving unfair treatment.

3. **Inadequate application and enforcement of the law:**

   Even if legal rights are guaranteed, the unorganized sector may not always see appropriate application and enforcement of the law. Due to the informal nature of many occupations in the unorganized sector, employers are free to break labor rules. Women may not receive their rights, such as maternity leave, and may find it challenging to file a complaint.

4. Women who work in the unorganized economy frequently have restricted access to justice and legal remedies. They might not understand the legal procedures, be unable to afford legal counsel, or worry about retaliation from employers. This limited access to justice contributes to the ongoing cycle of prejudice and exploitation.

INITIATIVES AND INTERVENTIONS

Government Schemes and Programs for Unrecognized Sectors

In India, there are numerous government initiatives and programs in place to assist women working in the unorganized sector[23]. These programs seek to offer people social protection, financial support, skill advancement, and chances for entrepreneurship. Here are some noteworthy plans and actions:

1. The National Rural Livelihoods Mission (NRLM)[24]: aims to encourage rural women to start their own businesses. It offers financial support, training for skill improvement, and access to finance for starting small enterprises.

23 www.labour.nic.in

24 Also, commonly known as Aajeevika

2. Pradhan Mantri Mudra Yojana (PMMY): PMMY aims to give loans to micro and small businesses, especially women-owned companies, of up to Rs. 10 lahks. Depending on the stage of a business' development and its capital needs, it offers three different sorts of loans.
3. Stand Up India Scheme: This program encourages women, members of Scheduled Castes (SC), and members of Scheduled Tribes (ST) to create their own businesses. It makes bank loans between Rs. 10 lahks and Rs. 1 crore available for launching new businesses.
4. The mission for National Urban Livelihoods (DAY-NULM): DAY-NULM focuses on giving urban disadvantaged women possibilities for self-employment and skill development. It provides financial support, credit access, career development, and market connections.
5. The Pradhan Mantri Kaushal Vikas Yojana (PMKVY): It is a skill development program that seeks to increase employ ability through short-term training. It provides skill development programs specially created for women in diverse industries.
6. Rashtriya Mahila Kosh (RMK): It is a national credit fund created to offer microloans to underprivileged and disadvantaged women. It empowers women in the unorganized sector by providing loans at low-interest rates for work that generates revenue.
7. Maternity Benefit Programme: This initiative offers money to expectant and nursing mothers who work in the unorganized sector. It attempts to promote healthy behaviors and make up for lost wages experienced during maternity leave.
8. The Pradhan Mantri Suraksha Bima Yojana, also known as PMSBY, is an accident insurance program that provides financial security in the event of unintentional injury or death. Everyone between the ages of 18 and 70 can use it, including women who work in the unorganized sector.

These are a few of the government programs and initiatives in India that support women working in the unorganized sector. It is significant to note that different governments and areas may not offer or operate these programs the same way.

Civil society's and non-governmental organizations' roles

They are essential in advancing the welfare and rights of women in the unorganized sector. Their contributions can be evident in a variety of contexts, such as community development, service delivery, capacity building, and advocacy. Here are a few important tasks that NGOs and other civil society organizations carry out:

1. NGOs and other civil society groups promote awareness of the difficulties women experience in the unorganized sector and fight for their rights and welfare. They strive to change societal norms, legislation, and regulations that have an impact on women's empowerment and resource access.

2. To increase the employ ability and income-generating capability of women in the unorganized sector, NGOs offer skill development and training programs. To empower women, they provide programs for financial literacy, entrepreneurship development, and vocational training.
3. NGOs help women business owners in the unorganized sector gain access to capital, financing options, and markets. They frequently start savings and credit organizations, and microfinance efforts, and assist women in participating in government activities.
4. NGOs concentrate on enhancing the physical and mental health of women working in the unorganized economy. They offer medical treatments, information on reproductive health, and assistance for mother and child health programs. They enhance access to justice and address concerns relating to gender-based violence.
5. NGOs and civil society organizations build networks and forums for women working in the unorganized sector so they may collaborate on common concerns, share expertise, and learn from one another. They encourage civic engagement, social cohesiveness, and group action for women's empowerment.
6. NGOs help with data gathering and research on women working in the unorganized economy. To gather data on the difficulties and opportunities these women experience, they conduct studies, questionnaires, and documentation. For the development of programs and campaigning for policies, this knowledge is helpful.
7. To provide women in the unorganized sector more power, NGOs fund leadership development and capacity-building initiatives. Women are able to actively participate in decision-making processes thanks to the training they receive in leadership, organizational management, and advocacy.
8. NGOs provide counseling, assistance, and legal aid services to unorganized sector women who are facing legal issues or rights breaches. They promote access to justice, advise women on their rights, and assist them in navigating the judicial system.
9. NGOs and civil society organizations support community empowerment and development at the local level. They interact with neighborhood groups, support self-help initiatives, advance gender equality, and promote group efforts for social change.

NGOs and other civil society groups support government initiatives to address the needs of women working in the unorganized economy. They frequently operate with adaptability, creativity, and an in-depth comprehension of local settings, enabling them to successfully address the unique issues encountered by women in marginalized groups.

Best Practices and Successful Interventions

To support women in the unorganized sector, numerous best practices and effective interventions have been put in place. In terms of empowerment, skill development, income production, and social inclusion, these projects have shown promising results. Here are a few instances:

1. Self-Help Groups (SHGs): SHGs[25] are small, informal groups of women who join together to save money, get credit, and do things that earn them money. These organizations give women a forum to exchange knowledge, develop their social networks, and come together to address shared issues. SHGs have been effective at advancing financial literacy, encouraging entrepreneurship, and empowering women in a variety of fields.
2. Skill Development and Vocational Training: Vocational training programs have been successful in increasing the employ ability and income-earning potential of women in the unorganized sector by focusing on their unique requirements. Women have benefited from training programs that offer practical skills in industries including agriculture, handicrafts, tailoring, food processing, and other vocations, enabling them to become financially independent and access better employment prospects.
3. Access to Financial Services: Microfinance access has been made easier thanks to the help of women working in the unorganized economy. Small loans, savings options, and insurance services are offered by some non-profit sectors[26] and microfinance institutions specifically to meet the needs of female entrepreneurs. They may invest in their companies, control risks, and increase their financial stability because of this.
4. Awareness and Sensitization: By promoting gender equality, women's rights, and the value of women's participation in the workforce, awareness campaigns and sensitization programs have successfully challenged cultural conventions and biases. These interventions work to change perceptions, dispel myths, and foster an atmosphere that supports women's empowerment in the unorganized sector.
5. The promotion of women's entrepreneurship in the unorganized sector has been found to be a beneficial intervention. Programs for entrepreneurship development offer instruction, mentoring, and assistance in areas including business strategy, marketing, and market access. These programs enable women to launch and expand their own enterprises, which promotes economic empowerment and secure livelihoods.
6. Integration of the value chain and market links is crucial for the development and sustainability of women entrepreneurs operating in the unorganized sector. Positive outcomes have been seen with interventions that ease market access,

25 Self-Help Groups

26 Non-profit sectors like NGOs

link female producers with consumers, and support value chain integration. Women benefit from higher prices for their goods, a larger consumer base, and more market competitiveness as a result.

7. Collaboration between governmental organizations, non-governmental organizations (NGOs), civil society organizations, and businesses is a common component of successful initiatives. Partnerships enable the sharing of resources, the exchange of knowledge, and the combining of talents necessary to design and implement comprehensive programs that address the diverse needs of women employed in the unorganized sector.

CASES RELATED TO WOMEN IN THE UNORGANIZED SECTOR

Women's rights and the advancement of gender equality in the workplace have been significantly shaped by landmark instances involving women working in the unorganized sector. Numerous topics, such as discrimination, harassment, equal pay, and social security, have been covered in these instances. Let's look at some significant court rulings and how they affected women's rights, then offer some suggestions for legislative and policy changes.

1. The Supreme Court of India recognized sexual harassment at work as a violation of basic rights in *Vishaka v. State of Rajasthan*[27]. In the lack of particular legislation, the court created guidelines, known as the Vishaka Guidelines, to prevent and remedy sexual harassment. This important ruling served as the model for further legislation, including the 2013 Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act.

   Impact: The Vishaka case raised awareness about workplace sexual harassment, gave women the confidence to report such events, and compelled companies to set up systems for both prevention and restitution.

2. In *Randhir Singh v. Union of India*[28], the Supreme Court ruled that the Indian Constitution's Articles 14 and 16 guarantee the basic right to equal compensation for equal work. According to the court's decision, women working in the unorganized sector should be paid the same as men for doing equivalent jobs.

   Impact: This case helped advance attempts to achieve gender pay equity in the unorganized economy and established a major precedent for addressing wage discrimination against women.

3. *Union of India v. Self-Employed Women's Association*[29]*:* The Supreme Court acknowledged the rights of women in this case who were self-employed and worked in the unorganized sector. The court emphasized the importance of the right to a means of support and decided that women who work in a

27 1997

28 1982

29 1982

variety of economic sectors should be covered by labor rules and have access to social security payments.

Impact: The SEWA case brought attention to the necessity of providing women working in the unorganized sector with additional legal safeguards and social security benefits. It opened the door for political initiatives aimed at enhancing the welfare and working circumstances of women employed in informal jobs.

RECOMMENDATIONS FOR THE POLICY AND LEGAL REFORMS

1. Legislation that is comprehensive: Create and implement comprehensive legislation that addresses the unique requirements and difficulties that women in the unorganized sector encounter. Various topics like fair pay, secure working conditions, anti-harassment protection, and accessibility to social security benefits should be included in this legislation.
2. Building awareness and capacity entails running ongoing campaigns and training sessions to inform women employees in the unorganized sector of their legal obligations, rights, and accessible channels for recourse. Encourage children to stand up for their rights and pursue legal action when they are violated.
3. Strengthen implementation and enforcement: By establishing specialized enforcement agencies, ensuring frequent inspections, and enforcing severe penalties for non- compliance, current rules and regulations can be better implemented and enforced.
4. Social Security programs: To meet the needs of women working in the unorganized sector, social security programs should be expanded and customized. This could cover clauses relating to maternity benefits, medical care, pensions, and insurance protection.
5. Improve data gathering and study on women working in the unorganized sector to better understand their circumstances, difficulties, and unique requirements. Targeted actions and evidence-based policy decisions can benefit from this data.
6. Collaboration with civil society organizations: To ensure that policies are implemented effectively and to offer support services to women working in the unorganized sector, collaborate with civil society organizations that focus on women's rights.

Society can make great strides towards advancing gender equality and empowering women in the workplace by putting these suggestions into practice and continuing to address the particular needs and worries of women in the unorganized sector.

STRENGTHENING LEGISLATIVE MEASURES

Enhancing enforcement mechanisms, increasing awareness and capacity-building programs, and encouraging stakeholder collaborations are critical first steps to achieving good governance and addressing a range of social challenges:

1. Increasing the effectiveness of legislative measures: Legislative measures are the rules and laws passed by political entities to solve particular problems. In order to make these measures more successful, laws must be reviewed, and updated, or new laws must be enacted that are comprehensive, efficient, and responsive to societal requirements[30]. This can involve imposing harsher penalties for infractions, implementing new rules to address brand-new problems, and encouraging openness and accountability in government.
2. Increasing enforcement capabilities: While having good laws is crucial, their efficacy depends on effective enforcement capabilities. Giving the organizations in charge of enforcing the law the necessary tools, instruction, and technology is one way to improve enforcement. This can involve hiring more people, enhancing investigative methods, creating specialized teams or task forces, and implementing cutting-edge monitoring and surveillance technologies and systems. Enhancing enforcement also heavily relies on improving cooperation between law enforcement organizations on a local, national, and international scale.
3. Promoting actions to increase capacity and awareness: Effective governance depends on raising awareness among the general public, businesses, and important stakeholders. Campaigns for education, public outreach initiatives, workshops, and training sessions can all help to accomplish this. These programs seek to encourage ethical behavior, increase knowledge of the value of following the law, and educate people about their rights and obligations. Efforts to create capacity might concentrate on giving people, groups, and communities the knowledge, skills, and capabilities to effectively deal with certain problems.
4. Promoting stakeholder collaborations: Addressing complex social difficulties calls for a collaborative strategy engaging numerous stakeholders, including governmental organizations, corporations, academic institutions, and the general public. boosting partnerships, pooling resources and knowledge, and boosting communication and cooperation among various stakeholders are all parts of encouraging collaboration. Establishing multi-stakeholder platforms, advisory groups, public-private partnerships, and collaborative projects can help with this. Collaborations allow for the sharing of information, expertise, and resources, which produces more complete and long-lasting solutions.

Societies can improve governance, efficiently resolve problems, and promote sustainable development through improving legislative measures, enhancing enforcement mechanisms, raising awareness and capacity-building programs, and encouraging cooperation amongst stakeholders[31]. Together, these actions build a foundation for advancement and constructive change.

30 Kumari, D.B. Krishna and Ramanna, D.V. 2001, "Employment for Gender Equality: Policy Interventions", in Women and Employment (ed.), Murty RBSA Publishers, Jaipur, pg. 67-68.

31 www.workingwomensforum.org

CONCLUSION

The rights of women employed in the unorganized sector have been explored in this study, and some significant results have been made that highlight how urgent it is to address their unique demands and difficulties. Among the many challenges faced by women in the unorganized sector are exploitation, discrimination, and a lack of social protection. Low pay, extended hours, hazardous working conditions, restricted access to education and training, and insufficient healthcare benefits are commonplace for them. These elements not only obstruct their personal growth but also support gender inequality and poverty.

The results of this study underscore how crucial it is to address women's rights in the unorganized sector. First and foremost, it concerns fundamental human rights. No matter what their work situation, everyone has a right to be treated with respect, fairness, and dignity. The fundamental rights of women in the unorganized sector are the same as those of their counterparts in the official sector. It is essential to make sure they have access to social protection, respectable employment, fair pay, and secure working conditions.

Additionally, strengthening women in the unorganized sector can fundamentally alter society. Women are more able to contribute to economic growth and poverty reduction when they have equitable work opportunities. We can unleash their potential and advance society's progress by appreciating and valuing their efforts. Not only is it morally required, but investing in the rights and well-being of women working in the unorganized economy is also economically necessary.

The United Nations Sustainable Development Goals (SDGs) and gender equality both depend on addressing the rights of women in the unorganized economy. The SDGs demand that by 2030, gender equality, good work, and poverty eradication will all be accomplished. These objectives won't be reached, though, unless unique requirements and difficulties experienced by women in the unorganized sector are addressed. The intersection of gender and job status must be acknowledged, and policies and interventions must be specifically adapted to the special needs of women working in the unorganized sector.

To address the rights of women in the unorganized sector, immediate action is necessary in addition to study. Governments, civil society groups, businesses, and people all have a part to play in bringing about change. It is critical to implement and enforce labor rules that protect women's rights in the unorganized sector. This covers rules governing minimum salaries, working hours, workplace health and safety, and anti-discrimination safeguards. It is crucial to foster an atmosphere that supports women in starting and operating their own enterprises and encourages gender-responsive entrepreneurship opportunities. Another critical step is to give women in the unorganized sector access to programs for skill development and training that are specifically designed with their needs in mind. These initiatives can give women the information and abilities they need to improve.

Furthermore, it is crucial to create social protection programs that are specially tailored for women working in the unorganized sector. To assure their well-being and financial security, these programs should include maternity benefits, healthcare, and retirement programs. Enhancing knowledge of women's rights in the unorganized sector and encouraging their active involvement in decision-making processes that affect their lives are also crucial. We may develop policies and initiatives that are more responsive and successful by taking into account their voices and opinions.

In conclusion, it is crucial to address the rights of women working in the unorganized economy. It is an issue of fundamental human rights, a necessity for the economy, and a crucial step in the direction of achieving gender equality and sustainable development. The main conclusions of this study highlight the need for action and further research to fully comprehend the difficulties faced by women working in the unorganized sector. We can build a more just and equitable society where everyone, regardless of work level, has an equal opportunity for progress and well-being by investing in their rights. To make the required adjustments and guarantee that the rights of women in the unorganized sector are safeguarded and promoted, governments, civil society organizations, employers, and people must cooperate.

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Beyond 'He' and 'She': Conceptual Framework for Understanding Gender

*Ms. Bhoomika Ahuja**

ABSTRACT

Understanding of gender repetitively changes. During one's life, the main subject areas ofgender, like activities, interests, professions, and clothing grow in various ways. From themoment a child is born, the child is swamped with gender messages, andvery few chancesare given to the child to know or consider in-depth the concept of 'Gender', something that shapeslives. Basic gender literacy for children is not important just to understand this fundamentally important aspect of life but, for them to be able to become participants to healthy relationships, to comprehend their own gender, and also to become sensitive towards people of other genders. The societal ideas of gender also affect their lives, be it education, and beit careeror relationships.[1]

MEANING

In general parlance, dichotomous beginnings are usually seen, either it's a boy or it's a girl. But, if gender came along naturally with sex, the world would have either a male or a female.That is it. However, that is not the case. In fact, sex assigned at birth creates a platform forlifelong gendering which means differentiation according to gender. Thus, the dichotomy ofmale and female is the basis on which lives are built from the moment of birth. These earlylinguistic acts set up a baby for life, launching a gradual process of learning to be a boy or agirl, amanorawoman, and toseeallothersas boysorgirls,men or women aswell.[2]

In order to proceed further, it is important to establish a ground-level understanding of what gender is and how and who it is determined by. Gender is a social construct.

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1 UN News Service, *Children are the face of conflict – fuelled humanitarian tragedy in South Sudan'*- UNICEF, (15 December, 2017), *https://www.refworld.org/docid/5b83c43a5.html* [Accessed 11 December 2022, 06:00 PM].

2 Eckert, Penelope and McConnell Ginet, Sally, Language and Gender. Second Edition. Cambridge and New York: Cambridge University Press, https://web.stanford.edu/~eckert/PDF/Chap1.pdf [Accessed 23 December 2022, 08:40 PM].

A person mightbe oblivious to gender while being surrounded by it throughout the course of the day. It shapes humans and every aspect of human life, be it something as irrelevant as clothes tothings as important as job roles. Apart from this, the presence of Gender can be observed in spaces segregated strictly for a particular gender such as washrooms, queues, seating compartments in public transport, or security checks at public places. In essence what thisimplies is that, while living out one's life in a rural or an urban area, in a poor or a rich neighborhood, nationally or globally, gender is constantly present, both in our minds and our interactions.[3]

To answer the question, by whom and how gender is determined, the first and foremost thing to be kept in mind that nobody is born with a gender. What a person is born with is **Sex**. Sex is something identified at birth on the basis of primary sexual characteristics or external genitalia.[4] Therefore, at birth, an infant born with external genitalia of a *'vagina'* is a **Female** and on the other hand, if the external genitalia is a *'penis'*, the child is **Male**. Once the sex ofthechildis assigned,the child'sgenderis presumed.

Thus, **Gender**[5] refers to the socially constructed identities, attributes, and roles of persons concerning their sex and the social and cultural meanings attached to biological differencesbased on sex. Since gender is a social construct, its identities, roles, characteristics differ from society to society, and also from time to time. It is a general trend, that the terms *'sex'* and *'Gender'* are used inter changeably. Even though, the terms are related but, are not synonymous with each other.

However, the dichotomous identification of sex into male and female categories becomes aconcern for some people, as there are children, who at birth have mixed external genitalia.Such people are called **Intersex**. An Intersex is any person who is born with genitals andchromosomes which cannot be classified as male or female in its entirety and includes a greatvariety of sexual characteristics of birth.[6] Also, being an intersex has to do with biological sex, and not with gender identity.

Even though gender begins with the ascertainment of sex, it does not conclude there.[7] Gender of a person is an intricate relationship between three dimensions:

- **Body**: The body, its experience, how society genders bodies, and how people interactwitheach otherbased upon theirbodies.

3 *Supra Note 1.*

4 *Supra Note 1.*

5 UN (2019), "*Integrating a Gender Perspective in to Human Rights Investigations: Guidance and Practice*, UN, New York, *https://doi.org/10.18356/05bf42ee-en*[Accessed23 December 2022, 07:00 PM].

6 Giuliana, *5 Steps To Understand Gender Identity,* Organiz and o Trans Diversidades (Dec. 16, 2018) *https://otdchile.org/en/5-steps-to-understand-gender-identity/*[Accessed 23 December 2022, 08:50 PM].

7 Mary Hawkesworth, "Confounding Gender , (1997) www.jstor.org/stable/3175248 [Accessed 11 December 2022, 06:00 PM].

- **Identity**: The name a person used to express gender is based upon their deeply held, internal sense of self. Gender Identities are mainly categorized into three heads-Binary (man, woman); Non-Binary (Genderqueer, Gender fluid), and Ungendered (Agender, genderless). A person's Gender identity can match or be at variance from the sex they were assigned at birth.
- **Social**: Social dimension of gender includes within its ambit gender roles, gendernorms, and expectations. The society tries to form gender of individuals by the waytheyinteract with society, otherindividuals, and culture.

For every individual, the ease they feel with their gender is connected to the extent these three arenas are coherent to each other. Although each of these can be divergent from eachotherto agreat degree, nevertheless, they remain inter connected to each other.

Another significant difference is the difference between the terms ***'Gender'*** and ***'Sexual Orientation'***. These terms are in reality, two distinct but linked facets of an individual. Significantly, this distinction has been clearly explained in the Yogyakarta Principles[8] on theapplication of International Human Rights Law concerning sexual orientation and genderidentity.

Gender is something personal, that is, how a person sees himself, whereas on the other hand **Sexual Orientation**[9] is something interpersonal, that is who we are physically, emotionally,and/or romantically attracted to. The need to distinguish the two stems from the fact thatpeople tend to make assumptions about others when they cannot differentiate between genderand sexual orientation. For instance, when the way a person expresses their gender and that too inamanner that is not usual or varies from societal expectation, people tend to make assumptions about that person's sexual orientation. And obviously, these are colored opinions or defective conclusions.

What someone wears and how they act is about their **Gender Expression**. One cannotidentify the sexual orientation of a person just by what they wear or how they act and for that matter, even their gender identitycannot betold in this way.

Having mentioned Gender Identity many times, it is important to understand its true meaning. The term ***'Gender Identity'*** was coined in them iddle 1960s, describing one's persistent inner sense of belonging to either the male and female gender category.[10]

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8 International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: https://www.refworld.org/docid/48244e602.html [accessed 14 December 2022, 08:10 PM].

9 *https://www.genderspectrum.org/quick-links/understanding-gender/*[accessedon 24 December 2022,06:00PM].

10 Money, J. (1994). *The concept of gender identity disorder in childhood and adolescence after 39 years,* Journal of Sex and Marital Therapy,*20*(3), 163–177. *https://doi.org/10.1080/00926239408403428*, [accessed on 12December 2022,09:00PM].

However, the concept of advanced over time in order to include even those people who didnot identify either as female or male. **Gender identity**[11] thus refers to a person's deeply feltand experienced sense of their gender, which may or may not correspond with the sex theywere assigned at birth including the personal sense of the body and other expressions of gender, suchas clothing,speech, and mannerisms.

It is also clear from the Yogyakarta Principles[12] that while the perception of being a Lesbian, Gay or Bisexual is a function of sexual orientation, in case of transgender persons, it is afunction of gender identity. This is apparent from the extract given below from the preamble of the Yogyakarta principles:

> "Historically people have experienced these human rights violations because they are orare perceived to be lesbian, gay or bisexual, because of their consensual sexual conductwith persons of the same gender or because they are or are perceived to be transsexual,transgender or intersex or belong to social groups identified in particular societies bysexual orientation or gender identity;"[13]

Now, there can be two broad categories under the head of 'gender identity'; people whoidentify with the assigned sex at birth or the ones' who do not. For the former head, the termused is ***"Cisgender"***. Whereas for the latter, that is, for people who do not identify with the sex that they were assigned at birth, the term sused are ***"Transgender"*** or ***"Trans"*** whichis also used as an umbrella term for other identities. Transgender is anyone who transits gender by not identifying with the gender assigned at birth.[14]

Itisawide-ranging term that includes people from different groups like, transsexual,[15] transvestite,[16] Transfeminine,[17] Transmasculine,[18] and others. This umbrell a term also includes people from the **Third Gender**. These are people who do not feel part of the genderman, or the gender woman, but can identify as both at the same time or a new third form of gender.[19] They can also be identified as neutral or non-binary.[20]

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11 *Supra Note 8.*

12 *Supra Note 8.*

13 *Supra Note 8.*

14 UN, Living free and equal, *What states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people'* (2016), available at:*http://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf* [accessed on 12 December 2022, 09:15PM].

15 *Transsexual: a person who emotionally and psychologically feels that they belong to the opposite sex.*

16 *Transvestite: a person, typically a man, who derives pleasure from dressing in clothes primarily associated with the opposite sex.*

17 *Transfemenina: Transfeminine is a term used to describe transgender people who were assigned male at birth, but identify with femininity to a greater extent than with masculinity.*

18 *Transmasculine: Transmasculine is a termused to describe transgender people who were assigned female at birth, but identify with masculinity to a greater extent than with femininity.*

19 *Supra Note 9.*

20 *Supra Note 9.*

Just a glance at these terms tells that Gender is a very wide scoped term. It is pertinent to notethat gender, does not necessarily stay the same throughout one's life. They are people who sometimes feel women, men, and sometimeslike othergender identities.[21] This way ofidentifying is thus, not suitable to be categorized under one particular label, and, thereforepeoplewho fall under this categoryareknown as **Gender Fluid**.

Gender, being a multifaceted social construct can be said to have become a root cause of a lotof human rights violations. It sounds simple but is a deeply layered complex concept. Gender *primafacie* becomes the reason for gender-based discrimination and gender-based violence.[22]

Gender-based discrimination[23] includes any distinction, exclusion, or restriction due togender that has the effect or purpose of impairing or nullifying the recognition, enjoyment, orexercise of human rights and fundamental freedoms. Gender-based discrimination can occur in two modes or ways, namely, Direct andIndirect.

It is Direct[24] when the variance in conduct is dependent upon differences made solely basedon one's sex or gender, which cannot be classified as a rational ground (e.g., laws excluding women from serving as army combatants). On the other hand, gender-based discrimination isindirect when on the face of it a law/scheme/provision seems to be neutral but negatively impacts people of a particular gender (e.g., laws excluding people of Trans community from availing benefits that men and women receive).

Gender-based violence[25] is violence directed towards, or disproportionately affecting someone because of their gender or sex. Such violence takes multiple forms, including acts oromissions intended or likely to cause or result in death or physical, sexual, psychological or economic harmorsuffering, threats of such acts, harassment, coercion and arbitrary deprivation of liberty.[26] Some instances could be the sexual-domestic violence faced by transgenders, harmful practices[27] against thetrans community, etc.

21 *Supra Note 9.*

22 UN Commission on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment*,26 April 1999, E/CN.4/RES/1999/32, available at: *https://www.refworld.org/docid/3b00f22e20.html* [accessed11 December 2022,11:00PM].

23 *SupraNote5.*

24 *SupraNote5.*

25 *SupraNote5.*

26 CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 26 July 2017 *https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267E.*pdf[accessed 16December 2022,06:00PM].

27 Harmful practices are persistent behaviors, attitudes and practices that are based on discrimination and aretypically justified by invoking socio-cultural or religious customs, values, practices and traditions. Harmfulpractices impair the recognition, enjoyment and exercise of human rights and are mostly perpetrated by privateindividuals. Joint general recommendation No. 31 of CEDAW and general comment No. 18 of the CRC onharmful practices, CEDAW/C/GC/31-CRC/C/GC/18, *https://undocs.org/CEDAW/C/GC/31/CRC/C/GC/18*[accessed16 December 2022, 06:30PM].

GLOBAL HISTORICAL EVOLUTION

Transgender history, in the broadest sense, includes examples of gender variance and gendernonconformity in cultures worldwide since ancient times. As the history available is beforethe coining of the modern term *'transgender'*, opinions of how to categorize these people andidentities vary.[28]

ANCIENT ERA

Texts from 4500 years ago document transgender or transvestite priests are known as *gala* and by other names.[29]

America, even before the European colonization, as well as in some contemporary cultures, traditionally recognized third gender or multi-gender roles.[30]

Graves of possibly Trans or third-gender people in Europe and America have been identified from 4500 years ago, and likely depictions occur in art around the Mediterranean from 9000 to 3700 years ago.

In Ancient Greece, Phrygia, and Rome, there were trans-female priests, and records of women who posed as meninorder to vote, fight or study during times when these things were for bidden for women.[31]

Roman emperors preferred to be called a lady, not a lord, and even sought sex reassignment surgeries, and thus, havebeen seenas anearly Transfigure.[32]

'Hijras' on the Indian subcontinent and *'Kathoeys'* in Thailand have formed trans-feminine third gender social and spiritual communities since ancient times, with their presence documented forthousands ofyears in texts.[33]

Religious iconography in these cultures includes depictions of and rogynous figures with bodies that aremaleon onesideand femaleon theother.[34]

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28 Genny Beemyn, *Trans Bodies,Trans Selves: A Resource for the Transgender Community*, (2014), *https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/genny_beemyn_transgender_history_in_the_united_states.pdf*[accessed18December 2022,04:00PM].

29 Caroline Jayne Crowhurst, ‾*True of Voice?: The speech, actions, and portrayal of women in New Kingdomliterary texts, datingc.1550to 1070 B.C,* (2017)*https://researchspace.auckland.ac.nz/handle/2292/36757*[accessed 18 December 2022, 04:30PM].

30 *Infra Note 31.*

31 Leslie Feinberg, *Transgender Liberation*, The Transgender Studies Reader, (2006, ISBN 041594709X), p.215-216, *https://forlackofsomegoodwriting.files.wordpress.com/2013/12/susan-stryker-and-stephen-whittle-eds-the-transgender-studies-reader.pdf*[accessed18December 2022,05:00PM].

32 Marianna Karakoulaki, "*Transgender refugees in Greece reclaim their dignity*, (2018) *https://www.dw.com/en/transgender-refugees-in-greece-reclaim-their-dignity/a44551880*[accessed 17 December 2022,09:00PM].

33 Winter, Sam; Udomsak, Nuttawut *"Male, Female and Transgender : Stereotypes and Selfin Thailand", International Journal of Transgenderism*, ISSN 1434-4599 (2002) *https://www.researchgate.net/publication/288617609_Male_female_and_transgender_Stereotypes_and_self_in_Thailand*[accessed 11 December 2022,05:45PM].

34 *Supra Note 33.*

MEDIEVAL ERA

IntheMiddle Ages, there have been many accounts of trans men around Europe.

In the Balkans since the 1400s, female-assigned people have transitioned to live as mencalled *'sworn virgins'*.[35]

In colonial America, people in the 1600s adopted clothes and roles of both men and women. In the 1800s, some people used military service to begin new lives as men or otherwise transitioned.[36]

In 1895, a transauto biographer organized the*'Cercle Hermaphroditos'*, which was a transgender advocacy organization in New York City to unite for defense against the world's bitter persecution.[37]

Apart from this, people in the early 1900s had female-to-male sex reassignment surgeries, male-to-female reassignment surgeries includingovaryand uterus transplants.[38]

MODERN AGE

In 1952, American trans woman Christine Jorgensen's public transition brought wide spread awareness to reassignment surgery.[39]

The grassroot fight for trans rights became more publicly visible with trans and gay people fighting back against police in many riots. In Iran, the government started partially funding sex reassignment, andnow carries out more surgeries than any where besides Thailand.[40]

In the 1990s and 2000s, the ***Transgender Day of Remembrance*** was started and Transmarches around the time of Pride became more common in New Zealand, India, Japan, and the USA.[41]

Transgenders were also elected to some public offices and legislative actions, combined with court actions began recognizing Trans peoples' rights in some countries around the world (especially in the West, India, and southern Africa).[42]

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35 Jake Scobey-Thal, *Third Gender: A Short History,* (Jun 30, 2014), *https://foreignpolicy.com/2014/06/30/third-gender-a-short-history/*[accessed11December 2022, 06:00 PM].

36 Benjamin, H. *The Transsexual Phenomenon, New York: Julian Press,* (2017), *https://pubmed.ncbi.nlm.nih.gov* [accessed 17December 2022,09:30PM].

37 *SupraNote 31.*

38 *SupraNote 31.*

39 Beene,Richard,*"ChristineJorgensenIsFightingaNewBattle"*,(Sep3,2017).*LosAngelesTimes,https://www.latimes.com/archives/la-xpm-1988-09-03-me-3079-story.html*[accessed 20December 2022,09:50PM].

40 *Supra Note 33.*

41 *https://www.hrc.org/campaigns/transgender-day-remembrance* [accessed 20 December 2022,10:00 PM].

42 Zeba Naz, *Conflicting Identities: Traversing Through The Subdued Voices Of Transgender In India With Special Reference To A Revathi's the Truth About Me: A Hijra Life Story* (2012), *https://akuconference.springer.co.in/wpcontent/uploads/2019/10/BOOK-CHAPTER-APJ-ICIR-2019.pdf* [accessed 17 December 2022, 11:00PM].

At the same time, other countries especially in the rest of Africa, Central Asia, and Arabia were hostile and curtailed Trans peoples' rights.[43]

Although it is doubtful that all of these traditions had a common origin, and possible thatsome of these are Trans only by coincidence, there do seem to be several similar themes tying them together. Sorting through them to find specific motives and beliefs is impossible because so little of the original traditions were recorded or survived. However, one thing thatcan be established is that transgenders are not new. They have existed in almost all pastcivilizations.

Thus, by virtue of this, it can be said that transgender rights stem from human rights, i.e., those fundamental rights belonging to every person. Persons with either cis-gender or transgender identities deserve to live and flourish in their communities with the freedom tolearn, work, love, and play and build lives connected with others at home, in the workplace, and in public settings without fear for their safety and survival.

INDIAN POSITION- JOURNEY FROM ANCIENT PERIOD TO CONTEMPORARY ERA

Ancient Period

Eunuchs have existed since the 9th century B.C. as evident from the word having roots in the Greek language, meaning '*Keeper of the bed'*[44] Because of mentions in Hinduism, Jainism, and Buddhism, andit canbeinferred thattheVedic culture recognized three genders.[45]

The *Vedas* (1500 BC - 500 BC) describe individuals as belonging to one of three separate categories, according to ones' nature.[46]

Various texts suggest that third sex individuals were well known in pre-modern India, and included male-bodied or female-bodied people as well as inter sexuals and that they could often be recognized from childhood.[47]

Third sex is also discussed inancient Hindulaw, medicine, linguistics, and astrology.[48]

The foundational work of Hindu law, the Manu *Smriti*(200 BC - 200 AD) explains the biological origins of the three sexes: "*A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, athird-sex childor*

43 *Supra Note 42.*

44 Preeti Sharma, *Historical Background and Legal Status of Third Gender In Indian Society,* IJRESS, Vol. ED–2(12), December. 2012 *http://euroasiapub.org/historical-background-and-legal-status-of-third-gender-in-indian-society/*[accessed 15 December 2022].

45 *Supra Note 44.*

46 *Supra Note 44.*

47 *Supra Note 44.*

48 *Supra Note 44.*

boy and girl twins are produced; if either is weak or deficient in quantity, a failure of conception results."[49]

In *Vedic* astrology, the nine planets are each assigned to one of the three genders; the third gender, *Tritiya-Prakriti*, is associated with Mercury, Saturn, and (in particular) *Ketu*.[50]

In the *Puranas*, there are also references to three kinds of devas of music and dance: *apsara*s (female), *Gandharvas* (male), and *kinnars* (neuter).[51]

Transgender persons have been a part of Indian society for centuries. There is historical evidence of recognition of *'third sex'* in the writings of ancient India.[52]

The concept of '*Tritiya Prakriti*' or '*napumsaka'* has been an integral part of the Hindumythology, folklore, epic and early *Vedic* and *Puranic* literature.[53]

The term '*napumsaka'* had been used to de note the absence of procreative ability, presented by signifying difference from masculine and female markers.[54]

Thus, some of the early text sex tensively dealt with issues of sexuality, and the idea of the third gender was an established thought there in.

MEDIEVAL PERIOD

Hijras played a famous role in the royal courts of the Islamic world, particularly in the Ottoman empires and the Mughal rule in Medieval India.[55] *Hijras* were considered clever, trustworthy, and fiercely loyal and had free access to all spaces and sections of the population, thereby playing a crucial role in the politics of empire-building in the Mughal era and thus they rose to well-known positions as political advisors, administrators, general.[56]

The *Hijras* also occupied high positions in the Islamic religious institutions, especially in guarding the holy places of Mecca and Medina, they were able to influence state

49 M.Michelraj, *Historical Evolution of Transgender Community in India*, (June 10, 2018), *http://www.trp.org.in/wpcontent/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June.pdf*[accessed 13 December 2022, 06:00 AM].

50 *Supra Note 44.*

51 *Supra Note 49.*

52 Anitha Chettiar, *Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference toTheir Health and Harassment by the Police*, International Journal of Social Science and Humanity, (2018) *http://www.ijssh.org/index.php?m=content&c=index&a=show&catid=59&id=877* [Accessedon13December 2022, 06:20AM].

53 *SupraNote 49.*

54 *SupraNote 49.*

55 Tahmina Habib, *A Long Journey towards Social Inclusion: Initiatives of Social Workers for Hijra Population in Bangladesh* University of Gothenburg International Masters Programme in Social Work and Human Rights, 2012 *https://gupea.ub.gu.se/bitstream/2077/32545/1/gupea_2077_32545_1.pdf* [Accessedon13 December 2022,06:30 AM].

56 *Supra Note 55.*

decisions and also received a large amount of money to have been closest to kings and queens.[57] Thus, *Hijras* had an important role and status in that period.

BRITISH PERIOD

At the beginning of the British period in the Indian subcontinent *hijra* used to accept protections and benefits by some Indian states through entry into the *hijra* community.[58] Furthermore, the benefits incorporated the provision of land, rights of food, and a small amount of money from agricultural households in areas that were ultimately removed through British legislation becausethe land was not inheritedthrough blood relations.[59]

Through the onset of colonial rule from the 18th century onwards, the situation changed drastically. Accounts of early European travelers showed that they were repulsed by the sightof *Hijras* and could not comprehend why they were given so much respect in the royal courtsand otherinstitutions.[60]

In the second half of the 19th century, the British colonial administration vigorously sought tocriminalizethe *hijra* community and to deny them civil rights.[61]

Hijras were considered to be separate caste or tribe in different parts of India by the colonial administration. The Criminal Tribes Act, 1871, punished all *hijras* who were concerned with kidnapping and castrating children and dressed like women to dance in public places.[62] The punishment forsuchactivities was up to twoyears imprisonment and a fine or both.[63]

However the Act was repealed in 1952 but, its legacy continues and many local laws reflected the prejudicial attitudes against certain tribes, including *Hijras*.[64] This pre-

57 Mohammad Rafeek, Transgender and human rights-current situation and potential options of development in India, (2015), https://www.academia.edu/30657645/transgender_and_human_rights_current_situation_and_potential_options ._of_development_in_india_delegation_to_the_1_st_international_congress_on_human_rights_and_duties [Accessed on 12 December 2022, 06:45PM].

58 *SupraNote 49.*

59 *SupraNote 49.*

60 Gnana Sanga Mithra S,Vijayalakshmi, *"Changing Trends in Socio-Economic Conditions of Transgender,* (2008) *https://www.ijeat.org/content/uploads/papers/v9i1/A1116109119.pdf* [accessed 4 December 2022, 06:05PM].

61 *Supra Note 60.*

62 TheCriminalTribesAct,1871,PartII.

63 The Criminal Tribes Act, 1871, Section 26*: Penalty on registered eunuch appearing in female clothes.- Anyeunuch so registered who appears, dressed or ornamented like a woman, in a public street or place, or in anyother place, with the intention of being seen from a public street or place. or dancing in public, or for hire.- orwho dances or plays music, or takes part in any public exhibition, in a public street or place or for hire in aprivate house, may be arrested without warrant, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine,or with both*

64 *Supra Note 63.*

partition history influences the vulnerable circumstances of *hijras* in this contemporary world.

CONTEMPORARY ERA

Transgenders in India are possibly the most well-known and popular third type of sex in the modern world. TheSupreme Court declared transgenderasthethird gender.[65]

The third gender people in India have emerged as a strong faction in the rights of lesbians, gays, bisexuals, intersex people, and others. In contemporary times the Government of India introduced welfare policies and schemes such as census, documentation, issuing of the citizenship ID Cards, issuing passports, social-economic development, and constitutional safeguards forthe transgender people.[66]

The *Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA)* is a majorinitiative of the 11th Five Year Plan period which brought employment opportunities for transgender people.[67]

Even though the transgender community wasgivena high position inthe Mughal period, they faced many problems during British colonial rule. But now there are various, social, economic, political transformations, housing measures, legal measures, police reforms, legal and constitutional safeguards to prevent human rights violations of the transgender community and institutional mechanisms to address specific concerns of transgender people.

In India, several native/regional terminologies are used to define gender transgressions. India,though being a host to various socio-cultural religious groups has transgender people inminority compared with the total population of the country. According to ***"The Report of the Expert Committee on the issues relating to Transgender persons"***[68], published by theIndian Ministry of Social Justice and Empowerment, a suggestive and not exhaustive list wasprepared by the Committee of all known transgender socio-cultural persons who qualify astransgender.Thelistcomprisesofsocio-cultural groups of transgender people including ***Hijras/Kinnars***, and other transgender identities like ***Shiv-Shaktis, Jogtas, Jogappas, Aradhis, Sakhi***, etc.

Transgender Communities Recognized in India

- *Kothi*: A local language term used in South East Asia to refer a Person Assigned Gender Male at Birth, who identify with characteristics, roles, and behaviors

65 National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC1863.

66 *Supra Note 60.*

67 Holmes, Rebecca and Sabharwal, *Gendered Risks, Poverty and Vulnerability in India: Case Study of the Indian Mahatma Gandhi National Rural Employment Guarantee Act (Madhya Pradesh)* (2010) *https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6254.pdf* [accessed4December 2022,06:45PM].

68 India, Ministry of Social Justice and Empowerment, The Report of the Expert Committee on the issues relating to Transgender persons, (Jan. 01, 2014) p. 64 http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf [Accessed 15 December 2022, 06:00 AM].

conventionally associated with the feminine.[69] *Koth is* have also been defined aspeople, who like to crossdress and see themselves as women and use the female pronounto describe themselves. They may take on this identity only while among their peers but may continue to dress and act like men otherwise. *Kothi* persons present themselves as males in most spheres of their lives and only reveal their feminine identity in certain social circles, unlike *Hijra* identified persons who present themselves in their feminine attire all the time.[70] Despite this difference, in present times, the two identities may often overlap, especially in terms of the social and community networks they are associated with.

- *Hijras*: *Hijras* are biological males who reject their '*masculine*' identity in due course of time to identify either as women, or *'not-men'*, or *'in-between man and woman'*, or *'neither man nor woman'*.[71] *Hijras* can be considered as the western equivalent oftransgender/transsexual (male-to-female) persons. There are regional variations in theuse of terms referred to *Hijras*, for example, *Kinnars* (Delhi) and *Aravanis* (Tamil Nadu). *Hijras*may earn through their traditional work: *Badhai*, blessing new-bornbabies, or dancing in ceremonies. Some proportion of *Hijras*engage in sex work forlack of other job opportunities, while some may be self-employed or work for non-governmental organizations.
- *Aravanis*and *Thirunangi*: *Hijras*in Tamil Nadu identify as '*Aravani*'. Tamil NaduAravanigal Welfare Board, a state government's initiative under the Department ofSocial Welfare defines *Aravanis*as biological males who self-identify themselves as awoman trapped in a male's body[72].Some *Aravani*activists want the public andmediatousetheterm'*Thirunangi*'torefertoA*ravanis*.
- *Jogtas*/*Jogappas*: *Jogtas*or *Jopgappas*are those persons who are dedicated to and serve as a servant of Goddess Renukha Devi, whose temples are present in Maharashtra and Karnataka.[73] "*Jogta*" refers to a male servant of that Goddess and

  "Jogti" refers to a female servant. One can become a "*Jogta*" if it is part of their family tradition or if one finds a '*Guru*' (or '*Pujari*') who accepts him/her as a '*Chela*'or '*Shishya*' (disciple).[74]
- *Shiv-Shakthis*: *Shiv-Shakthis* are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression.[75] Usually, *Shiv-Shakthis*are inducted into the *Shiv-Shakti* community by senior gurus, who teachthem the norms, customs, and rituals to be observed by

69 *Supra Note 68.*

70 *Supra Note 68.*

71 *Supra Note 68.*

72 *Supra Note 68.*

73 *Supra Note 68.*

74 *Supra Note 68.*

75 *Supra Note 68.*

them.[76] Occasionally, *Shiv-Shakthis* cross-dress and use accessories and ornaments that are generally/sociallymeant for women. Most people in this community belong to lower socio economic status and earn for their living as astrologers, soothsayers, and spiritual healers.

The integration of a gender perspective in human rights investigations implies an analysis ofthe gender dimensions of the violations that include the perspectives of everyone, including Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Asexual, and the impacts of the human rights violations on all individuals and groups, which can differ dependingon their sex and gender.[77]

All human beings are persons and by that, they are entitled to rights regardless of their sexualorientation or gender identity. These rights include everything ranging from the basic right tolife and liberty to integral freedoms to achieve a dignified life as well as the equal protectionbeforelaw without anydiscrimination.

Having said that, it is unfortunate that the reality is contrary to this. Around the globe, regardless of the cultural environment or religious setting, human rights violations occurbecause people perceive sexual orientations and gender identities differently. This includesactsof violence, arbitrarydetention, and extrajudicial killings.

What often legitimizes human rights violations of members belonging to the Trans community are the laws and policies of countries. These laws make them vulnerable and thus, easy targets to be victimized. Many countries criminalize expressions of sexual orientation and gender identity.

It has only been lately, that the Indian judiciary in a landmark ruling[78] said that the people ofthe third gender, are legally recognized and must have equal rights to education, jobs, drivinglicenses, etc. The court added that *"Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue.*[79]

76 *Supra Note 68.*

77 *Supra Note 68.*

78 *Supra Note 65.*

79 *Supra Note 65.*

Legal Protection of Geographical Indications in India: Issues & Challenges

Ms. Ekta Sood & Ms. Yogita Sharma***

ABSTRACT

GI as an intellectual property is developing at a faster pace as compared to other forms of intellectual property. Geographical Indication is a sign used to specify that a product possesses certain qualities because of its origin in that particular geographical area. In India, we have Geographical Indications of Goods (Registration and Protection) Act, 1999 and Geographical Indications of Goods (Registration and Protection) (Amendment) Rules, 2020 to protect Geographical Indications at national level. The focal point of the paper is on the legal framework that protects Geographical Indications in India and response of judiciary. The paper also draws attention on the loopholes in the legislation and certain suggestions and recommendations are also provided to improve the structure of the legislation for better development of Geographical Indications.

Keywords: *Origin, Registration, Goods, Indications*

I. INTRODUCTION

A geographical indicator (GI) is a technique that allows manufacturers to distinguish their products from rival items on the market and to develop a reputation and goodwill about their products that will allow them to command a higher price. GI registration has been shown to have potential economic benefits in several studies. The notion of geographical indication has developed significantly since its inception in nineteenth-century Europe. The present international regime is outlined in Article 22 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which requires members to establish "legal means for interested parties" to obtain the protection of their GIs.[1] GIs are a type of intellectual property that is generally used to focus on

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1 Shashikant B. Bagade and Deven B Metha, "Geographical Indications In India: Hitherto and Challenges" 5 *Research Journal of Pharmaceutical, Biological and Chemical Sciences* 1226 (2014)

things as being from a specific location. They give producers in a geographical region, special rights to use distinctive signs to differentiate their products from rival items on the market, in addition to providing consumers with precise information about the origin of a product.[2]

Many known Geographical Indications such as Basmati, Darjeeling Tea, Nagpur Orange, Scotch whiskey, Alphonso, Antigua Coffee are continuous and collective efforts of individuals, communities, and organizations to maintain their validity, sublimity, and genuineness as well as to promote and retain the quality of the products. A geographical indication is a distinct type of intellectual property whose protection has been hampered by numerous obstacles around the world, particularly in developing countries. Geographical indications prevent the misbranding or representation of a product by implying that it originated in a location other than where it belongs. GI protection has become a more essential concern for producers that see improved legal protection for their commodity at both home and abroad as one of their primary challenges. The Geographical Indication Act, which allows a manufacturer or authorised user to register a GI and protect the name, was adopted by the Indian government at the end of 1999. If the products compete in worldwide marketplaces, it's because of their quality rather than their quantity. Geographical, natural, and human variables all influence quality. As a result, the geographical indicator is given proper protection.[3]

II. AIMS & OBJECTIVES OF STUDY

The study's main aim was to include an overview of geographical indications as an intellectual property right that can resolve developed countries' concerns, thus leading to better policy decision-making and, in turn, successful security. The study's basic objectives were as follows:

i. To study the origins of Geographical Indications and their legal protection;

ii. To conduct a cognitive review of Geographical Indications;

iii. To make recommendations for improvements to the international and national regimes for the protection of geographical indications, if any are required.

III. HISTORY & EVOLUTION OF GEOGRAPHICAL INDICATIONS

Even in the ancient and colonial periods, geographical indications had achieved worldwide awareness despite the lack of legal sanction. There are numerous examples to prove this. Christopher Columbus was inspired by Indian spices to ship from Europe to India. Scotch whiskey, Dhaka muslin, Arabian horses, Chinese clay pots, Indian rubber, Kashmiri carpets, Damask tablecloth, and other age-old examples of

2 Addor F & Grazioli A, "Geographical indications beyond wines and spirits: A roadmap for a better protection for geographical indications in the WTO TRIPS Agreement" 5 *Journal of World Intellectual Property* 865-897 (2002).

3 Anna Bashir, "Protection of Geographical Indication Products from Different States of India" 25 *Journal of Intellectual Property Rights* 74 (2020)

worldwide known products that embody the fame of various regions are only a few to name. In previous centuries, nations have used laws against false trade descriptions, unfair competition, and passing off to protect trademarks used about food products and other goods associated with a specific region. These legal provisions protect against indications/ recommendations that a commodity has a certain quality, origin, or association when it does not. People used GIs back then, though the phrase wasn't formed, in the usual course of business to establish a link between a specific location and a specific commodity, to show standards of quality and benefits from the region's excellent image. It denoted that a product from a specific location possessed characteristics unique to that region. As in the case of Basmati for specific rice varieties from India and Pakistan, Champagne for sparkling wine from the Champagne region of France, and Habana for tobaccos from Havana, Cuba, the term reflected the geographical origin of a given product.[4]

Before the TRIPS Agreement, which for the first time in the transnational realm brought to the surface the particular legal notion of GI, there were primarily three international conventions provided for the protection of IGOs, namely the Paris Convention for the Protection of Industrial Property (1883), the Madrid Agreement (1891), and the Lisbon Agreement for the Protection of Industrial Property (1958). The Paris Convention and the Madrid Agreement both dealt with 'indications of source,' whereas the Lisbon Agreement concentrated on 'appellations of origin.' The adoption of the TRIPS Agreement was a major leap forward in the international protection of geographical indications. First, it established 'minimum' standards of protection for GIs (and all other IPRs), which as many as one hundred and fifty (as of now) WTO Member countries were required to implement in their national legislation, and second, it was supported by an established procedure mostly in form of the WTO's dispute settlement agreement.[5]

For a nation like India, which was abundantly bestowed with agricultural and natural products and already had world-famous geographical names such as 'Darjeeling' (tea), 'Basmati' (rice), 'Alphonso' (mango), etc., effective protection for GIs was critical. However, until the enactment of 'The Geographical Indications of Goods (Registration & Protection) Act, 1999. Tea from Kenya and Sri Lanka has frequently been mislabeled as 'Darjeeling tea,' which refers to the exquisite aroma product of the elevated highlands of North Bengal, from where it gets its name. Corporations in France and the United States have begun developing rice based on 'Basmati' types and filing trademarks that allude to 'Basmati,' attempting to profit from this well-known geographical name. The recent issue over the US patent granted to Texas-based Rice Tec Inc on 'Basmati

4 Lisa P Lukose, "Rationale and Prospects of the Protection of Geographical Indication: An Inquiry" 12 *Journal of Intellectual Property Rights* 212 (2007)

5 Kasturi Das, "Protection of Geographical Indications- An Overview of Select Issues with Particular Reference to India", *SSRN Electronic Journal*, available at: 10.2139/ssrn.1587372 (Last visited on Oct 5, 2021)

Rice Lines and Grains' is a clear example of improper exploitation of a well-known GI from India. The list goes on and on.[6]

There was no explicit law on Geographical Indications in India before 1999 that could appropriately protect the rights of manufacturers. Although being a signatory to the TRIPs agreement, India did not pass a geographical indications law until 1999. The judiciary, on the other hand, has been active in stopping people from abusing geographical indications.[7]

In *Mohan Meakin vs Scotch Whiskey*[8], the Delhi High Court upheld the registrar of trademarks' refusal to register the applicant's mark, which included the words "Highland Chief" and a device of a gentleman clothed in Scottish highland costume-wearing, among other things, a feather bonnet and plaid and edged with tartan, a well-known symbol of Scottish origin.

In another case, *Scotch Whiskey Association vs Pravara Sahakar Karkhana*[9], the defendants were barred from exporting their whiskey with the label "Blended with Scotch" and the symbol of a Scottish drummer wearing a kilt or tartan, as well as the word "Drum Beater."

Apart from this, there were three ways in which the then-existing legal systems of the country could have been utilised for preventing the misuse of GIs:

- Under the consumer protection acts
- Through passing-off actions in courts
- Through certification marks

IV. LEGAL FRAMEWORK IN INDIA

TRIPS provides the bare minimum of security. Article 23 (which protects wines and spirits) gives member states the freedom to expand protection to other items under their national laws. Countries like the United States, for example, did not develop a different system, preferring instead to use trademark laws for GI protection, whereas the 'Old World' implemented robust sui generis laws for GI protection. The EU model is the most developed and the most similar to Indian legislation. The Indian government was never aggressive in addressing the subject of GI protection under TRIPS until the 'Basmati episode' sparked public outcry.[10]

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6 Mangala & Anil Hirwade, "Geographical Indications: Indian Scenario" available at: https://www.researchgate.net/publication/28805024_Geographical_indications_Indian_scenario (Last visited on Oct. 5, 2021)

7 VK Ahuja, "Protection of Geographical Indications: National and International Perspective" 46 *Journal of the Indian Law Institute* 272 (2004)

8 AIR 1980 Del 125

9 AIR 1992 Bom 294

10 J Adithya Reddy & Siladitya Chatterjee, "A Critique of the Indian Law and Approach towards Protection of Geographical Indications with Special Reference to Genericide" 12 *Journal of Intellectual Property Rights* 574 (2007)

GI protection has become a more essential concern for providers that see improved legal protection for their products at both the national and international levels as one of their primary obstacles. The Geographical Indication Act, which allows a manufacturer or authorised user to register a GI and protect the name, was adopted by the Indian government at the end of 1999. The existing GI legislative structure in India for the preservation of Geographical Indications appears to be an intriguing option.

India is a fascinating destination. The GI Act is thought to be a mechanism that could:

i) provide manufacturers with an adequate protection framework; and

ii) be utilised as a promotion strategy, giving producers a financial advantage over their business rivals due to their existing reputation.[11]

A geographical indication (GI) is a relatively new idea in India, having been introduced in writing in 1999 and implemented on September 15, 2003. The first registered GI was for Darjeeling tea, which was applied for in 2003 and formally recognized in October 2004. This is a typical example of a regional origin indication that greatly aided India's brand awareness in the international market. The Geographical Indications of Goods (Registration and Protection) Act, 1999 (GI Act) and the Geographical Indications of Goods (Registration and Protection) Rules, 2002 are the Indian laws that deal with GI protection (GI Rules). Parliament enacted its GI legislation to implement national intellectual property laws under India's TRIPS responsibilities. A GI's registration allows its rightful owner and qualified users the right to seek infringement remedy. In India, a GI is first registered for ten years and can be renewed for another ten years at any time. According to Indian law, a registered GI cannot be used for transmission, assignment, pledge, licensing, mortgage, or any other type of transaction.[12]

Following are the few features of Geographical Indications of Goods (Registration and Protection) Act, 1999:

i. Definition

The terms 'indications,' 'goods,' 'producers,' and 'geographical indications' are all specified in Section 2 of the Act. Simply reading the definitions indicates how India safeguards GI in far more comprehensive ways than the TRIPs allow. One of the most fundamental differences is that the Act defines products as either agricultural, natural, or manufactured goods that can classify as a GI, whereas TRIPs refer to all things. In some ways, including specific commodities limits the breadth of protecting goods that aren't covered by those specific goods. The provision, for example, excludes

11 *Supra* note 3.

12 Suvrashis Sarkar, "History & Evolution of Geographical Indication as Intellectual Property in India" 6 *International Journal of Scientific Research* 530 (2017)

'handicrafts' from its meaning. Handicrafts are not included in the dictionary definition of manufactured products.[13]

As per the (Indian) Geographical Indications of Goods (Registration and Protection) Act, 1999 "Geographical Indication", concerning goods, means an indication which identifies such goods as agricultural goods, natural goods, or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in the case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.[14]

ii. Registration

To claim protection against infringement, a Geographical Indication must be registered. The Registrar of Geographical Indications has registration authority under the Act. The Controller General of Patents, Designs, and Trademarks is also designated as the Registrar of Geographical Indications under Section 3 of the Act. For registration of geographical indication about concerned goods, any association of persons or producers, or any organization or authority which is established by law shall apply in writing to the Registrar in the form and manner prescribed for the registration of geographical indications. An application must be accompanied by the fees prescribed for the registration of geographical indications.[15]

The Calcutta High Court denied the plaintiff's request to register "SIMLA" as a trademark for cigarettes in *Imperial Tobacco Co. Ltd vs The Registrar of Trademarks and Anr*[16]. The court ruled that a well-known geographical term cannot be registered as a trademark because it "may hinder or disgrace the commerce, or traders in or around the location in the future."

Geographical names are not allowed to be protected as a trademark. In *India TV vs India Broadcast Live LLC & Ors*[17], this was also made evident. Section 9 of the Act outlines which geographical indicators are not allowed to be registered as geographical indications.

Benefits of Geographical Indication Registration:

1. It provides legal protection to Geographical Indications in India

13 N. Krishan Kumar, "Geographical Indications Laws in India: Issues and Challenges" 3 *Journal of Intellectual Property Rights Law* 12 (2020)

14 The Geographical Indications of Goods (Registration and Protection) Act, 1999, s.2

15 M.K. Bhandari, "Law Relating to Intellectual Property Rights" 272 (Central Law Publications, Allahabad, 2019)

16 AIR 1977 Cal 413

17 MIPR 2007 (2) 396

2. It forbids anyone from using a registered Geographical Indication without permission.
3. It provides legal protection for Indian Geographical Indications, which encourages exports.
4. It encourages manufacturers' economic development.
5. It allows you to seek legal protection from other WTO members.[18]

iii. What type of goods can be registered

As per Section 8 of the Act, a geographical indication may be registered in respect of:

i. any or all of the products that are included in the Registrar's classification of goods
ii. country's defined territory
iii. a specific geographical area
iv. a specific location within the territory[19]

iv. Duration

Section 18 of the Geographical Indications Act, 1999 deals with duration, renewal, restoration, and removal of registration. The registration of a geographical indication is for ten years, but it may be renewed in accordance with the rules of this section at any time. A registered proprietor can apply for the renewal of the registration of geographical indications to the Registrar on the payment of prescribed fees. The registrar shall not remove the geographical indication of an authorized user if an application is made with prescribed fees within six months from the date of expiration of the last registration. However, such removal can be restored back after six months and within one year from the expiration of the last registration.[20]

v. Infringement

Section 66 of the Geographical Indications Act, 1999 deals with the suits for infringement. Jurisdiction of suit for infringement lies to District Court within the local limit of whose jurisdiction actually or voluntarily resides or carries on the business or personally works for gain.[21] Any person who is not an authorized user of a registered geographical indication infringes it when:

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18 N.K. Manjunatha, "Status of Geographical Indications in India, Especially Karnataka" Third Concept 32 (2016)

19 Suresh C. Srivastava, "Geographical Indications under TRIPs Agreement and Legal Framework in India: Part II" 9 *Journal of Intellectual Property Rights* 113 (2004)

20 Sec 18 of Geographical Indications Act

21 Sec 66 of Geographical Indications Act

i. Uses any geographical indication in the designation or presentation of goods that implies or signifies that such goods originate in a geographical area other than the genuine place of origin of such goods in a way that deceives people about the geographical origin of such goods.[22]

ii. Uses any geographical indication in a way that is considered an "act of unfair competition," such as passing off registered geographical indications.[23]

iii. Utilizes another geographical indication to the goods that, while right as to the locality, region, or territory from which the goods originate, misrepresents the goods to the public as originating in the locality, region, or territory to which such registered geographical indications pertain.

It is also an infringement to use a geographical indication on goods that do not originate in the location indicated by the geographical indication, even if the true origin of the goods is also demonstrated and the geographical indication is associated by manifestations like "kind," "style," "imitation," or similar expressions.[24]

vi. Remedies

Infringement is punishable both civilly and criminally under the statute. Injunctions, damages, or accounts of profits, and the surrender of infringement labels and indications are all civil remedies. Unless he can show that he acted without purpose to defraud, anyone who falsifies or falsely applies geographical markings to commodities faces a penalty. The Act stipulates that these offenses are punishable by imprisonment for a period of not less than fifty thousand rupees but not more than two lakh rupees. In terms of Section 40, selling goods with a fake geographical designation carries a comparable penalty. On a second or subsequent conviction, Section 41 imposes a harsher penalty, including imprisonment for not less than one year but not more than three years, as well as a fine of not less than one lakh rupees but not more than two lakh rupees.[25]

vii. Appeals.

Any person aggrieved from the order of the registrar may prefer an appeal within three months to the appellate board from the date on which the order was made. No appeal shall be made after the expiry of the specified period as per Section 31.[26]

Features of Geographical Indications of Goods (Registration and Protection) (Amendment) Rules, 2020

Recently, Geographical Indications of Goods (Registration & Protection) (Amendment) Rules 2020 has been passed by the Department of Promotion of Industry and Internal

22 Sec 22(1) of Geographical Indications Act

23 Explanation 1 to Sec 22(1)

24 Sec 22(3)

25 *Supra* note 4

26 Geographical Indications of Goods (Registration & Protection) Act, s. 31

Trade under the Ministry of Commerce and Industries. On August 26, 2020, these rules came into force. This amendment modifies a few sections concerning the regulation of the authorized users of products. The guidelines have also aided in the simplification of the procedures for registering people as GI Authorized Users. The goal of such revisions appears to be to make it easier for those who wish to register as authorised users of a product with a GI Tag to do so.[27]

These rules defined the term 'authorized user'. A person who has the authority to create, distribute or manufacture any product/goods with a geographical indication is known as an authorised user. Any person who is producing any goods can seek to become an authorised user. Dealing, trading, processing, or production (in the case of agricultural commodities), dealing, trading, or exploiting (in the case of natural goods), and dealing, trading, manufacturing, or producing (in the case of industrial products) are all termed as producers. In the event of a geographical indication violation, an authorised user has the right to file a lawsuit.

a. Registration as an authorized user.

Initially, to register as an authorized user, one must have to file an application together with the registered proprietor of the concerned geographical indications. But after amendment, to become an authorized user, only the person intended to be authorized person will file an application by filling Form GI-3.[28]

b. Application accompanied with certain documents

An authorized user who intended to register himself as an authorized user has to apply for a GI product and that application must be accompanied by the statement of the case. A copy of the application must be provided to the registered proprietor, and a notification to the registrar is necessary.

c. Duplicate copy of registration certificate

The Act allows the Registrar to issue a duplicate copy of the registration certificate. To apply for a duplicate copy, Form GI-7 has to be filed along with the prescribed fee.

d. Fee for registration and renewal.

The charge for registering an authorised user was originally Five hundred Rupees, and the fee for renewing an authorised user was One thousand Rupees. But after amendment, the fee for registration as well as renewal is reduced to Ten Rupees.[29]

V. STATUS OF GEOGRAPHICAL INDICATIONS IN INDIA

The year-by-year distribution of GIs in India shows that the number of registered GI products is on the rise. In the initial year, 2004-05, just three goods were registered.

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27 Sakshar Law Associates, "Understanding Geographical Indications of Goods(Regulation & Protection) (Amendment) Rules, 2020, LEXOLOGY, available at: https://www.lexology.com/library/detail.aspx?g=252e1fd7-f1b7-437f-80a5-fab8434e74cb (Visited on Dec 2, 2021)

28 Ibid

29 Ibid.

In the fiscal year 2005-06, the number of GI-registered items increased significantly. In the following year, 2005-06, twenty-four (24) new items were registered, but just three (3) were registered the following year, 2006-07. Thirty-one new goods were registered in the 2007-2008 fiscal year. The year 2008-09 had seen the highest number of new items, at forty-five. However, there was a considerable decline in the number of new GI product registrations in 2009-10. During the 2009-10 fiscal year, only fourteen goods were registered. In the 2010-11 fiscal year, twenty-nine new items were registered, whereas, in the 2011-12 fiscal year, twenty-three new products were registered. Twenty-one new goods were registered in the 2012-13 fiscal year. In the next year, 2013-14, twenty-one new goods were registered. Nineteen new items were registered under the GI tag in the 2014-15 fiscal year. Only two goods were registered under the GI designation in the years 2015-2016. The highest number of GIs registered, one hundred and fourty-four, account for 60.75 percent of all registrations, followed by agriculture and manufacturing, which account for 26.16 percent and 7.59 percent, respectively.[30]

Three hundred and seventy items have been registered under GI till March 2021, fifty three have been rejected, twenty-five have been withdrawn, twenty-eight have been shelved, and two hundred and thirty are still undergoing registration. Foreign countries have also registered certain items in India. For GI, fifteen goods from nine nations were registered. Peruvian Pisco, a brandy, was the first product registered by Peru in 2009-2010, followed by France Champagne (2010-11) and Cognac (2011-12), and the United States's Napa Valley (2010-11), United Kingdom Scotch Whiskey (2010-11), Italy's Prosciutto di Parma (2010-11), Parmigiano Reggiano, Prosecco and Asiago (2016-17), Grana Padano (2018-19), Portugal Porto and Douro (2011-12), Mexico Tequila (2012-13), Thailand Lamphun Brocade Thai Silk (2017-18), and Ireland Irish Whiskey (2019-20).[31]

Unlike previous years, when the GI registry published the list of newly certified goods one by one, this year it decided to post all fifty-one at once on its website. And the appearance of at least a couple of products from four Western countries suggests a new phenomenon is on the way. Some of these items have been undergoing registration since 2018, and instead of delivering certificates to the applicants, the GI top brass has been personally handing them over to the chief ministers of the relevant states. In India, till March 2023, four hundred and thirty- two products ranging from agricultural to handicraft items have been accorded the GI label as a result of this list. The top 5 states holding maximum number of GIs are Karnataka, Tamil Nadu, Uttar Pradesh, Kerala and Maharashtra.[32]

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30 *Supra* note 18

31 Rajiv M. Patel & Lavzi N. Zala, "Geographical Indications in India: Present Scenario" *Library Philosophy and Practice (e-journal)* 2021

32 A Subramani, "51 products get GI tag; German Beer among 12 entrants from Europe" *Times of India,* Oct.7, 2021

VI. JUDICIAL RESPONSES IN INDIA

i. Bikanervala vs. New Bikanerwala[33]

The words Bikanervala and New Bikanerwala were in disagreement in this case. Bikaner is a well-known geographical region in Rajasthan that is well-known for a specific type of food for human consumption. It stands out from the crowd due to its distinct personality. The plaintiff, Bikanervala, is a partnership corporation that manufactures and markets food products for humans, such as namkeens and sweets. The court has issued an interim injunction prohibiting the use of the term "Bikanerwala" in any form.

ii. Hi-Tech Pipes Ltd. Vs Asian Mills Pvt. Ltd.[34]

Although a geographical name or a word indicating geographical origin is indeed not prima facie competent of distinguishing, it may be recognised for registration based on evidence of obtained uniqueness through the use of the term as a trademark in connection to specific goods or services, according to the Delhi High Court. Then it'd be a geographical indication, and it couldn't be used. As a result, 'Kolhapuri' can be used as a perfume but cannot be used as a chappal.

iii. Priya Gopal Bishoyi Sarees Pvt vs Benarsi Kothi Priya Gopal Alias[35]

The plaintiff in this action has been using the "Priya Gopal" or "Priya Gopal Bishoyi" names for a long period of time, over a century, and the marks are famous in the textile sector, specifically in the manufacture or sale of sarees. These marks were also being used by the defendant to take care of its company. The defendant shall be barred from passing off and attempting to pass off its company by using the marks "Priya Gopal" or any other mark containing the words "Priya Gopal," according to the Calcutta High Court.

iv. Tea Board vs ITC Limited[36]

This was the dispute between the Tea Board of India and the ITC Limited relating to the word 'DARJEELING'. As per Tea Board, they have exclusive control over the word 'Darjeeling', and on the contrary, ITC asserts that the word 'Darjeeling' has more things attached to it apart from tea grown here. The appellant contended that it would amount to the action of passing off or attempting to pass off services and businesses if the name and logo 'DARJEELING' of the original geographical indication is used. The Act disgraces the name of DARJEELING Tea as a geographical indication. ITC Sonar is selling beverages by deceiving people that the character of beverages sold under them is similar to that of original DARJEELING tea. Hence, the use of the word 'DARJEELING' as a name or logo generate doubts in the mind of the consumers.

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33 2005 (30) PTC (Delhi) 113

34 2006 (32) PTC 92 Del.

35 C.S. No 171 of 2008

36 MANU/WB/0271/2011

The respondent refuses all the allegations and asserts that ITC does not have any intention to hurt or utilize the name earned by the Tea Board. Calcutta High Court stated that it is not difficult for the average intelligent person to distinguish from DARJEELING lounge with Darjeeling Tea and it is not likely to create confusion if any food product belonging to Tea Board of India is served in that lounge. Hence, the usage of the word "DARJEELING" is not the absolute right of the Tea Board. Calcutta High Court decided in favor of the ITC Hotel and its lounge.

v. CWWS (Chakhesang Women Welfare Society) vs TRIFED (Tribal Co-Operative Marketing Development Federation of India Ltd) & Ritu Beri[37]

A civil suit has been filed against fashion designer Ritu Beri and TRIFED (Tribal Co-Operative Marketing Development Federation of India Ltd.) by CWWS (Chakhesang Women Welfare Society) for infringement of registered GI. In February, 2020, Ritu Beri hosted a fashion show at the Suraj Kund Crafts Mela at Haryana with the theme "Naturally North East: The Naga Narrative" where the alleged misrepresentation of the Chakhesang shawls takes place. The shawls were meant for men and in the fashion show, it was worn by women. Court of District judge, Phek, Nagaland summoned both the parties. CWWS stated that the Chakhesang shawls have already been registered under GI and cannot be used by any individual without prior approval and consent.

vi. Madhya Kshetra Basmati Growers Association Samiti v. Intellectual Property Appellate Board, Chennai.[38]

An application was filed by APEDA (Agricultural and Processed Food Products Export Development Authority) before Assistant Registrar of the Geographical Indications Registry, Chennai for registration of 'Basmati' as Geographical Indications because they claim five states to be "Traditionally Basmati Cultivating Areas" namely, Punjab, Haryana, Delhi, Himachal Pradesh & Uttarakhand as well as parts of two other states namely Uttar Pradesh and J&K. Petitioner files a special leave to appeal and raised the opposition under Section 14 of the GI Act that APEDA hasn't included thirteen districts of Madhya Pradesh. The petitioner further claimed that the region delineated by APEDA for this purpose was ambiguous, inconclusive, and contradicted the GI Act's provisions. The Supreme Court declared that the High Court made a mistake in not ruling on a case involving the over-inclusion of areas in states, and remanded the case for further consideration.

VII. ISSUES & CHALLENGES

Many issues require the immediate attention of the policymakers related to GIs, out of which cybersquatting is one of the issues. Many well-known GIs have already been registered as domain names with fraudulent misrepresentation by people who have no GI registration and no intrinsic rights to use the designation. It is carried

37 Sentinal Digital Desk, 23rd Sept, 2020

38 Special Leave to Appeal (C) No (s). 8461 of 2020, decided on 2-9-2021, available at: https://www.scconline.com/blog/post/2021/09/06/geographical-indication/

out by unlicensed third parties solely to take undue advantage of the GIs' image. As a result, sufficient measures to prevent inappropriate registration of GIs as domain names are required. The Uniform Domain Name Dispute Resolution Policy (UDRP) and the IN Domain Name Dispute Resolution Policy (INDRP) must be amended to prevent the registration of GIs as domain names for malicious purposes, thereby securing and protecting the interests of approved GI users. The developing and least developed countries have a rich culture and heritage, with uncommon and valuable expertise in foods, handicrafts, art forms, agriculture products, traditional remedies, and other areas that are unique to their geographical area. Throughout the ages, this information has been diligently developed and safeguarded. They also have a large number of unidentified and unrecognized GIs. These GIs are intangible asset that belongs to the community at large. Inherent in such GIs is a huge economic potential. Countries must first identify and acknowledge these GIs before they can be protected.[39]

Due to high demand and low supply because only a few producers in the geographical place of origin, also known as authorised users, can generate the desired good, there is a high risk of counterfeit items bearing the same GI tag coming onto the market, posing a risk to both producers and consumers. Although the statute provides adequate mechanisms to avoid the selling of counterfeit Darjeeling tea, counterfeit Darjeeling tea has infiltrated the market and is being sold in three times the amount of authentic Darjeeling tea produced. This fake Darjeeling tea is grown and sold globally, not just within the country's borders, but also in countries like Kenya and Sri Lanka that have specific geographical circumstances, making it easier to grow and sell under the Darjeeling tea label.[40]

Internal registration of a GI is a pretty simple task, and progress has been made in this area over the last sixteen years, with the number of registrations increasing year after year. However, GI registration is not a goal within itself. It is important to remember that merely registering products to obtain a GI tag does not imply that the Act's objectives have been met. Currently, there appears to be a rivalry among states to see who can have the most GI-registered items, which appears to be contrary to the Act's purposes. One of the Act's significant flaws is its definition of GI, which only covers specific commodities rather than goods in general, as in TRIPs. This restricts the extent of potential protection available to commodities that do not fall into the natural, agricultural, or manufacturing categories. It is exceedingly erroneous and short-sighted to regard GI registration as a goal in and of itself. Following the registration of GIs, there is a major lack of strategy in terms of ads, increasing awareness, and other brand-building initiatives. Lack of funding is frequently stated as one of the key reasons for the lack of any sort of implementation strategy. Not only at the national level but also at the international level, an efficient and effective enforcement system is required. When comparing the enforcement of GIs at the domestic and international levels, ensuring it at the international level would be a dreadful and

39 Lukose, supra note 4

40 Ruchika Chouhan, "A Critical analysis of the registration of Geographical Indications vis-à-vis Recipes" *The NUALS Intellectual Property Law Review* (2020)

difficult effort due to technical limits in the registration procedure and financial restrictions in appointing an enforcement mechanism outside the country.[41]

Presently, government operations involving GI are mostly focused on registering GI products, with state governments acting quickly. The identification and registration of GI-based goods are not done with the utmost care. Groups applying for GI registration do not consider a GI product's commercial potential in domestic and international markets, as well as the potential for such registration to contribute to the product's future growth and the social-economic repercussions for the groups involved in the supply chain. Determining the specific geographical borders of a product, particularly in the case of non-agricultural items, can be difficult. Banarasi saris, for example, are weaved not only in the city but also in the rural areas of the same district and other neighboring districts. Furthermore, there is a need for post-registration promotion and ongoing awareness building, particularly among consumers (AIACA, 2011). There are currently no established protocols for discussion before registration, and the pre-application process is likely to result in insufficient engagements with numerous stakeholders, including retailers. While marketing and promotion activities may necessitate a long-term investment of money, there is no assurance of success, compared to newer GI products. According to respondents in our survey, there is a continuing need to improve capacity and understanding regarding GIs among many stakeholders, including consumers. Technicalities involved in the registration processes in different foreign countries, high costs incurred in assigning a timepieces agency to gather information on misallocation, and economic investment needed for pursuing legal battles are just a few of the challenges associated with GI protection.[42]

VIII. RECOMMENDATIONS AND SUGGESTIONS

The European Community has taken steps to 'Claw-Back' specific GIs that emerged in the European Community, such as the Trade Mark PARMA, which was filed in good conscience but not as a GI that indicated Mexico as the country of origin. The Claw Back of the GI entails seizing trademarks without compensation and the trademark owner's representation during negotiations. As a result, GI protection necessitates a multilateral system for GI notice and registration, as well as the "Clawing Back" of country-approved GIs based on generic terms or trade needs. To ensure that trademark owner and users of preceding cliched words implement their legal claims correctly, a strong international agreement on GI issues is essential. Minimal variance is likely in a GI-covered product, and the degree of fluctuation must be reported. There may be subtle variation in the variety between sub-zones of the geographic area inhabited by that variety because of the genetic differences of the material covered by GI. If 'Basmati rice' is a GI and the designated zone for cultivating 'Paddy Basmati' in the foothills and nearby plains of Punjab, Haryana, and Uttaranchal, then differences in rice quality due to 'Amritsari Basmati,' 'Karnal Basmati,' Dehra Doon Basmati,' and

41 Kumar, supra note 13.

42 Nitya Nanda, et.al., "The Protection Of Geographical Indications in India: Issues and Challenges" TERI- Energy and Resource Institute 7 (2013) available at: http://yucita.org/uploads/yayinlar/diger/makale/8-The_Protection_of_Geographical_Indications_india.pdf (last visited on Oct 8, 2021)

so on can be catered for. Each of these subzones encompasses a 75-kilometer-wide micro-niche with similar environmental, soil, and plant types. Producers in these subregions can be registered, and their products can be barcoded to ensure that the nature of the product can be traced. Consumer confidence will be boosted by GI backed by barcoded monitoring.[43]

Following are some suggestions to improve the functionality of GI-

1. Strong institutional and organizational frameworks to preserve, commercialize, and supervise the GI, including fundamental procedures such as (i) recognising and accurately demarcating a GI, (ii) organising current standards and practices, and (iii) developing a plan to safeguard and promote the GI. All of these things necessitate the establishment of community organizations and administrative structures, as well as a lifetime commitment to participatory methods of collaboration.
2. Participation of producers and businesses in a GI region on an equal footing. The term "equitable" refers to the citizens of a GI region sharing fairly not only expenditures and rewards, but also power and decision-making over their public assets.
3. Strong market partners who are devoted to long-term promotion and commercialization. Many of the GI market's triumphs are the outcome of cooperative business relationships. Stable market positioning and efficient commercialization have resulted in a long-term market presence as a result of these.
4. A strong domestic GI system is part of effective legal protection. Deceptive goods and marketing can jeopardize a GI's reputation as well as its legal standing. To decrease fraud, carefully designed protection mechanisms will allow for effective monitoring and enforcement in relevant markets.

IX. CONCLUSION

The GI Act, which went into effect on September 15, 2003, coupled with the GI Rules, has been essential in the expansion of GI status to many commodities so far. The Geographical Indications Registry, which has all-India jurisdiction and is based in Chennai, has been formed by the central government for right-holders to register their GI. The GI Act, unlike TRIPS, does not limit its special protection to wines and spirits only. The federal government has the authority to decide whether products should be protected at a higher level. The drafters of the Indian Act purposefully took this method to provide GI of Indian origin with the same level of protection as granted by the TRIPS Agreement. Other WTO members, on the other hand, are not required to provide Article 23-style protection to all Indian GI, allowing the possibility of theft in the international arena. In India, GI registration is not mandatory. If it is registered, it will provide better legal immunity and make it easier to bring an infringement case. Once a GI is registered in India, it is quite simple to seek protection in other countries, particularly those that are WTO members.

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43 S. Nagarajan, "Geographical Indications and Agriculture-related intellectual property rights issues" 92 *Current Science* 169 (2007)

Law in Dilemma – Environment vs. Globalization

Esha Anand*

ABSTRACT

The term "Environment" is an expression which denotes Surroundings, affecting all living creatures and it's branch Environmental law is considered to be an integral part of government agency, which mentions a series of laws and regulations related to air quality , water quality, forest protection and other environmental aspects. But the question reflected by the researcher through this research is to clarify that firstly, the success of Legislation completely depends upon its implementation not upon mere formulation. Though legislation act as a vigilant eye upon protection of Environment with an aim to guarantee Sustainability and serving healthy environment to present as well as future generation but still it has been observed that in the desire to uplift the economy the legislation has in some or the other way has foregone the concern towards Environment protection and its issues. Secondly, through this research paper the researcher is trying to put light on such issues which is causing a threat to humanity but the legislation is someway being not so stringent upon them in order to quench the thirst of Globalization on priority basis. With the society walking towards the path of Modernization the environmental concerns are also rolling on increasing pace which generates a strong need for separate environment laws for businesses, public, companies and industries. An attempt is thereby required to comply not only with national laws but international laws too. The legislation is required to work upon maintaining balance between environment concern and the need to increase global as merely keeping national income on rise will be of no use unless and until the mankind has a longevity of life under the shed of clean and healthy atmosphere.

Keywords: *Globalization, Trade, Climate, Pollution, Environment.*

INTRODUCTION

The term "Globalization" means integrating our economy with the world's economy. It has been considered as a most prominent way to modernize the economy but such trend is coming with a major threat on environment, as globalization has affected

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environment and led to Global Warming. MNC's that setup in different nations is found to use that nation's resource in such a way that their own profit could also rise but at the cost of exploiting other country's resource, as it has been observed that most of the developing countries invite developed countries to make investment in their countries to increase GDP and create employment opportunities which leads to negative impact on environment. The sake of rapid development of emerging countries over the years has also led to major emitters of Green House Gases. The main problem concern with this issue is Climate change due to greenhouse gas emission.

"Where globalization means, as it so often does, that the rich and powerful now have new means to further enrich and empower themselves at the cost of the power and weaker, we have a responsibility to protest in the name of universal freedom." - By Nelson Mandela.

Globalization is the process of being economically , politically, socially & culturally connect with other country. Through globalization people share ideas, technology , thoughts, services with one another making countries interdependent on each other. In spite of having numerous positive effect Globalization has another side as well whereby it is creating Income inequality among developed and developing countries, interdependence among countries, exploitation of resources, exploitation of cheap labour & lasting impact on environment.

Globalization generates new challenges in preparing strategies for urban development because globalization act as a threat that led to urban environment pollution and natural resource degradation. Urban environmental issues include-

- Localized environmental health problems such as inadequate potable water, sanitation facilities & overcrowding
- City regional environment issues like loss of green areas, polluting of water bodies, improper waste disposal management system.
- Impact of urban activities such as depletion of resources, emission of chemicals & greenhouse gases and ecological disturbance

Globalization had a huge impact on our lives giving us communication , faster access to technology, trade opportunities, innovation and much more but on the other hand it has been a subject to question in terms environment highlights. Meanwhile, the concept of green economy has come out as a critical policy framework for growth & development of the developed and developing countries with the aim to improve poor people's access to a healthy, safe & sustainable environment with assurance to human security by preventing disputes arising over land, food, water and other resources. Globalization to a severe extent had transformed our way of life by providing prosperity, innovation, technology, development channels but on the other hand, gave rise to harsh environmental concerns , ecological consciousness etc.

ENVIRONMENTAL CONCERNS

It has been recorded that most of the developed countries use the developing countries and undeveloped countries for their benefits as for MNC's through undeveloped

countries they get cheap labour and easy availability of resources in abundance at low cost, which leads to increase in the profit of the country which would otherwise won't be possible with their own expensive labour. Global warming and other environmental issues are increasingly becoming a point of deep analysis with the rise of global consumer trade which further creating a challenge in obtaining a sufficiently rigorous global climate to maintain an ecological balance. It has been noted that after the emersion of globalization pollution had a blast with an irreversible influence on our earth. Although Globalization was formed with the aim to bring more of Profit avenues for country with increase in trade and unity across countries but harmed environment in many other ways that are listed below-

- **Increased Greenhouse Gas emission**

One of the most evident issue is Climate change due to greenhouse gas emission because of extensive retention of solar energy in atmosphere due to piling of certain gases specifically Carbon dioxide. The main source of CO2 outpouring is industrial production, transportation & deforestation but on the other side industrialization along with transportation facility is considered to be an essential element for development in the present scenario. Transportation through sea lane that lead to increase the chances of oil spills causing to water bodies and marine species which further leads to Sea pollution.

The developed countries are found to be the smartest player of global industrialization and the biggest polluter causing Greenhouse gases emission. For example- US is found to be responsible for approximate 20% of GHG emission. As a result, developing countries are putting environment under threat at the cost of making money. Due to the alarming situation countries like India, US, UK are trying to touch 100% usage of renewable energy by 2030.

- **Globalization causing Deforestation**

Logging & burning of trees leads to reduction in volume of Carbon dioxide which plants convert into oxygen. Transforming rainforest/ oxygen house into the farmland or barren land for producing goods to fulfill the demand of market. Due to the ecological imbalance the living species may extinct or disappear in the near future such as penguins, snow leopards, dolphins, whales, polar bear is declared as endangered species, who just gave up their life on account of human activities and this created an enduring mark on ecosystem. ***In Rural Litigation Entitlement Kendra, Dehradun Vs. State of UP***,[1] in which the court observed that, "We are not oblivious of the fact that natural resources have got to be append for the purposes of social development but one cannot forget, at the same time that tapping of resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way. It has always to be remembered that these are permanent assets of mankind and not intended to be exhausted in one generation. ***"In State of Himachal Pradesh v. Ganesh Wood Products***[2], the Supreme Court contended that while reflecting

1 1985 SCR (3) 169

2 1995 SCC (6) 363

the significance of intergenerational equity observed that: "It is contrary to public interest involved in conserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and intergenerational equity. After all, the present generation has no right to exhaust all available forests and leave nothing for the next and future generations."

- **Impact on Indian Manufacturing industries and Education sector**

With the advent of Globalization , Indian handicrafts has revealed a great decline in the business as people got fonder of foreign products among across countries with modified features and being made of Hi-tech machine and economical. After 1991 LPG Policy (Liberalization, Privatization and Globalization) the reforms put an end on License Raj, Tariff and Quota barriers which presently leads to number of Mergers, Takeovers, Collaborations and Joint Ventures taking place every moment. Indian telecom sector is found to be exploding and all big payers in the industry are planning to setup their manufacturing unit in India so as to cater strong domestic demand.

Globalization has a strong impact on Education sector as well with the entrants of foreign universities with their Distant Learning or Short-term learning programmes and Certification courses

- **Increase Fishing in water bodies**

Overfishing has led to threat in life of ocean species due to peak in demand of fishes not only for consumption but for medicinal purpose also. According to IUCN (International Union for Conservation of nature, has recorded that 22% of the world's mammal are on the verge of extinction along with 24% of world's snake & 31% of world's amphibians and 35% of world's bird. The outcome of Overfishing in coastal areas such as Southeast Asia has majorly led to decline in fish populations and marine population. Mixing of contaminants in water bodies has also made the lives of fishes and aquatic animals critical.

- **Flora at Risk**

Increased demand for exotic raw material and farm products at reasonable price received from developed countries leading to downfall in availability of plants. For example-demand for teak wood for furniture is on peak and other high-quality wood which made itself entered in threatened species category. Secondly, demand of paper is been a major cause for Deforestation in urban areas which lead of wiping out of Flora and Fauna from the earth's surface. As per the prediction of WWF (World Wildlife Fund) by 2030, if there would be no change in human actions it will vanish the resources with twice rate the resources being produced every year. Due to globalization and industrialization various chemicals have been poured into the soil resulting in many noxious plants and weeds, which has put a strain on land and water resources affecting their sustainability and quality. Hence, rise in level of carbon dioxide, acidification of ocean, global warming and endangered flora contributes to loss of biodiversity.

5G Technology, case[3]-In this case the leading actress-environmentalist filled a suit against trial of 5G wireless network technology creating a RF radiation impact on living, she contended that if Telecommunication industry plan for 5G – no person, animal, bird, insect and plant on this earth will be able to exposure as the plan threaten to provoke serious irreversible effect on humans and permanent destruction to Earth's ecological balance. In this regard, advocate Deepak Khosla sought direction from the authorities to certify and analyses the impact of technology over humankind health , life, organ or limb and every type of living organism , flora and fauna

Coca-Cola Case[4]– In this case a plant in Uttar Pradesh was closed down due to over extracting of groundwater by the company to bottling their plant, which leads to depleting of groundwater. Henceforth, Uttar Pradesh pollution control board ordered the closure of Coca-Cola plant. The company further appealed to the NGT (National Green Tribunal) against closure order.

In India Parle, Amul, ITC, Britannia are marked as top most polluters. While, the MNC's PepsiCo, Hindustan Unilever, Coca-Cola, Perfetti Van Melle are accused of being polluter.

The usage of single-use disposable and low value plastic packaging to lift up their Profit margins in causing a threat upon society and environment. The moto of CSR (corporate social responsibility) is to focus upon saving energy, water, management of waste, recycling and contributing some part of the profit for welfare of society and to restore the loss done to the environment.

- **Emission through Transport**

Recently thee has been number of instances where it has come out that the major cause in deteriorating the quality of environment also comes from international trading opportunities and pollution generated through Transport was virtually very much ignored. The emission of CO2 arising from energy used in transport and production. Although CO2 generated by transport is of very small fraction as compared to total emission of C02 emission. For example, natural resource commodity production tends to be energy intensive but its transport mode is almost via maritime shipping in bulk carries which seems to be fuel efficient, as compared to machinery and electronic equipment are clean in production but proved to be dirty in transport since they rely on air transport. Henceforth, considering transport emission will fortunately leads to surprising conclusions.

EFFECTS OF GLOBAL TRADE ON ENVIRONMENT

It is easy to reflect numerous examples where trade and international Investment has caused a threat to Environmental damage. Evidently, images of toxic waste from developed countries being dumped in low income countries had a jolt effect on Anti-globalization activist and led to Basel convention on shipment of hazardous

3 CS (OS) 262/2021

4 2004 (1) KLT 731

waste along with resource depletion due to deforestation and sea exploitation. Further, excessive demand of wood in China leads to forest depletion in other neighboring country. Trade has resulted in encroaching species leading towards both water pollution along with ecological imbalance. In Demark also earlier, the society faces ecological crisis due to excessive Deforestation for construction purpose. Although, scaling up of economic activity is the need of hour but not at cost of environment and hampering the life of future generation. One liner argument raised is that Trade causes growth and growth some way leads to environment degradation of affecting the resources. Policy stringency is directly proportional to real per capita income, as a result if trade rises real income it will very much likely to impact and put pressure on the environmental regulations. Trade and Foreign direct investment cause an impact on location, scale, composition and environment in both activities of production and consumption along with that emission generated through international transport in also hampering the lifestyle , biodiversity around. It is most prominently marked that Trade increases real income, that increase scale of consumption and leads in uplifting the level of pollution. There is an emergent need for large body of work that studies the role of Trade policy in in influencing the environmental outcomes. For example- in WTO trade dispute in 2015 over Chinese restrictions on exports of rare earth, China argued that trade restrictions were necessary to protect the environment.

ROLE OF WTO

Through its goals, rules, policy and agenda WTO plays an important role in advancing international environmental goals. The body of WTO i.e. CTE (Trade and Environment Committee) being a standing forum which directs government on the impact of trade policies on environment and environment policies on trade . Under the shed of WTO, Doha Development Agenda, a regular committee is formulated to look at the effects of environmental measures on market access, biodiversity and labeling for environmental purposes. In context of which, a series of Ministerial Statements were launched in December 2021 on different aspects such as trade and environment sustainability, plastic pollution and fossil fuel subsidies. Finally, in June 2022. The 12th WTO Ministerial Conference marked an important milestone as government finally recognized the need of multilateral trade to address environment related challenges. Sustainable development and protection and preservation of the environment are the fundamental goals of WTO. Substantially, in Doha Round, WTO received a proposal to link trade and environment to further regulate the relationship between WTO's agreement and market access for environmental goods and services.

DECLARATIONS AND TREATIES

a) ***The Declaration of the United National Conference on Human Environment-*** is the first major attempt made to focus upon human impact on the environment as well as International effort to solve the challenges of environment degradation and look out the scope for improvement,

b) ***The Rio Declaration on Environment and Development***, also termed as Rio Earth Summit, was a declaration of UNCED 1992 with an aim to guide prospects of future global sustainable development keeping in view the needs and wants of future generation.

c) ***United Nations Framework Convention on Climate Change*** – The convention was addressed during Rio Conference in 1992 with the aim to reduce the emission of greenhouse gases that are controlled by Montreal Protocol. The objective is to tackle the problem of climate change owing to the emission of harmful gases in the atmosphere.

d) ***The Kyoto Protocol 1997 –*** It set out the ultimate objective to stabilize and control the atmospheric concentration of greenhouse gases so that it may not further lead to environment destruction. The protocol provides various set of principles to work upon emission reduction commitments.

e) ***The Paris Agreement 2015-*** The agreement also provides specific commitments to protect the environment and maintain balance between trade and developments and focus upon building a friendly pace between developed and developing countries. The agreement aims to reach the level of neutral climate by eradicating all the vulnerable effects of climate change and environment degradation.

NEED FOR ENVIRONMENT EDUCATION

From the earlier times, human activities have been pin pointed causing negative impact on natural environment, owing to such harm need for environmental programmes and policies risen making people more aware about their own actions in detoriating their own quality of life. The idea behind was not to dictate mankind on how to behave but to help them to make wise choices. The need of Environment education, at UNECO meeting in Asia- Pacific region was to capture the notion of Sustainability, with three goals such as –

- To promote awareness & concern about economic, political, social and economic interdependence at local, regional, national and global level
- To stimulate every person with optimum opportunities to acquire knowledge, values, attitudes and criteria with advanced mind set to protect and improve the environment.
- To reinforce new patterns of environmentally sensitive behavior among individuals, group and society as a whole.

In order to achieve the following a 5-set rule was framed i.e. *Awareness , Knowledge, Attitude, Skill & Participation* along with certain guiding principles for various member countries being Environment Educator such as-

- Environment educator should consider environment as a sum total of natural, Man- made, technological and social environment.

- Creating awareness about Environment should be a continuous and life long process at all levels and in all sectors
- Focus should be upon current and potential environmental situations.
- There is a need to boost environmental sensitivity, knowledge and problem-solving skills to think and analyze critically
- Need to use diverse learning environments and a broad array of educational approaches to teach and learn about environment with an emphasis on practical activities and experiences.

FUTURISTIC APPROACH

Through this research, the author is looking forward for some key issues to be addressed for the betterment of the economy as a whole –

- To analyze the accountability and transparency in the entire economy with respect to formulation & implementation of Public policy and diminishing loopholes
- More work is required to balance the relation between Trade & Environment taking in view sustainable development & aim to transform India from developing to developed country giving a tough competition across the world
- To highlight the need for the Legislation to make more stringent laws in terms of Punishment and Penalties in accordance to widened the scope of NGT
- Strive to achieve harmony between environment regulations and maintaining of competitive edge in the economy.

CONCLUSION

It would be correct to depict that Humans themselves have become the most threatening element to the environment since last 10,000 years. With the surfacing of Agriculture, it leads to affect the quality of Land which caused 2 billion hectares of cropland, pastures and forest degraded and with the introduction of industrialization Atmosphere became the Target point. Though with the increased scope of Globalization, Indian economy accelerates in economic growth, income and modernization but on the other hand globalization has adversely affect our culture, resource and value to convert all of them into monetary assets. Pressure on earth due to wings of globalization has put the life of human being in question as developing industrial base, advanced technology, established factories releasing toxic and chemical waste effluents became a reason for unavoidable diseases and environment problem. There is a stringent need for humans to be conscious about their actions and unavoidable emerging risk factors therefore we should try to live in harmony with the nature. There should be a joint collaboration between government, educational and environment institution to create public awareness and sensitizing environment concerns at both rural and urban level. However, Globalization generates Competitiveness among countries but

it acts as a hurdle in implementation of environment policy. Economic growth and Capital accumulation if not coordinated with the Environment policy will have negative impact on the quality of life of people living in society. Environment Outcomes completely depends upon individual's actions and behavior but it has also been seen that current environment policies and regulations are not so stringent to reduce or control human actions towards the climate therefore we need some more strong policy regulations along with regulators to ensure implementation of the same. However, globalization can build a bridge in regulation of such policies but there is a need to create a balance between Growth , Competition between countries , GDP , National Income, Trade and Environment sustainability for the wholesome survival of life. Therefore, Social and Ecological balance shall go hand-in-hand.

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Rights to Sexual and Reproductive Health of Women

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ABSTRACT

This paper examines the textual framework of women's rights to sexual and reproductive health. Rights to reproductive and sexual health include the right to life, liberty and the security of the person; the right to health care and information; and the right to non-discrimination in the allocation of resources to health services and in their availability and accessibility of central importance are the rights to autonomy and privacy in making sexual and reproductive decisions, as well as the rights to informed consent and confidentiality in relation to health services. The paper is illustrated by issues that reflect systemic violation of the above rights in varied forms, including maternal mortality, lack of procedures for legal abortion, inadequate allocation of resources for family planning, coercive population programs, spousal consent to sterilization, and occupational discrimination of pregnant women.

Keywords: *Human Rights; Gender Discrimination; Equality; Autonomy; Choice; Informed Consent; Confidentiality.*

INTRODUCTION

Sexual rights refer to the fundamental human rights related to sexuality and sexual health, including the right to make decisions about one's own sexual and reproductive health, to access comprehensive sexual education and information, and to live free from discrimination, coercion, and violence related to sexuality. The concept of sexual rights is based on the idea that sexuality is an essential aspect of human life and that individuals should have the freedom to express their sexuality without fear of punishment or discrimination. Sexual rights are recognized as a basic human right by international law, including the United Nations Universal Declaration of Human Rights and various other international treaties and agreements. Some of the key elements of sexual rights include the right to:

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- Access comprehensive sexual education and information
- Choose one's sexual partners and practices freely and without coercion
- Access contraception and reproductive healthcare services
- Refuse unwanted sexual advances or sexual contact

Be free from discrimination and violence based on sexual orientation, gender identity, or expression. The recognition and protection of sexual rights are important for promoting sexual health, reducing sexual violence and discrimination, and ensuring the overall well-being and autonomy of individuals. Reproductive rights are the legal and ethical rights of individuals to make decisions regarding their own reproductive health and bodies. These rights include the right to access contraception, to choose whether or not to have children, to access safe and legal abortion, and to receive comprehensive sexual health education. Reproductive rights are essential for promoting gender equality and ensuring that individuals are able to make informed decisions about their own health and wellbeing. They are also important for reducing maternal mortality and morbidity, as well as preventing the spread of sexually transmitted infections. However, reproductive rights are not universally recognized or protected. In many countries, access to reproductive health services is restricted, and women and other marginalized groups may face significant barriers to exercising their reproductive rights. It is important to continue advocating for reproductive rights and working towards creating more equitable and just societies.

"Reproductive rights are based on the acknowledgment of the fundamental rights of all couples and people to make decisions about the number, spacing, and timing of their children in a free and responsible manner and to have access to the knowledge they need to do so, as well as the right to the best possible level of sexual and reproductive health. They also include everyone's right to make reproductive choices without fear of persecution, coercion, or violence.[1]

Reproductive rights are crucial to the realisation of all human rights, according to the fundamental rights and human rights movement. They cover a range of civil, political, economic, and social rights, including the right to life and health, the right to equality and the prohibition of discrimination, the right to privacy and information, and the right not to be subjected to torture or cruel treatment. In order for states to fulfil their obligations to protect these rights, they must ensure that women and girls have access to comprehensive reproductive health information and services as well as positive reproductive health outcomes, like lower rates of unsafe abortion and maternal mortality and the freedom to make fully informed decisions. Violations of reproductive rights disproportionately harm women due to their capacity to become pregnant and legal protection of these rights as human rights is critical to enable gender justice and the equality of women[2].

1 Srinivas Kosgi, Women Reproductive Right in India: Prospective Future, Online Journal of Health and Allied Sciences, Volume 10, Issue 1; Jan-Mar 2011

2 Available on https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.

Additionally, the courts in India must play a significant part in protecting the constitutional and human rights protections for women's reproductive rights.

The Supreme Court of India particularly recognised women's constitutional rights to choose their own reproductive options as a component of their personal liberties under Article 21 of the Indian Constitution in The Puttaswamy judgement (2012). Similar to this, the SC determined in Suchita Srivastava v. Chandigarh Administration that the right to choose one's own reproductive path is a component of the personal liberty granted by Article 21.[3]

In the cases of Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors. and Jaitun v. Maternity Home, MCD, Jangpura & Ors., the Delhi High Court rendered a significant joint ruling in 2011 on the denial of maternal health treatment to two women who were living in poverty. These petitions, according to the Court, "focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the mother's reproductive rights."[4] In Sandesh Bansal v. Union of India, a public interest lawsuit seeking accountability for maternal deaths, the High Court of Madhya Pradesh concurred with the Delhi High Court's ruling in 2012, stating that "it is the primary duty of the government to ensure that every woman survives pregnancy and childbirth" and that "the inability of women to survive pregnancy and child birth violates their fundamental right to life as guaranteed under Article 21 of the Constitution of India." n the long run, "reproductive rights" refer to a person's freedom to choose whether or not to have children and to maintain their reproductive health. This may include the freedom to have children, to end a pregnancy, to use contraception, to receive sex education in public schools, and to access reproductive health care. Reproductive rights are based on the understanding that every couple and individual has the fundamental right to decide for themselves, in a responsible and free manner, how many, where, and when to have children, as well as the right to the best possible sexual and reproductive health. A further one among them is the freedom from violence, coercion, and prejudice for everyone to decide how they want to reproduce.[5]

Reproductive rights issues are hotly debated in every society, regardless of socioeconomic status, religion, or culture. Reproductive rights include some or all of the following rights:

1. Right to legal or safe abortion.
2. Right to control ones reproductive functions
3. Right to access in order to make reproductive choices free of coercion, discrimination and violence.

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3 2009(14) SCR 989

4 Available on https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.

5 Gender and Reproductive rights home page. Available at: http://who.int/reproductive-health/gender/index.

4. Right to access education about contraception and sexually transmitted diseases and freedom from coerced sterilization and contraception.
5. Right to protect from gender based practices such as female genital cutting and male genital mutilation

Understanding Reproductive Rights in the Indian Context: As a signatory to the International Conference on Population and Development in 1994, India has committed itself to moral and expert standards in family planning services, including the right to individual reproductive autonomy and social equality.[6]

Indian policies and laws so far seem to reflect this understanding, at least on paper. The National Population Policy, 2000, affirms the right to voluntary and informed choice in matters related to contraception.[7] The issue of right to reproductive health especially abortion, takes on special significance in the Indian context as various national and international stakeholders struggle to bring meaning to the important concepts of women empowerment, rights and choices as articulated in the Cairo Agenda at the 1994 international conference on population and development (ICPD).[8]

The Indian setting combines a number of apparent contradictions in how family planning and abortion policy is set; how services are delivered; how demographic trends and desires about family size and composition shape the demand for contraception and abortion; and the social context defines the pressures, constraints and options for women's reproductive behavior.[9]

Indian experience in implementation of reproductive rights and choices:

The policies and services Nineteen ninety eight analysis of seven states shows that implementation of the target – free approach varies considerably across states, with some states unwilling or unable to abandon targets. [10]Field level assessment indicate that entrenched attitudes among policy makers and service providers have been difficult to change as illustrated by the following quote from physician at the community health centre: The government says that family planning should be left to free choice, but I don't understand why it is wrong to put pressure on women from poor families".[11]

6 United Nations International Conference on Population and Development (ICPD), 5-13 September 1994 Cairo, Egypt. Available at http://www.iisd.ca/cairo.

7 Zavales A. Genital mutilation & the United Nations: male and female circumcision, human rights & the restoration of spiritual integrity & freedom. Presented at the Fourth International Symposium on Sexual Mutilations, University of Lausanne, Lausanne, Switzerland, August 9-11, 1996.Available at http://www.nocirc.org/symposia/fourth/Zavales4.

8 United Nations International Conference on Population and Development (ICPD), 5-13 September 1994 Cairo, Egypt. Available at http://www.iisd.ca/cairo.

9 Reproductive Rights and choice: The role of abortion in India. Published by International center for research on women (ICRW), Information Bulletin, pages 1-4, November 2001

10 Pachauri S, Subramanian S, Editors. Implementing a Reproductive Health Agenda in India: The Beginning. Population Council: New Delhi, India 1999

11 Skov A. Editor. Women's Voices–Women's choices on reproductive Health. The Danish Family planning Association Copenhagen, Denmark: 1998. Available at http://www.iiav.nl/ezines/email/ICRWinformationBulletin/2001/November.pdf

Although the policy goal is to provide greater choice in family planning methods, the promotion and availability of spacing methods continues to be limited. Data from 1990s document shows that it is only within limited number of highly urbanized centers that Indian women have range of contraceptive options available. In poor, rural areas especially, contraceptive supplies primary health centers and sub centers are frequently inadequate or lacking altogether.[12]

The choices for contraception are very limited at rural centers. For e.g. either you have option to undergo tubectomy or laparoscopic sterilization based on the proximity of the rural center to the district head quarter. Specialists who conduct sterilization prefer to move to nearest center for conducting camps than remote areas. This has forced the people to accept only available option and not to choose method of their choice. In true sense it has curtailed the reproductive rights of the individuals.[13]Even when official policy encourages the provision of options to women, service providers often do not practice principles of informed choice. Data from national family health survey (NFHS 2) indicate only 40 % of women remember ever discussing family planning with a health worker, only 10 % had ever discussed the pill, and even fewer have other temporary methods. Only 15% of those who use modern contraceptive were informed about an alternative method.[14]

The Medical termination of pregnancy (MTP) act made abortion legal in India in 1972, but vast majority of women gets abortions outside this legal frame work. In part, this is due to the inherent restrictions regarding registered facilities and doctor consent built into by providers and even poorer understanding among women regarding their legal rights. While official records indicate that somewhere between 550,000-600,000 induced abortions take place in the country per year, recent publications suggest estimates close to 7 million induced abortions per year.[15] Demography and fertility In the last decade, India has experienced declining fertility levels. The total fertility rate fell from 3.4 to 2.9 between 1992 and 1998.The mean ideal number of children also fell – from 2.9 to 2.7.(17)This trend is accompanied by a rising demand for contraception, including spacing methods; however, use of spacing methods continues to be limited and permanent methods, more specifically female sterilization, continue to predominate. In 1998, 34 % of currently married women were sterilized (Accounting for 71% of contraceptive use), but only 7% were using a spacing method – levels virtually unchanged since 1992. Unmet needs for family planning is substantially greater than is obvious at first glance. The NFHS-2 calculates unmet need at 15.8%

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12 Koenig M, Editor. Improving quality of care in India's Family Welfare Programme. Population council: New Delhi. India.1999.Available at http://www.popcouncil.org/pdfs/qocbook-koenigIntro.

13 National Family Health survey (NHFS-2), 1998-99: Mumbai, India. International Institute for population Sciences (IIPS) and ORC Macro 2000.

14 Stanley KH, Susheela S, Taylor H. The incidence of abortion worldwide. International family planning perspectives Jan1999;25(Suppl):S30-S38.

15 National Family Health survey (MCH and Family Planning).1992-93: Mumbai, India. International Institute for population Sciences (IIPS) 1995.

in India using a limited definition of currently married, fecund women who either want no additional children, or want no additional children for at least two years. An ICRW study in Uttar Pradesh calculated unmet need at 31.7% in sitapur using this same definition. But unmet need rose to 54.8% using an expand definition that took into account dissatisfaction with contraceptive methods, more accurate assessment of the protective effect of post partum amenorrhea and incorrect use of traditional methods. (18) Social Context India has a vibrant women's movement and strong presence of grass root NGOs committed to bringing rights and choice to women. At the same time, large proportions of women continue to face social and domestic pressures and constraints that limit their ability to formulate and act on reproductive decisions. In particular, the continued strength of son preference is well documented ; 33% of women would like to have more sons than daughters with 85% of women wanting at least one son.[16]

My personal experience of working with people in rural area as medical officer. There was a lady having five children with ongoing sixth pregnancy, my self and my health workers motivated this lady and her husband to undergo laparoscopic sterilization from 6th month of pregnancy onwards. On the day of sterilization when our health workers went to meet her, the voice of old lady from inside spoke there is no need for my daughter in law to undergo sterilization, births are god gifts. Later we learnt that she is the main decision making for five families which stayed together in the same house. What we need to understand from this is, though reproductive right is very much specific to the couples, but in Indian context it is the collective decision of the family. Extrapolation of such rights to Indian social context needs careful examination. Spousal consent for abortion and sterilization The right to make free and informed decisions about health care and medical treatment, including decisions about one's own fertility and sexuality, is enshrined in Articles 12 and 16 of the Convention on the Elimination of all Forms of Discrimination Against Women (1978).[17] Autonomy, the right to informed consent and confidentiality are considered the fundamental ethical principles in providing reproductive health services. Autonomy would also mean that when a mentally competent adult seeks a health service, there is no need for an authorization from a third party.[18] According to recent ethics guidelines in reproductive health research, even use of the term "consent" has been restricted only to the person who is directly concerned; in circumstances where partners are involved it is termed a "partner agreement" Contrary to this

16 National Family Health survey (MCH and Family Planning).1992-93: Mumbai, India. International Institute for population Sciences (IIPS) 1995.

17 Pande R, Astone NM. Explaining son's preference in rural India: The role of women's social and economic position. Paper presented for 2001 Annual meeting of the population Association of America, Washington D.C., March 29-31, 2001.

18 It is inconceivable how, even if one were to take what is stated in the FIR to be true, the expression of love by a young married couple, in the manner indicated in the FIR, would attract the offence of "obscenity" and trigger the coercive process of the law." A & B vs. State through N.C.T. of Delhi. CRL.M.C. 283/2009. High Court of Delhi.

Supreme Court judgment when hearing an appeal in the Ghosh vs. Ghosh divorce case, the court ruled on March 26, 2007: "If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy (read tubectomy) or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty."

The court also ruled that a refusal to have sex with 2 one's spouse and a unilateral decision to not have a child would also amount to mental cruelty. Considering the circumstances of the case, the court granted a divorce. The judgement has serious implications for reproductive health services in India, because it mandates spousal consent for induced abortion and sterilization. The judgement conflicts with the existing guidelines for medical practice, and it is likely to confuse those who are seeking as well as offering these services. It implies that when a woman seeks abortion or sterilization on her own and if her husband is not informed or does not consent, the very act of the woman could be cited by her husband as mental cruelty and grounds to seek a divorce.

The judgement thus hits at the very core of reproductive rights: taking a decision and seeking a service without fear of coercion or violence. It is likely to set a wrong precedent and put many providers on guard, because they would not want to be involved in legal tangles. Many clinics may start using this ruling to impose a requirement of spousal consent. Even providers in the public sector may insist on a spouse's signature to avoid legal problems. The highest judiciary in the nation has to demonstrate a better understanding and commitment to human rights, especially women's rights. Reproductive Rights in Mentally Retarded Women: In India, a disabled girl-child is usually at the receiving end of a lot of contempt and neglect. [19]Women with disabilities have been consistently denied their rights. Nineteen year-old mentally challenged orphan girl at Nari Niketan, Chandigarh, a government institution for destitute women, was raped some time in March 2009 on the premises by the security guards. In May 2009, the pregnancy was detected.[20] Four-doctor Multi Disciplinary Medical Board which included a psychiatrist recommended that woman "has adequate physical capacity to bear and raise the child but that her mental health can be further affected by the stress of bearing and raising her child." Based on these recommendations, the Punjab and Haryana High Court ruling ordered medical termination of pregnancy (MTP). On the NGO appeal against the High courts order, the Supreme Court (SC) of India gave a landmark decision allowing a 19-year-old mentally challenged orphan girl to carry on with a pregnancy resulting from a sexual assault. This case thus raised fundamental issues relating to consent and to the support required while assessing consent. This case was not about abortion per se, it was about whether the law of this country recognizes and protects the agency of a woman to take decisions

19 Suresh Kumar Koushal vs. Naz Foundation. 2013, (SLP (C) No.15436 of 2009). Supreme Court of India.

20 Report of the Committee on Amendments to Criminal Law". 2013. Justice Verma Committee on Amendments to Criminal Law

for her life and body, especially all its nuances when the woman is a person with mental retardation (MR) or any other disability." Legally, Medical Termination Of Pregnancy (MTP) Act does not deal with access to abortion of women with MR, and that it wrongly distinguishes between women with mental retardation and mental illness, leaving the former out totally. Also that the Act does not understand that both these kinds of women are more likely than not to be destitute, in which case guardianship is not that simple. Since SC has gone ahead to continue pregnancy but has failed to address support mechanism and state's accountability for creating and sustaining comprehensive and reliable support systems for her within a rights framework an obligation under Article 12 of the UN Rights of Persons with Disabilities Convention. This case indicates eloquently that the Indian legal framework has to be strengthened a great deal to bring it in line with international legislation. It also raises the question whether our government institutions are safe enough to protect women and more so people with disabilities.

What needs to be done to empower women's rights to reproductive health?

Inadequate reproductive health care for women results in high rates of unwanted pregnancy, unsafe abortion, and preventable death and injury as a result of pregnancy and childbirth. Violence against women, including harmful traditional practices like female genocide, takes a steep toll on women's health, well-being and social participation. Violence in various forms also reinforces inequality and prevents women from realizing their reproductive goals. Men also have reproductive health needs, and the involvement of men is an essential part of protecting women's reproductive health. Providing quality reproductive health services enables women to balance safe childbearing with other aspects of their lives. It also helps protect them from health risks, facilitates their social participation, including employment.[21] Reproductive health does not affect women alone; it is a family health and social issue as well. Gender-sensitive programmes can address the dynamics of knowledge, power and decision-making in sexual relationships, between service providers and clients, and between community leaders and citizens.[22]A gender perspective implies also that institutions and communities adopt more equitable and inclusive practices.As the primary users of reproductive health services, women have to be involved at all levels of policy-making and programme implementation. Policy makers need to consider the impacts of their decisions on men and women and how gender roles aid or inhibit programmes and progress towards gender equality. Reproductive health care should include following components; Family planning which involves strong government support, service providers who are well trained, sensitive to cultural conditions, listen to clients' needs, and are friendly and sympathetic, Services are affordable and a choice of contraceptive methods is available, Counseling ensuring informed consent in contraceptive choice, ensuring privacy and confidentiality,

21 Policing Morality at AMU: An Independent Fact Finding Report". 2010. http://feministlawarchives.pldindia.org/wp-content/uploads/Amumoralpolicingfina

22 Naz Foundation vs. Government of NCT of Delhi. 2009, WP(C) No.7455 of 2001. High Court of Delhi

comfortable and clean facilities and prompt service. Safe motherhood programme should provide access to emergency obstetric care, including treatment of hemorrhage, infection, hypertension and obstructed labour. Life-saving interventions, like referring to medical centers.

A community-based system for ensuring rapid transport to an equipped medical facility. Training Community health workers to detect and treat postpartum problems, as well as to counsel on breastfeeding, infant care, hygiene, immunizations, family planning, and maintaining good health.

ABORTION AND POST-ABORTION CARE

Abortion is an important public health issue. Family planning services ensure reduction in unwanted pregnancies and prevent abortions. In circumstances where abortion is not against the law, quality health services should ensure safe abortion practices and effective post-abortion care would significantly reduce maternal mortality rates. Prevention and treatment of sexually transmitted diseases (STDs and HIV/AIDS); Because of culture as well as biology, women are more vulnerable to STDs than men.[23] The integration of family planning and STD/HIV/AIDS services within reproductive health services can reduce levels of STDs, including HIV/AIDS, by providing information and counseling on critical issues such as sexuality, gender roles, power imbalances between women and men, gender-based violence and its link to HIV transmission, and mother-to-child transmission of HIV; distributing female and male condoms; diagnosing and treating STDs; developing strategies for contact tracing; and referring people infected with HIV for further services.[24] Involvement of men in reproductive health programme: Greater involvement of men in reproductive health decisions will give more power to women, not less. The common aim is the well-being of all family members. Men can advance gender equality and improve their family's welfare by; Protecting their partners' health and supporting their choices (E.g. adopting sexually responsible behavior; communicating about sexual and reproductive health concerns and working together to solve problems; considering adopting male methods of contraception), Confronting their own reproductive health risks (learning how to prevent or treat sexually transmitted infection, impotence infertility, sexual dysfunction and violent or abusive tendencies) Refraining from gender violence; Practicing responsible fatherhood; Promoting gender equality, health and education.[25]

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23 Dehne K, Snow R. Integrating STD Management into Family Planning Services: What Are the Benefits? Pages 20-21.Published by Department of Tropical Hygiene and Public Health, University of Heidelberg, Germany 1998

24 Kerr R, Janice McLean. Paying for Violence: Some of the Costs of Violence against Women in British Columbia. Report prepared for the Ministry of Women's Equality, Government of British Columbia. May 1996. ISBN 0-7726-2946-3. Available at http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/2577 80/paying_for_violence.pdf. Accessed on Nov 2nd 2009

25 Men, Reproductive Rights and Gender Equality: Chapter IV.United nations Population Fund (UNFPA). Available at http://www.unfpa.org/swp/2000/english/ch04.

CONCLUSION

Reproductive health and right to reproductive health is not only women issue it is a family health and social issue. The ultimate aim of the right to reproduction is well being of the family and individuals. At the same time it becomes the responsibility of the governments to give quality reproductive health care and protect the individual reproductive rights while being sensitive to local and cultural issues. There is increased need for sensitization of the judicial and government while protecting the reproductive rights of people with disability especially mental retardation and mental illness.[26] There is also increased need for sensitization of juridical system on process of consent to abortion. To ensure quality reproductive health services, there is need for active community participation and involvement of men (spouse).

26 "One Stop Centre Scheme". Department for Women and Child Development. http://www.wcd.nic.in/sites/default/files/ProposalforOneStopCentre17.3.2015

Role of Law in Transforming Single Parenthood: A Critical Analysis with Respect to Childcare in India

*Ms. Kanika Garg**

ABSTRACT

'Family' is the most basic unit of a society and is usually understood as comprising of a mother, a father and their children. However, many changes may happen in the familial structure over the course of time which may cause disruptions in this structure. These may be caused by death, separation or divorce; or the unit may not conform to this conventional structure of family with it being a one-parent household by choice. The major problems surfacing lone-parenthood are of resources and care since there is no division of tasks among the family members and only a single person is responsible for keeping the family afloat economically as well as to provide for care requirements. The high costs of childcare coupled with the other expenses of bringing up children weigh high on the parent who is left alone to fend for the family. It is observed that there is also a lack of governmental assistance in providing welfare schemes including childcare benefits for lone-parents in India. The paper seeks to understand the problems faced by single mothers and single fathers in raising their children; and how the State can play a pivotal role in improving the situation of these families through welfare legislation.

Keywords: *Single Parenthood, Singlehood, Childcare, Role of State.*

I. INTRODUCTION

Families are an important building block of societies, crucial for the working of communities and economies.[1] It is through these familial structures that people share resources like housing and income; and perform caring duties for the children, the elders and the sick.[2] At the same time, families are the abodes of love and affection, fundamental for the growth and development of each member.[3]

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1 UN Women, *Progress of the World's Women 2019–2020: Families in a Changing World* (2019), p.14.

2 *Ibid*.

3 *Ibid*.

It has been observed that men and women across the world are delaying marriage.[4] The mean age at effective marriage of women in 2019 in the country was 22.1 years.[5] The percentage of never married individuals between the ages 15-29 years have increased from 17.2percent in 2011 to 23percent in 2019 while that of married individuals have decreased from 11.7percent in 2011 to 8.3percent in 2019. [6] Cohabitation or live-in relationships are on rise, with increasing number of men and women opting to avoid marriage. Rising divorce rate has been another important reason for changes in familial structure with liberal divorce laws across the world.

Stereotypical notions about ideal families with males as 'bread-winners' and women as 'homemakers' fail to represent the millions of families with single-parents, or children living with extended family members. Relationships outside marriage are being recognised by law and positively interpreted by the courts which have increased the acceptance of the modern ideals of freedom of sexuality and agency along with recognition of feminist and LGBTQ+ rights.

II. CHANGING FAMILIAL STRUCTURES AND INCREASING SINGLEHOOD

Single parent families comprise of a single parent (either male or female) and their child(ren). These parents could have either married at least once or be unmarried. The first category of parents includes divorced, separated and widowed individuals. The second category includes parenthood out of wedlock (biological), by adoption and through modern reproductive techniques.

Parenthood by adoption

Adoptions under the Indian law are regulated by the personal laws of the parent(s) wishing to adopt the child. According to the Hindu law, any male or female Hindu can adopt a child if the person fulfils the requisite conditions for adoption *viz*., she/he is of sound mind, is a major, has the capacity to take a son or a daughter in adoption; and if married, has obtained the consent of her/his spouse, and without such consent under certain circumstances.[7] Under Muslim, Christian and Parsi religion, adoption has not been recognised. An individual can become the guardian of a child with the permission of court under the Guardians and Wards Act, 1980, though the relationship does not confer on them the rights of parents and children. A laudable attempt was made by the legislature through introduction of a secular law on adoption under the Juvenile Justice Act through the Central Adoption Resource Agency (CARA). Its rules make no discrimination against single parents, whether never-married, divorced, widowed, or separated applying for adoption.[8]

4 *Supra* note 1 at 16.

5 Government of India, "Youth in India" (Ministry of Statistics and Programme Implementation, 2022), p.93.

6 *Id.* at 94.

7 The Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956), s.7&8.

8 Adoption regulations, 2017 for adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), (*w.e.f.* 16th January, 2017).

Parenthood through modern reproductive techniques

As per the surrogacy law, an 'intending couple' or an 'intending woman' *i.e.,* an Indian woman being a widow or divorcee between the ages 35 to 45 years can have children through surrogacy.[9] The area has recently been regulated with restriction on single men to become fathers through surrogacy, and, therefore there are many single fathers in the country who have already experienced parenthood through this procedure.

The Assisted Reproductive Technology law allows 'patients' (an individual, or couple being a man and woman) to avail the benefit of these technologies to experience parenthood.[10] An 'individual' here refers to a woman who has attained the age of twenty one years.[11] Thus, any woman over the age of twenty one years can become a single mother through assisted reproductive techniques, and any woman being a widow or a divorcee between the ages 35 to 45 years can experience single motherhood through surrogacy. For the purpose of the above two pieces of legislation, 'couple' means a legally married couple.[12]

Parenthood for the LGBTQ+ community

The joy of parenthood can also enjoyed by people belonging to the homosexual, intersex and transgender community by adoption and through modern reproductive techniques. As has been observed earlier, the surrogacy regulation law allows only divorced women and widows to avail the benefit of surrogacy along with couples; but the Assisted Reproductive Technology law allows couples and all single women (including homosexual women), disallowing only live-in couples and same-sex couples from its ambit. Thus, homosexuals can become parents, though the law does not recognise their partners as the other parent since their marriage has still not been legally recognised. Also, India houses around 4.88 lakh transgender population[13] and they too can become parents through adoption.

III. ROLE OF THE STATE

Organisation for Economic Co-operation and Development (hereinafter, OECD) observes that single-parent families tend to be the most vulnerable with an OECD average poverty rate of 32.5percent.[14] And, the major factors contributing to their vulnerability

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9 The Surrogacy (Regulation) Act, 2021 (No. 47 of 2021), s.2(r) & s.2(s).

10 The Assisted Reproductive Technology (Regulation) Act, 2021 (No. 42 of 2021), s.2(n).

11 *Id*., s.2(u).

12 *Supra* note 9, s.2 (h). "couple" means the legally married Indian man and woman above the age of 21 years and 18 years respectively.

Supra note 10, s.2 (e). "commissioning couple" means an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank.

13 The Census of India, 2011.

14 OECD, *Supporting single-parent families Evolving Family Models in Spain: A New National Framework for Improved Support and Protection for Families* 1 (2022).

include difficulty in accessing labour market and adequate income, caring responsibility and lack of practical and emotional support from the other spouse.[15]

The Universal Declaration of Human Rights (UDHR) states that "families are entitled to protection and assistance by the society and the State"[16] and "motherhood and childhood are entitled to special care and assistance".[17] CEDAW under Article 11(2)(b) obliges State parties to take appropriate measures to enable parents to combine family and work commitments with promotion of childcare facilities in particular. The Child Rights Convention mandates member States to take all appropriate measures to ensure that children of working parents have the right to benefit from childcare services and facilities for which they are eligible.[18]

Since the burden to provide for both the caring duties and financial needs of the family falls on the single parent with no support to her/him, it becomes the responsibility of the State to protect them. It is understood that single parents need support to help them balance work and family life, and to secure their economic well-being.[19] Supporting them through family-friendly policies to ensure that each individual can thrive and achieve their potential is essential for creating peaceful and prosperous societies.

Economic support

Provision of child maintenance by the non-custodial parent is a legal obligation in India, usually accompanied by sanction through enforced payment and even civil imprisonment in certain cases. This is helpful in cases of separation of parents by divorce or judicial separation, and where children are born from relationships outside marriage. Personal laws of the parties govern the provisions related to legitimate children; while illegitimate children if Hindu, can claim maintenance under their personal law[20], and others can claim it under the secular law provisions of the Code of Criminal Procedure.[21]

Financial health of the family is an important determinant of the external environment of children and builds the capacity to admit them in quality schools and daycares. Mrs. Clinton in one of her book says "*children will thrive only if their families thrive and if the whole of society cares enough to provide for them*."[22] Thus, the economic well-being of a family is a constituent factor having a direct impact on childcare. And, schemes

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15 *Id.* at 3.

16 The Universal Declaration of Human Rights, 1948, art.16(3).

17 *Id.*, art.25(2).

18 United Nations Convention on the Rights of Child, 1989. art.18(3).

19 *Supra* note 14 at 3.

20 The Hindu Adoptions and Maintenance Act, 1956 (Act No.78 of 1956), s.20.

21 The Code of Criminal Procedure, 1973(Act No.2 of 1974), s.125(1)(b) & s.125(1)(c).

22 Hillary Rodham Clinton, *It Takes a Village: And Other Lessons Children Teach Us* 12 (Touchstone Simon and Schuster Publishing, New York, 1996).

like cash transfers, additional family allowances and tax credits specially designed for single parents are adopted by various countries to support them economically.

Childcare support

International Labour Organization in one of its books has observed that childcare is almost a universal problem for parents who work or aspire to work. [23] And, the situation worsens when all family tasks are assigned to the lone-parent. The terms 'balancing work and family life' and 'access to labour market' include policies that facilitate access to daycare, early childhood care and education, education in schools and after-school care of children of working parents; and policies that promote at-home care of children by parents including maternity leaves, paternity leaves, childcare leaves and flexible working hours.

For example, in Slovak Republic, single mothers can avail extended maternity leaves; in Greece, parental leaves are double for single parents.[24] Similarly, in Czech Republic, single parents with children under the age of ten years can avail long-term care leaves for their care. [25] In France, up to 85percent of childcare cost of children below the age of six is supported by the government on the family income-based criteria and the number of children in the family.[26] Parental allowance for single parents of a disabled child is higher than for couples.[27]

Caring for children in India

The Indian Constitution has taken care of the country's children by making special provisions for their protection under Article 15(3). The states are obligated to ensure that children are provided early childhood care and education,[28] secure that the tender age of children are not abused[29], and ensure healthy development of children and protect their childhood and youth against any form of moral or material abandonment or exploitation in any other manner.[30] The directive principles though not enforceable, yet provide a guideline to states in framing their policies. The significance of quality childcare in India has been recognized since the National Policy for Children, 1974 was laid down. Several other policy documents including National Policy for Education, 1986, the National- Plan of Action for Children, 2005 and the National Child Policy for Children, 2013 have recommended the State to make provisions for the same.

The first scheme of the Central Government rolled out in 1975 to cater to Indian children is the Integrated Child Development Scheme (ICDS). It targets the health

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23 International Labour Organisation, *Workplace solutions for childcare Workplace solutions for childcare*, (ILO, Switzerland, 2010).

24 *Supra* note 14 at 4.

25 *Ibid.*

26 *Supra* note 14 at 5.

27 *Ibid.*

28 The Constitution of India, 1950, art.45.

29 *Id.,* art.39(a).

30 *Id.,* art.39(f).

and nutritional requirements of a child below six years of age, pregnant and lactating mothers and adolescent girls and women through a network of aanganwadi centres. In the last few years, realising the increasing importance of childcare for children, these aanganwadis are proposed to be converted to aanganwadi-cum-crèches. Some aanganwadis have already been converted to provide these crèche services, though most of them are yet to be updated to accommodate a crèche in the existing premises.

Another important governmental effort in this regard is the National Crèche Scheme. The scheme is being implemented in partnership with NGOs, and some of the private and corporate agencies. However, the present status of this scheme is dissatisfactory. The number of functional crèches under this scheme during the period 2019-20 was a mere 6458.[31]

Some Acts in the labour legislation have made provisions for establishment of crèches at workplaces by the employers where the number of women workers is beyond a certain minimum.[32] It is observed that the legislature had earlier related the need for crèches either with the mothers employed in these labour intensive industries, or with other poor working mothers. A universal need for childcare for all working mothers irrespective of the industry they are working in and their economic status has been made in the Maternity Benefit Act, 1961(hereinafter, the MB Act) through its 2017 amendment, wherein every employer employing more than fifty employees is mandated to provide crèche facility to its employees.[33]

IV. SINGLE MOTHERHOOD IN INDIA

It is estimated that there are around 7.5percent lone-parent households across the world. Of these, most (84.8percent) are lone-mother households.[34] In India, 4.5percent households are headed by mothers alone and 0.9percent households are headed by fathers alone.[35] National Family Health Survey (NFHS) data states that around 11percent of children below the age of 18 years live with their mother but not their father, and 2percent live with their father but not their mother.[36]

There may be various reasons for the same including cruelty (the NCRB data reports that under the head of crime against women, majority (approximately 33percent) of the cases were registered under 'cruelty against woman by husband or his relatives'[37]),

31 Ministry of Women and Child Development, National Crèche Scheme dated 9th February, 2022, available at www.pib.gov.in.

32 These include the Plantations Labour Act, 1951 (Act 69 of 1951) and The Mines Act, 1966(Act 35 of 1952).

33 The Maternity Benefit Act, 1961 (Act 53 of 1961), s.11A.

34 *Supra* note 1 at 45.

35 Available at https://data.unwomen.org/ (last visited on 26.10.2022).

36 Government of India, "National Family Health Survey (NFHS-3) (2005-06) I", (September, 2007), p.26.

37 Government of India, "Crime in India: 2021Statistics Volume I" (National Crime Records Bureau Ministry of Home Affairs, 2022), p. xix.

domestic violence, or desertion in the marriage. The others reasons involve difficulty of re-marriage after divorce or death of the husband; or difficulty in marriage where the woman has children from relationship outside wedlock.

It is observed that there is a growing reluctance among women to play an expected sub-ordinate role in family relationships.[38] And, with the increasing opportunities of education and employment; and better law and order situation, more women are choosing to remain single. Also, the increasing economic independence of women empowers them to leave abusive relationships.

At the same time, in cases of children born outside marriage, it is usually the mother who brings up the child as a single parent if the father refuses to acknowledge paternity. Women cannot hide child birth and motherhood unlike men. Suravi's story covered by Ms. Lamba in her research depicts the life of an unwed village mother. [39] She had a child outside wedlock with a man from the same village as hers.[40] The biological father of the child refused to acknowledge paternity of the child, and she had to bring up the child in her maternal home.[41] The famous case of Rohit Shekhar Tiwari who fought a paternity battle against this biological father politician N.D. Tiwari is another example of instances wherein mothers are forced to single-handedly bring up children born outside marriage.

Economic vulnerability

With the rise in divorce and separation of couples, women have become more vulnerable. A United Nations report observes that "Mother-child families are almost universally at a considerably higher risk of being poor." [42] This is for the reason that the economic consequences of the breakdown of a marriage are greater for women than for men.[43] Women lose their interest in marital assets, resources and even custody of children[44].

In the Indian society, women face patriarchal bias in obtaining education and training, and experience sex segregated labour market with few jobs for women and those that are available, are usually low paid, part time, and insecure.[45]Adding to this, the earlier notions of joint family system wherein families of single mothers were considered as the joint responsibility of the joint family have been withering away.[46]

38 *Supra* note 1 at 16.

39 Lamb, S. *Being Single in India: Stories of Gender, Exclusion, and Possibility* 135-143 (University of California Press, Oakland, 2022).

40 *Ibid.*

41 *Ibid.*

42 *Supra* note 1 at 64.

43 *Ibid.*

44 *Supra* note 1 at 17.

45 Shalini Bharat, "Single Parent Family in India: Issues and Implications" 47(1) *Indian Journal of Social Work* 61&62.

46 *Id.* at 62.

In most Indian families, women either renounce or don't easily get their rightful share of inheritance. In a survey conducted in three Indian states of Uttar Pradesh, Bihar and Madhya Pradesh, it was observed that only 13percent of women whose parents own land have inherited it, and the biggest opposition to women inheriting land comes from their brothers followed by their fathers.[47] And, one of the key reasons for this is their reluctance to claim it in exchange for familial support they may require if they suffer from breakdown of marriage.[48] It is observed that nearly half of lone-mothers live with their extended families.[49] In Central and Southern Asia, this figure is around 66.9percent.[50] This effectively explains the situation of these families- need for support in the form of resources and childcare.[51]

V. SINGLE FATHERHOOD IN INDIA

A lower rate of single-father households reflect the fact that across the globe males are more likely to re-marry and leave the children in care of their female counterparts or other female relatives. Caring duty seems to be the job of the mothers, not of the fathers. The prevalent gender-roles in the society relate mothers with caring duties, and fathers with providing financial security to the family. This renders managing the house and taking care of the family problematic for single-fathers.[52] Adding to this, the legislature does not recognise fathers as caregivers by ignoring them while drafting important welfare legislation.

Paternity leaves for fathers

The MB Act provides that any woman legally adopting a child below the age of three months shall be entitled to a maternity benefit of twelve weeks from the date the child is handed over to her.[53] The provision was introduced through the 2017 amendment to the Act.[54] However, no such provision has been provided for fathers. It is observed that the legislature has since 1890 recognised that any major person (including a male) can be the guardian of a minor (under the Guardians and Wards Act), or an adoptive single parent (under the Hindu Adoptions and Maintenance Act) since 1956; yet their duty as care-givers of children has still not been acknowledged.

As has been discussed above, childcare is largely considered as the duty of the mother or the female members of a household, and not of the father. No law similar

47 Rema Nagarajan, "Barely one in ten women own land, brothers most anti sisters inheriting land: Survey", *The Times of India*, March 6, 2014, available at https://timesofindia.indiatimes.com (last visited on 28.10.2022).

48 *Ibid.*

49 *Supra* note 1 at 65.

50 *Ibid.*

51 *Ibid.*

52 *Supra* note 46.

53 *Supra* note 33, s.5(4).

54 The Maternity Benefit (Amendment) Act, 2017 (Act No. 6 of 2017), s.3(iv).

to the MB Act has been drafted for fathers relating to paternity leaves. Attempts were made in 2017 and 2019 by the Members of Parliament Shri Rajeev Satav and Ms. S. Jothimani respectively through introduction of a bill titled the Paternity Bill; however, the same could not be passed.

Crèches only for children of working mothers, not of working fathers

Crèches for children have generally been linked with the employment of mothers in the labour legislation in India. There must be a minimum threshold of women working in an establishment to make it mandatory for an employer to provide a crèche facility at the workplace. Under the Factories Act, 1948, there must be at least 30 women[55]; under the Plantations Labour Act, 1951, there must be at least 50 women.[56] Similar provisions can be found in a few other Acts.

The MB Act provides for crèches for establishments with fifty or more employee[57]. The provision is applauded for being gender neutral with respect to the employees, however, the proviso to that section states that four visits per day to the crèche shall be allowed to the woman.[58] There has been no mention of visits by a man.

The National Crèche Scheme of the government uses the term "crèche facilities for the children of working mothers", thus making it evident that the legislature forgets the responsibility of fathers as care-givers for their children.

Childcare leaves for lone-fathers

In 2019, the Indian Government recognised the importance of childcare by extending the childcare leaves to single male parents (unmarried, widower or divorcee). An amendment was made in the Central Civil Services (Leave) Rules, 1972 to this effect after accepting the recommendations of the 7th Central Pay Commission.[59] The amendment is praised for having recognised the childcare provision by fathers for their children, but a lot more still needs to be done in this respect.

VI. CONCLUSION AND SUGGESTIONS

The structure of families in India has been changing with a greater number of single people than ever before. These people comprise of individuals who have never married, or been separated, divorced or widowed; or are single by choice. They may have children from marriage, or through relationships outside marriage, or adoption, or through modern reproductive techniques. It is understood that single-parent families tend to be vulnerable since all the tasks ranging from fulfilling the financial needs of the family to the caring duties have to be performed by a single individual.

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55 The Factories Act, 1948 (Act 63 of 1948), s.48(1).

56 The Plantations Labour Act, 1951(Act 69 of 1951), s.12(1).

57 *Supra* note 33, proviso to s.11A(1).

58 *Ibid.*

59 Government of India, Ministry of Personnel PG & Pensions, Department of Personnel & Training Notification No.11020/01/2017-Estt. (L) (*w.e.f.* 14.12.2018).

There is a need to recognise the rise of single parenthood in India, and reform the legislation to support these families. It is understood that the economic well-being of a family directly influences childcare provision to the children. Towards this end, priority should be given to improve the economic condition of these families by providing tax benefits and providing access to public funded or subsidized childcare facilities to the children of these families to promote employment of the lone-parent.

One of the methods of supporting them is to increase the tax deduction limit available to an individual under the Income Tax Act from Rs.1,50,000 for a single parent to off-set the pooled exemption of Rs.3,00,000 available to couples. One head in the category of deductions is tuition fee expenses of up to two children.[60] This will serve two-fold purposes *viz.*, to increase the disposable income in the hands of such families and to push education of the children belonging to these families.

Importance of paternity leaves should be recognised by the legislature with equal treatment to a single-father as a mother under the maternity benefit legislation in India. Gender neutral term 'working parents' should be used instead of 'working mothers' in the labour legislations providing for crèches at workplaces to include the 'working fathers' within their ambit. The MB Act should be amended to allow four visits per day to a workplace crèche to the fathers also. The term 'woman' in proviso to section 11A(1) of the Act should be replaced with 'parent' to facilitate fathers also to visit their children admitted in these crèches.

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60 The Income Tax Act, 1961 (Act No. 43 of 1961), s.80C. Deduction in respect of life insurance premia, deferred annuity, contributions to provident fund, subscription to certain equity shares or debentures, etc (2)(xvii) as tuition fees (excluding any payment towards any development fees or donation or payment of similar nature), whether at the time of admission or thereafter,— (a) to any university, college, school or other educational institution situated within India; (b) for the purpose of full-time education of any of the persons specified in sub-section (4).

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The Draft EIA in India: Whether It Stands the Test of the 'Precautionary Principle' & 'Participatory Governance'?

Ms. Nidhi Singh Arora*

ABSTRACT

Environmental change, natural deterioration, extinction of species, and resource contamination are the century's most pressing challenges. The greatest approach to combat these is for governments and individuals to work together globally. India concentrated on global efforts such as the Bonn Convention, the Kyoto Protocol, and the Paris Agreement on this front. At the public level, environmental change relief is mostly achieved through efficient energy arrangements and afforestation, although solid and well-executed legislation were crucial in achieving these goals.

There is widespread skepticism of strong climate legislation, which are blamed for financial disaster. Exploration of natural approaches revealed durable ecological principles that are to a large extent viable in reducing natural debasement through time and aiding monetary development both worldwide and in India. Beyond the legal system, biodiversity and public stewardship have a good impact on climatic and environmental goals.

Given the circumstances, the proposal to weaken ecological insurance measures with the Environmental Impact Assessment (EIA) draft 2020 has sparked widespread public concern. EIA is a tool used by the United Nations Environment Program (UNEP) to discern between an undertaking's ecological, social, and financial implications before moving forward.

The Union Ministry of Environment, Forest and Climate Change presented the draft EIA warning, 2020, on March 23, 2020, which will replace the 2006 notice. It aimed to make several reforms to the country's ecological administration, including possibly compromising environmental protections while supporting business. In essence, the EIA draft contradicts laws established near the Supreme Court of India and the National Green Tribunal (NGT), destroying the fundamental protected ways of law-and-order reasoning and co-employable federalism. It also puts the major right to a perfect climate in jeopardy under the Right to Life. In contrast to the proposed adjustments, it is critical to strengthen natural guidelines by

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strengthening the nature of pattern studies, offering a more grounded arrangement of governing principles, and making the cycle simpler and more comprehensive for varied partners.

The 2020 proposal provides no remedy for the political and administrative strengthening of the EIA cycle, and therefore on businesses. Overall, it aims to strengthen the public authority's optional force while limiting public commitment to climate protection. The purpose of this study report is to fear those initiatives involving public guard and security that are often regarded as critical, and the public authority will decide on the vital tag for various ventures. According to the 2020 draft, no data on such assignments will be made public. The report will also focus on whether it creates a window for synopsis flexibility for any activity deemed critical without explaining why.

Furthermore, the revised proposal exempts a lengthy list of activities from public discussion. Straight projects, such as streets and pipelines in line zones, will not require any official procedures. The 'line zone' is defined as a zone within a 100-kilometer elevated distance from the Line of Actual Control with India's lining nations. That would include a major portion of the Northeast, which is home to some of the country's most diverse biodiversity.

Keywords: *EIA, Precautionary Principle, Participatory Governance, COVID-19, Biodiversity.*

1. INTRODUCTION

A signatory to the Stockholm Declaration (1972) on environment, India enacted laws to manage Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 before long when. However, it had been solely when the Bhopal gas leak disaster in 1984 that the country legislated associate degree umbrella Act for environmental protection in 1986.

Under the Environmental (Protection) Act, 1986, Asian country notified its first EIA norms in 1994, setting in situ a legal framework for regulation activities that access, utilize, and influence natural resources. Each development project has been needed to travel through the EIA method for getting previous environmental clearance ever since.

The 1994 EIA notification was replaced with a changed draft in 2006. Earlier, the Government redrafted it once more to include the amendments and relevant court orders issued since 2006, and to form the EIA *"process additional clear and expedient."*

The new draft is predicted to incorporate the teachings of special experiences say the Uttarakhand floods of 2013; recent Chamauli district glacier burst increasing incidents of flood disasters, together with urban floods; ever-changing monsoon pattern; improved data concerning the standing of variety in numerous agro environmental condition things. It is expected to incorporate the necessities, thanks to India's international environmental commitments. The expertise of different countries also can be helpful guide in raising our environmental governance. The new draft additionally is expected to follow the *principle of non-regression* and also follow the fundamental tenets of the Constitution together with basic tenets of democratic functioning, *Article 21, Article 48A,* among others. The notification is additionally expected to require into consideration the general public commitments of the govt,

together with Ganga Rejuvenation and Watercourse Rejuvenation, Conservation of mountain chain and Western Ghats, among others. The draft notification is meant to stick to basic setting principles together with those of precautionary principle, bad person pay principle, property development principle and avoiding conflict of interest. An in depth reading of the draft and comparison with the prevailing notification shows that the draft fails on each one amongst these necessities.

The draft EIA will increase the list of comes utterly exempt from EIA method, additionally to B2 comes that are also much exempt. Exemption means that no EIA study wants be conducted on the project's adverse consequences for the atmosphere and other people. As highlighted within the CAG report of 2016 not one project has been fined for the violation of terms and conditions on that its environmental clearance has been granted. The CAG report conjointly highlights the matter of lack of additive impact assessment of all projects under EIA.

The draft EIA will increase the increases the validity of prior granted environment clearances for projects. The validity of prior-ECs for river and valley projects has been increased from 10 to 15 years, mining projects from 30 to 50 years and for all other projects from 5 to 10 years. Enabling this allows previously harmful projects to continue for longer, affecting the environment and numerous communities around.

Exemption means that no EIA study wants be conducted on the project's adverse consequences for the atmosphere and other people. As highlighted within the CAG report of 2016 not one project has been fined for the violation of terms and conditions on that its environmental clearance has been granted. The CAG report conjointly highlights the matter of lack of additive impact assessment of all the projects in EIA.

The draft notification additionally exempts large construction comes beneath class B2 from the necessity to conduct public consultations before seeking environmental clearance. As a result, the controversial central view project won't need to endure public scrutiny. The absence of effective environmental scrutiny of a part that, in line with the urban center Pollution management Committee, accounts for half-hour of pollution is on the far side legal justification.

2. EIA: AN IMPLICATION

'Draft EIA Notification (2020) is a mere formality in the name of introducing transparency. When evaluated against UNEP's environmental rule of law framework, it falls short on several counts. A standalone EIA law is required and not a tick-box approach.'

Environment Impact Assessment or EIA is the procedure or study which predicts the impact of a proposed mechanical/infrastructural venture on the habitat. It forestalls the proposed action/venture from being affirmed without appropriate oversight or facing unfavorable results into account. In other words, EIA is a significant modus operandi for assessing the possible natural effect of a proposed venture. It is an approach whereby individuals' perspectives are mulled over for allowing final assent [2] to any formative undertaking or movement. It is fundamentally, a dynamic device

to choose whether the undertaking ought to be affirmed or not. It can be characterized as the examination to anticipate the impact of a proposed activity. A dynamic device, EIA thinks about different choices for an undertaking and looks to recognize the one which speaks to the best blend of monetary and ecological expenses and advantages.

3. BACKDROP

"The EIA procedure was generally formulated to consider the necessities of networks, and ought to be a fastidiously mapped, expand procedure to find out the ecological feasibility of a task. The whole procedure is diminished to a progression of snappy advances that is being satisfied by compromising. This whole system basically doesn't report the voices of networks that will be legitimately influenced by propose grown ventures. The couple of occasions it does are not many and far in the middle. The reverberating cry of specialists in the field is altogether determined by the questionable "ease of doing business" system [3]. Socially, we are at a disastrous crossroads where business foundation picks up priority over characteristic framework (nature), i.e., air terminals and thruways are esteemed more in contrast with mangroves and biologically delicate territories that are a piece of our way of life and information legacy. The way to deal with "improvement" ought to be base up and there is a critical need to make an empowering democratic based condition that permits individuals to advance their perspectives without the dread of backfire. "

4. HOW DOES IT WORK?

EIA deliberately looks at both helpful and antagonistic results of the undertaking and guarantees that these impacts are considered during venture proposal. It assists with recognizing conceivable natural impacts of the proposed venture, put forwards the measures to moderate antagonistic impacts and predicts whether there will be huge unfavorable ecological impacts, much after the alleviation is executed. By considering the natural impacts of the task and their alleviation right off the bat in the venture planning phase, environmental assessment has numerous advantages, for example, safety prerequisite, ideal use of assets and sparing of time and cost of the venture. Appropriately led EIA additionally diminishes clashes by advancing network support, advising leaders, and helping lay the base for ecologically stable ventures. Advantages of coordinating EIA have been seen in all phases of an undertaking, from investigation and arranging, through development, activities, decommissioning, and past site conclusion.

5. DRAFT EIA: NEWFANGLED NOW AND A VICTIM OF ENIGMA

India's new EIA draft has been generally reprimanded for its tricky changes in rules. A large portion of the arrangements in the new draft of EIA ends up being a backward takeoff from the prior rendition. The 1994 notice went through a few cycles throughout the long term, contingent upon the public authority of the day [4], and was supplanted by a 2006 warning. The 2020 Draft Notification looks to supplant 2006 one. With the COVID-19 emergency having managed a hit to the Indian economy, this maybe is another turning point for India.

As the years progressed, despite the relative multitude of changes, the condition of the climate in India has not improved. Moreover, the complexities related to directing an EIA study have been intensified throughout the years for project advocates just as those contradicting these ventures. In this specific situation, the Draft Notification plans to make the EIA cycle more straightforward and practical for the partners. In any case, a few natural activists have restricted this draft because it will deliver EIA as a simple convention. It is then intriguing to evaluate the Draft Notification through a natural standard of law (EROL) system created by the United Nations Environment Program in its 2017 Global Report.

There are numerous issues [5] with this draft on the ecological and equitable front which has neglected to:

1. Blanket exemption for strategic projects will pave way for violence on environment with impunity. Environmental degradation does not differentiate between projects. It will affect everyone equally. Suo moto reporting may never happen as there is no responsibility fixing mechanism for damage caused.
2. Resolve the emergency of inappropriate e-waste management, which effectively affects characteristic biological systems and general wellbeing by deciding not to manage e-waste handling in India.
3. Consolidate the real factors of the present and the future by excluding ventures, for example, battery producing, production of solar panels, and different parts that are the foundation of the roaring renewable energy sector.
4. Incorporate Geo-engineering, which is purposeful and enormous scope control of Earth's characteristic procedures, and is a major supporter of the climate calamity.
5. Moderating the rundown of ventures that are either absolved from ecological leeway or needn't bother with open meeting before getting environmental clearance viz.:

Firstly, progressive projects like interstate developments have been absolved from getting prior environmental clearance despite the fact that there are hazards of crumbling of the wildlife habitats and spaces thus the rise of zoonotic infectionslike COVID-19. *Secondly,* Projects that encouraged with the incessant reliance on fossil fuel activities like coal bed methane extraction, inland and seaward oil and gas boring, shale gas survey, and extraction are set in the excluded class, despite the fact that they apply an immense cost for nature and are not green.

The draft should be pulled back and discharged at an increasingly appropriate date when individuals are not wrestling with a worldwide pandemic. At the point when it is discharged, it ought to be finished with sufficient time for the formal review time frame. There ought to be more straightforwardness with respect to the reaction individuals give during this period and why it has been actualized or not executed in the last report.

Right off the bat, this draft proposes to abbreviate formal conferences and excluded some enormous ventures from formal conferences itself-incorporates water system, dam works, and so on. Minimized people group who rely upon the land for every one of their needs can in fact lose it without being counseled for 'vital tasks'. The term vital activities could be anything-it isn't obviously characterized by any stretch of the imagination! Either this, or there is lesser time for activation and composed dissent due to the shortening of the formal proceeding time frame.

At that point the fait accompli issues come in with the post-facto freedom. The legitimacy for clearances for specific enterprises have expanded more current establishments to undertakings should be possible at considerably more simplicity with less counsel due to the clearances. The consistence report has diminished every year rather than biennially-which causes even more harm and lesser requirement for tests! This pandemic ought to have been a reminder to reinforce the earth guidelines not weakens it further.

6. CHIPPING IN OF COMMON MAN

Numerous provisions of the new EIA Notification additionally endanger the fundamental tenets of public participation. The amount for public consultation has been reduced from thirty days to twenty days. Considering the socio-political context of the vulnerable population generally full of 'development' comes, this reduction might virtually exclude some teams of individuals from consultation.

The reduction amount is additionally against directions in 2000 of the Gujarat state supreme court in *Centre for Social Justice v. Union of India*, once it insisted on a minimum of thirty days for public hearing. The notification additionally exempts comes with *"strategic concerns as determined by the government"* from the stricter scope of EIA and public hearings. Here, the blanket authority provided to the govt to categorize comes as strategic and elimination of public hearings beneathmines the terribly material of India's international commitment under varied three-cornered agreements.

7. PRECAUTIONARY PRINCIPLE IN CONTEXT OF EIA

The dilution of environmental standards within the EIA must be evaluated within the background of the sturdy environmental principles operational at the national and international levels. The country may be a party to the Rio declaration adopted by the world organization Conference on setting and Development (UNCED) in 1992 that enunciated a listing of environmental principles together with property development, precautionary principle, and environmental impact assessment.

Many of the MEAs to that Republic of India may be a party, together with the Convention on Biological Diversity (CBD) and United Nations Framework Convention on Climate Change (UNFCCC) contains a demand to possess a previous EIA in things having a big threat to the setting. Following the Rio Conference 1992, EIA became a part of the formalized legal framework in Republic of India in 1994.

The principle of property development and precautionary principle became a part of India's domestic legal framework once in *Vellore Citizen's Welfare Forum v. Union of India*, the Supreme Court of Republic of India declared those principles a part of the law of the land. With the enactment of the National inexperienced judicature Act in 2010, the principle of property development, precautionary principle, and bad person pays principle became a precise a part of India's legislative framework.

However, given the uncertainty related to the edge and contours of each these principles, EIA emerges as an outstanding and vital restrictive mechanism for the environmental policy as a tool for au courant decision-making towards property development and application of the precautionary principle. EIA's role as a tool within the accomplishment of property development has been supported by the world organization setting Programme (UNEP) in its pointers of EIA.

EIA's significance stems from the actual fact that the accomplishment of property development may be a legal obligation of conduct beneath environmental law, EIA, and also the public consultation area unit the potential needs for the fulfillment of this duty. The purpose is that it's tough to justify a project supported property development while not recourse to the conduct of an efficient EIA.

Thus, any dilution of the EIA and public consultation may be a move far from the legal obligation of conduct entrenched within the principle of property development. In spite of the main focus on global climate change at the international and domestic level, the EIA notification has not incorporated specific regard to climate resilience, impact or vulnerability from the scope of EIA study. This contradicts the provisions of UNFCCC and Paris Agreement.

Additionally, meaning opportunities for public involvement constitutes an important determinant of EIA outcome and is thought to be a procedural right recognized beneath Principle ten of the Rio Declaration. Over the past decades, state apply on public participation has undergone speedy transformation and is said as a basic requirement for the accomplishment of property development. At the start adopted through soft law declarations like Agenda twenty-oneand the Rio Declaration, the thought found specific expression in a very big selection of environmental conventions.

The public participation and modalities in EIA are detailed at the international level within the Convention on Environmental Impact Assessment in a very Transboundary Context ("Espoo Convention"). The procedure has been highlighted as associate degree exemplary customary for the method to be followed once conducting associate degree EIA by Justice Dalbeer Bhandari in Republic of *Costa Rica v Nicaragua.*

It ought to even be emphatic that the rights of the members of the general public in environmental matters has been given a brand-new positive stimulus by the Convention on Access to info, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention). Though the Espoo convention has been negotiated within the context of transboundary context, the principle guiding the convention has relevancy within the domestic context of the operation of development comes.

India's experiments with public participation in EIA have a checkered history. Instances of crying violations embody cases wherever the affected communities are physically prevented from taking part within the hearings to inadequate provision of notice of the meeting and lack of access to essential info to the general public.The judiciary, in a very chain of cases, has stressed the importance and has specified the key modalities of public participation in EIA.

In the case of *Adivasi Majdoor Kisan Ekta Sanghatan v Union of India*, the court declared the faulty public hearing to be a nonexistence within the eye of law. Its value noting that, within the wake of the contention related to the introduction of genetically changed foods, the danger assessment and public consultation were undertaken with the then environmental minister, Jayaram Ramesh overseeing the complete method. Effective public consultation will be instrumental in upholding the legitimate considerations of the native communities and stakeholders plagued by the project.

It ought to be stressed that for affected communities, the EIA remains the sole viable mechanism and to confirm that comes adhere to legal safeguards. the importance of public participation has been elevated by the judiciary in province *Mining Corporation Ltd. v. MOEF (Vedanta)* once it dominated that the Gram Sabha would ought to be thought of before the MOEF grants environmental approvals for organic process comes involving rights of people and communities in regular areas.

Considering the two decades of large judicial interventions within the field of environmental impact assessment to pronounce on the crucial method of EIA in consonance with the international developments, the EIA notification of 2020 may be a regressive step back.

8. DRAFT EIA'S IMPACT ON BIODIVERSITY

Natural environments globally give services price $44 trillion annually, per a study by the social science of Ecosystems and variety and UNEP in 2012. thanks to their inherent complexness, however, ecosystems will be extraordinarily troublesome and disproportionately pricey to recover when a major disruption.

Aligned with this, the NGT selected the 'precautionary principle' to be among the essential tenets of environmental justice.

The provisions for post-facto clearance within the new draft permit industries to violate EIA norms 1st and ask for a clean invoice afterward — contrary to the rule of law, per the Supreme Court. A one-time amnesty protocol was developed in 2017 for comes that profaned the foundations underneath EIA 2006 and these were to be remedied through compensation or penalties.

LG Polymers Republic of India Pvt Ltd — in whose plant in Visakhapatnam, a tragic gas leak occurred in 2020 — was among these violators. Incidents like these can possibly increase in frequency if post-facto clearance becomes commonplace. whereas the preparation of EIA is simply a place to begin, the exercise is hollow while not diligent observance and compliance with the mitigation measures.

Ecosystems usually answer external changes when a wait and continuous observance is vital to capture tipping points. At a time, once violations — like the gas leak in Visakhapatnam and therefore the oil field incident in Baghjan — became more and more frequent, quiet compliance reports from double a year to once a year is ostensibly regressive.

Additionally, the supply of EIAs supported one season of knowledge will probably create the analysis incomplete and dishonorable, masking the total environmental impact of a project.

Ecological studies from round the world showed there was heaps of within-year and between-year variation in ecological information, environmental conditions and population sizes of plants and animals. Single-season information is not representative of natural variations and cycles, creating extrapolations inaccurate.

In general, variety assessments take a backseat in EIAs, since pollution management boards (PCB), that play a distinguished role in these assessments, square measure possible to rate problems related to pollution of natural resources.

The EIA should be multi-faceted and a lot of representatives of the environmental impacts of the project, together with indirect effects of variety loss, if variety assessments performed by skilled personnel were created a locality of it.

In order to form the method a lot of clear and strong and to carry consultants responsible, the Union government should conjointly devise associate enfranchisement system for such professionals.

Communities living in shut proximity area unit affected the foremost once a project is granted clearance. EIA 2020 reduces opportunities for public participation by reducing the time window for public response to twenty days from the prevailing thirty and excluding variety of comes from public hearings.

'Strategic considerations' could be an obscure new class that does not need hearings, one thing which will be victimized to bypass the general public method, compromising transparency and answerableness.

Further, complaints against compliance measures of the project will currently solely be reportable by the developer themselves or the PCBs, keeping the general public out of the range.

There areunit further barriers to accessibility, as EIA reports area unit typically not offered in native languages or area unit packed with jargon.

For purposeful participation, summaries of the EIA, with major take-aways and impacts on the area people should be created offered to the communities United Nations agency could be affected, with ample time at hand and in their native tongue. The panchayats system and native organizations at grassroots levels will play a distinguished role in facilitating these discussions. Inequalities exist even among communities which will be affected, with public hearings not representing all voices equally.

Linking EIA public hearings to existing laws below Social Impact Assessment might improve transparency and inclusivity for all stakeholders.

The new rules tip the ability sharing in setting governance powerfully towards the Union government, weakening the federal arrangement. The projected changes provide the Union government full powers to appoint the State Environmental Impact Assessment Authority.

Laws like the National BiodiversityAct, 2002, provides a terribly distinguished role and vital autonomy to native bodies like Gram Sabhaswithin the protection and conservation of native variety.

Such spread has, thus, helped scale back instances of bio-piracy and promoted a harmonious and property co-existence of variety in human settlements. Within the lightweight of those positive outcomes, it solely is smart for allied environmental laws to follow an identical 'bottom-to-up' approach.

With EIA set to play a key role in property growth going forward, there's a necessity to elevate its legal importance from simply associate degree government notification to a full-fledged parliamentary act on its own.

As associate degree government notification, the provisions get lesser protection and area unit susceptible to differing interpretations supported the whims and fancies of the administration at the bottom level. As an act, it might bring larger stability and uniformity within the EIA method. A parliamentary committee should be grooved to look at the scope associate degreed powers below such an act.

India has not solely pledged formidable goals in setting and temperature change on many international forums, however has additionally taken a lead role in renewable energy within the style of the international star Alliance. Diluted domestic laws appear inconsistent with these ambitions and also the overall aspiration to be a worldwide leader within the fight against pressing up to date challenges.

We need to travel on the far side stating development comes at associate degree setting value and pioneer ways in which to develop with reduced negative impact on the environment. The economic slump posts the novel corona virus malady pandemic might sound an excusable reason to disregard environmental rules, however the long impacts of deteriorating natural ecosystems will solely worsen our economic woes.

9. LIMITATIONS WITH THE EIA SYSTEM

Another significant viewpoint to be considered is the managerial prerequisites of actualizing organizations. The CAG report of 2017 on 'Ecological Clearances and Post Clearance Monitoring' saw that such prerequisites have not been met enough be it with respect to arrangements or framework needed for the executing offices. Perhaps the most intriguing highlights of the EIA system in India is that it keeps on being as an appointed enactment under the Environment Protection Act, 1986 (EPA) in spite of having arrangements found in an undeniable resolution.

This makes it simpler for the public authority to dabble with the arrangements as amiable to personal stakes. Further, the Draft 2020 supersedes its parent enactment, the Environment Protection Act (EPA), on a few tallies.

10. NEED FOR A FORWARD-LOOKING LAW

An ideal path forward is ordering an independent law on the EIA given its situation of significance in India's administrative system on climate.

Aside from the previously mentioned focuses, it would likewise be significant for the EIA system to remember evaluations of task impacts for wellbeing, environmental change, and biodiversity, in this manner making the activity more all-encompassing. A simple box ticking approach by concerned specialists should end.

Taking everything into account, it tends to be said that a well-working and viable EIA system is a pre-imperative to India's journey for supportable turn of events.

11. CONCLUSION

The transition to get rid of individual environmental clearances for ventures inside corporations will prompt feeble fulfillment and adherence to ecological principles by the enterprises inside the modern complex. Further, there is no extent of fixing singular responsibility under such conditions meaning ecological infringement are more probable than at any other time to sneak by the radar, thereby, prompting far reaching ecological impairment.

The 2020 draft just hopes to serve the interests of the business network as it curtails the courses of events for getting ecological clearances, builds the legitimacy of mining and riverbed related ventures, gets rid of freedom prerequisites for expansion projects and has extended the avoidance list under which tasks are absolved from getting environmental clearances. As of late/years, we have watched the impacts of a powerless ecological strategy. Mumbai's Aarey backwoods was cleared to assemble a metro shed despite enormous fights. Vizag's LG Polymers caused a gas spill on seventh May. Assam's Baghjan gas spill is another ongoing model. In the perspective on current circumstance where we confronted common cataclysms like typhoons because of environmental change, beetle assaults, COVID-19 pandemic this year and a lot increasingly normal and man-made catastrophes in the previous not many years, we should make the EIA revisions considerably more grounded to ensure and safeguard our regular assets and use them economically as opposed to weakening it and making it simpler for enterprises to get leeway.

The projected EIA notification looks to be mostly targeted on rushing up the clearance method and there is no concrete proposal on up different vital components of EIA, specifically

(a) delivery a lot of science into the method,

(b) enhancing transparency,

(c) broadening participation of stakeholders, particularly those that area unit probably to be affected particularly social group communities, and

(d) guaranteeing answerableness and due diligence by those concerned in critical, the projects and people getting ready environmental impact assessments.

Republic of India is facing multiple environmental crises and a vital legislation just like the EIA notification ought to be adopting a proactive and not the "business as usual" approach learning from the wealth of expertise gained throughout the previous couple of decades. intrinsically what has been projected ought to be completely rewritten not simply to handle the current day (and yesterday's) issues, however additionally the rising ones

Also, we ought to have warnings for EIA open remarks on ventures publicized on national TV and national papers for individuals who do not have web get to or the information to explore through online gateways. Lion's share of our country/agrarian populace who might be more probable be influenced by numerous modern activities do not have a clue how to get to the online entries. Before deciding online for such significant enactments, we ought to have satisfactory preparing for the general population toutilize these entrances proficiently.

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The Historical Account of Madras High Court (1862–2012) with Reference to the Judicial Institutions in Tamil Nadu

*P. Mary Leema Rose**

ABSTRACT

The Judiciary in India is one of the important roots of the government and as such an integral part of good governance. The history of the Madras High Court dates back to 1862 when Queen Victoria granted the Letters Patent under of the British Parliament of the Indian High Court Act. The History of judicial institutions in Madras was started in the year 1600, even before Madras was born. A Court started functioning in Madras very soon after the founding of the settlement and it was called as the Choultry Court. It tried petty cases – civil or criminal. The first great court of Madras (a Supreme Court of Judicature) was established at Fort St. George on 26th December, 1801. The High Court of Judicature at Madras came into existence on 15th August, 1862 in a building which later became the Collectorate of Madras. It is now known as SingaravelarMaaligai. After 30 years, in 1892 the High Court got shifted to its present location. It was fortunate for the High Court of Madras that able Justices were appointed, in succession, to guide its destinies. After India attain Independence Justice P.V. Rajamannar, to become the first Indian Chief Justice of the High Court of Madras. The Madras High Courts and has contributed a very illustrious chapter to the history of Indian High Courts and has been responsible for the confidence which people have in the Courts.

Keywords: *Judiciary, High Court, Civil, Criminal, Judge,Law, Madras, Tamil Nadu.*

INTRODUCTION

The Madras High Court has contributed a very illustrious chapter to the history of Indian High Court and has been responsible for the confidence which people have in the court. The Legislature, the Executive and the Judiciary are three basic organs of the state. It has a vital role in the functioning of the state and more so, in a democracy based on rule of law. Since times immemorial, law and judiciary have

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played a vital role in Indian Polity. It also acts as a guardian of our constitution, by preventing abuse of power, unfair procedure, unconditional action and even inaction. This paper highlights the History of Madras High Court with reference to the Judicial institutions in the Madras Presidency. One of the characteristic of civilized societies is how their inhabitants settle disputes peacefully. Where there is peace , there is progress. If people get justice, they will remain content . If there fail to get justice, they will revolt. The Madras High Court founded on the Constitution preamble of Justice, Liberty, Equality and Fraternity. In its historical glory the Madras Presidency has seen the evolution of the legal system as we know it today.

The History of judiciary institutions in Madras was started in the year 1600, even before Madras was born. Queen Elizabeth granted a Charter on December, 31, 1600 to the London East India Company. The charter gave the power to the Governor and company to make reasonable laws, impose penalties by imprisonment or fine.[1] In 1639 Francis Day sailed to the south and obtained a grant from DamerlaVenkatappa, the Nayak of Poonamalle under Emperor Venkata III for the construction of a settlement and a fort in or around Madraspatnam also called ChannarajaPatnam, He found the place full of sand and mud with no scenic beauty, yet with good anchorage for ships. There a small fort, erected in 1640, was enlarged subsequently and was called Fort St George. The English obtained confirmation of their right to Madras from the Rajah of Chandragiri.[2] The Emperor of Vijayanagar and the Sultan of Golkonda in return for the payment of annual rent, Through its rapid growth from a settlement of traders and sea men to a city of Tamils and Telugus, Madras overshadowed the cities of Kanchi, Vellore,andArcot. In 1653 Fort St. George was made a separate Presidency. In 1654 it was the headquarters of the English on the Coromandel Coast.[3]

The Fort with its European and British servants of the Company within it was called the White Town, but the village as MadrasPatnam as Madras originally was the Black Town. The Company was allowed by the Rajah to mint money and govern MadrasPatnam. The court started functioning in Madras very soon after the founding of the settlement and it was called as the Choultry Court. It tried petty cases – civil or criminal. The Charter of Charles II dated 3rd April, 1661 specifically authorized the Agent or Governor and Council to judge all person living under their power, both civil and criminal matters, according to the laws of England, and to executed judgment. As a consequence the Choultry Court was recognized by increasing the number of judges by the then governor of Madras, Streynsham Master. He directed the Justices to sit in court every Tuesday and Friday to dispense justice. But soon the Choultry Court was found insufficient to meet the rapidly rising needs of Madras.

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ThereforeStreynsham Master made a wise decision to established the first Court of Judicature which came into existence in 1678.[4]

In 1687 the company constituted another court called the Mayor's Court. On 22nd July 1687, the first legally qualified person appeared in Madras. He was a lawyer named Sir John Biggs, who had been employed in England as Recorder of Plymouth. He entered upon his duties as judge advocate in Madras by holding the Quarter Sessions.[5] During the period from 1686 to 1726 the Mayor's Court as well as Choultry Court functioned at Madras. In 1729 the Sheriff's Court was created. The Sheriff was empowered to sit as a small cause judge and decide without appeal on his decisions on all matters not exceeding the values of five pagodas. The new Sheriff's Court had a short life. The Court of Directors were vexed with the experiment, and so, on 21st July, 1729 the Sheriff's Court was abolished.[6]With the establishment of the Court of the Recorder at Madras on 1st November, 1798, a new age dawned in the judicial administration. On the very next day, a scientific definition of the Town of Madras was given. But the Court of the Recorder at Madras was a short lived. It was abolished in 1800 but it was a very important experiment in the centralization of justice.[7]

The first great court of Madras (a Supreme Court of Judicature) was established at Fort St. George on 26th December, 1801. The new Supreme Court was to be a court of the Recorder, and it was made to consist of one principal Judge who shall be called chief justice of the Supreme Court of Judicature. The establishment of Supreme Court at Madras had set the judicial system of the Town on firm foundations.[8] During the Government of Lord Clive the administration in the Presidency of Madras was reformed on the model of the system obtaining in Bengal.[9] In 1802, the new system was introduced through the Regulations. The Supreme Court at Madras and the Adawlut system of administration of justice built up the judicial pattern for the future.. The reputation of the Supreme Court grew, because of the succession of truly able Chief Justices, who presided over it.[10]

The East India Company received a serious jolt in its political career in India in 1857. The events of that year sealed its fate, and, led to the assumption of direct rule by the Government of England. By the Act for establishing High Courts of Judicature in India passed on the 6th August, 1861, the Queen of England was empowered by Letters Patent to erect and establish a High court of Judicature at Madras. The establishment of such High Court in the presidency of Madras, it was enacted that

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the Supreme Court at Madras and the Court of SudderAdawlut and FoujdaryAdawlut should be abolished. The High Court of Judicature at Madras came into existence on 15th August, 1862 in a building which later became the Collect orate of Madras. It is now known as Singaravelar Maaligai.[11]

With the implementation of several reforms, the graded system in civil justice consisted of Panchayat (Village munisiff) District panchayat (District munsiff) Zilla Courts and Suddaradawlut. The parallel set up in criminal justice consisted of Assistant magistrate District magistrate Criminal court of circuit and Foujdaryadawlut. The English sought to govern the Indians with Indian law and Englishmen with English law, but the Hindu code was found vague. The English men received privileged treatment. In addition there functioned two systems, one organized by the Company and the other by the Crown.[12]

The High Court Act, 1865 empowered the Governor General in Council to alter the local limits of Jurisdiction of the High Courts. The High Court of Judicature at Madras was to continue to be a Court of Record. After nearly 30 years, in 1892 the High Court got shifted to its present location where a temple once existed. The temple was destroyed in a mysterious fire. The destruction of the temple of God paved the way for the construction of the temple of justice. The next important measure was the passing of the High Court Act, 1911 which fixes the maximum limit for the number of Judges of the High Court to twenty. Minor changes were introduced by the Government of India Act,1915. The high Court became the symbol of serenity, unity and power.[13]

The establishment of the High Court at Madras synchronized with the great age in law. The Supreme Court and the Suddar Courts had to administer justice at a time when laws were uncertain or unascertained, and law reports were rare. Standard works on Indian law were not in existence, and the laws had to be searched out and garnered from oriental manuscripts or Arabic text. But judges of the High Court did not have to suffer from such a disability. Their main task became the art of interpreting the statute law, which came up before them in codified forms. The official law reports, supplemented by numerous unofficial ones, gave them considerable assistance, though perhaps, with the passing of years, it might be said that the presence of too many law reports has been disadvantageous to the grasp and exposition of fundamental principles.[14]

The Government of India Act, 1935, proved the next land mark. Section 220 of that Act dealt with the constitution of the Court, and substantially re-enacted the clauses

11. Justice V. Ramasubramanian (2012) From The Archives: 1862 – 2012 Madras High Court a Saga, Gnanodaya Press, Chennai.
12. Maclean G. D. (1885) Manual of Administration of the Madras Presidency, Vol – I madras.
13. Chaudhuri Chandra Kiran (1999) History of Modern India New Central Book Agency (p) Hyderabad.
14. Justce. BASU DAS DURGA (1988) Constitutional Law of India, Prentice Hall of India, New Delhi.

of the Act of 1915. It provided that "every Judge of a High Court shall be appointed by His Majesty by Warrant under the Royal Sign Manual and shall hold office until he attain the age of sixty years". His Excellency the Governor, under the Government of India Act, delegated the power of swearing in Puisne Judges to the Chief Justice. It was fortunate for the High Court of Madras that able Chief Justices were appointed, in succession, to guide its destinies.[15] Judicial administration at Madras was put to a severe test during the Second World War, particularly, during the time when the Japanese fleet was sighted in the Bay of Bengal, and the City of Madras was seized with panic (1942). During the event known as the ' Evacuation of Madras' in 1942, the offices of the High Court had to move out of the High Court Buildings, with all their records and arrangements had to be made for the sittings of the Courts outside the Buildings.During this period, the High Court functioned in the buildings of a Convent in Theogaraya Nagar. But, after a short time, the High Court reassembled in the High Court Buildings, and the various offices returned to the accustomed edifice with their records.

On the eve of Independence, Sir Frederick Gentle took over the rein of office from Sir Lionel Leach. But, he resigned the office in the very next year. This enable Justice P.V. Rajamannar, to become the first Indian Chief Justice of the High Court of Madras. Till that event, Indians had the distinction only of acting as a Chief Justice. During the long tenure of office of chief justice Dr. Rajamannar, which lasted till 1961, many events have happened which have a direct bearing on the history of the Madras High Court. The separation of the Judiciary from Executive, the formation of linguistic states and the consequent creation of the High Courts of Andhra, Kerala and Mysore, the former two of which could well be said to owe at least parent of their structure and traditions to this parent High Court.[16]

After India gained independence and the adoption of the Constitution on January 26, 1950, the Federal Court was superseded by the Supreme court of India. By India Act VII of 1950, the seal of the High Court was replaced by a new one bearing the device and impression of the Asoka capital within the exergue or label surrounding the same, with the inscription of "The Seal of the High Court at Madras" and "Satyameva Jayate" in Devanagari Script.[18] The State of Madras was bifurcated in 1953 under the Andhra State Act and a separate High Court of Andhra was established with jurisdiction over thirteen districts, the High Court of Andhra was formed on 5th July, 1954, which resulted in the strength of the Judges of the Madras High Court getting reduced to 12 by the Notification of the Government of India, dated 3rd July, 1954.[17]

The State Re-organization Act, 1956, further reduced the number of districts under the Appellate Jurisdiction of the Madras High Court. Though by and large, the territorial jurisdiction of the High Court was only shrinking after independence, there was also

15. Chandra Bipan, Mukherjee Mirdula, Mukherjee Aditya (2015) India After Independence (1947 -2000) Penguin Books, New Delhi.
16. Rao Hari V. N. (1973) History of India Upto A.D. 1526, Rochouse&Sons , Madras.
17. Menon V.P.(2014) Integration of the Indian States, Orient Black Swan, New Delhi.

one expansion, namely, to the Union Territory of Pondicherry in October 1954, an agreement was signed between India and France for the de facto transfer of French Territories, including Pondicherry, to India. A treaty of Cession was signed in May, 1956. It was ratified by the French parliament in 1962. On16.8.1962, both countries exchanged instrument of ratification. Consequently, de jure transferred to get effected and Pondicherry and the enclaves of Karaikal, Mahe and Yanam became the Union Territory of Pondicherry from 01.07.1963. in the meantime, by virtue of the Pondicherry (Administration) Act, 1962, the jurisdiction of the High Court got extended to Pondicherry with effect from 06.11.1962.[18]

A historical fact which may also be viewed as a beautiful coincidence, is that within the very area of the present High Court building and enclosures, the old Temple of Chennakesvara appears to have stood till about 1762, when the Company made an equivalent grant of land south of China bazaar, and Chennaimalleawara Temples were erected there. The edifice of justice thus rests on consecrated ground.[19]Though by and large, the territorial jurisdiction of the high Court was only shrinking after independence, there was also one expansion, namely, to the Union territory of Pondicherry. In October 1954, an agreement was signed between India and France for the de facto transfer of French Territories, including Pondicherry, to India. A Treaty of Cession was signed in May 1956. It was ratified by French Parliament in 1962. On 16. 08. 1962, both countries exchanged instrument of ratification.Consequently, de jure transfer got effted and Pondicherry and the enclaves of Karaikal, Mahe and yeman became the Union Territory of Pondicherry from 01.07.1063. in the meantime, by virtue of the Pondicherry (Administration) Act, 1962, the jurisdiction of the High Court got extended to Pondicherry with effect from 06.11.1962.[20]

The High Court of Madras is a pioneer in promoting free legal aid to the poor. Article 39- A of the Indian Constitution mandating the state to provide free legal aid to person suffering from economic or other disabilities, came into force on 03.01.1977, by virtue of tne 42nd Amendment to the Constitution. But, even before that, the Government of TamilNadu constituted a one man Commission headed by Justice P. Ramakrishnan(Retd), in pursuance of the report submitted by JuticeV.R. Krishna Iyer to the Government of India in 1973.The mandate of the One Man Commission was to examine the feasibility of providing legal aid State's cost. On the basis of his report, a Board known as the Tamil Nadu State Legal Aid and Advice Board was constituted and notified in the Tamil Nadu Government Gazette on 04.12.1976 even before Article 39- A came into force. Within four months of the constitution of the Board, District Legal Aid and Advice Committees were formed in Chennai and other District in August 1977. Subsequently, the high Court Legal Aid Centre was constituted

18. Krishnamoorthi V.M.(1960) History of South India (Political and Cultural) Vol – II, Vijaylakshmi Publication, Neyyoor.
19. Agarwala. B.R. (1993) India – The Land and the People Our Judiciary, Nationl Book Trust, New Delhi.
20. Madras Tercentenary Commemoration Volume pp.359-362: records in C.S. Nos. 183\25, 140\30,H.C

in July 1983. The Legal Service Authorities Act itself was enacted only in 1987, after 10 years of the constitution of the State Legal Aid and Advice Board. Today the Madras High Court have the State Legal Service Authority, the High Court Legal Service Committee and Legal Services Committees at the District and Taluk level.

In Tamil Nadu the first Family Court was started in Madras I High Court in 1988. The process of computerization of the Court started in 1996 with the National Informatics Centre, supplying Systems to the Court. At first computer were used for the preparation of case lists. In 2000, the daily case lists began ti get hosted in the internet. Today, all judgements which are marked as reportable by the learned Judges, get hosted in the website of the High Court to which anyone can have access.The Amendment of the Civil Procedure Codein the year 2002, the techniques of alternative dispute resolution gained momentum. Therefore, in order to give impetus to mediation and Conciliation, which now have statutory sanction in terms of Section 89 of the Code of Civil Procedure, a Centre Known as "Tamil Nadu Mediation and Conciliation Centre" was established on 09.04.2005, within the High Court premises, perhaps as the first kind in the country.[21]In the year 1990 the Additional Family Court was established.[22] Due to increasing cases of the matrimonial disputes the second additional Family Court was set up in the year1994[23]it was followed by the third additional Family Court in year 2010.[24] For the first time in India the holiday Family Court was established in the year 2011.[25]

In the year 2004, the High Court Museum was established with the technical advice and guidance from the School of Planning and Architecture, Anna University and the Director and Curators of the Madras Government Museum, at the instance of the then Chief Justice MarkandeyKatju. The Museum was opened on 9th April 2005. Some of the object displayed at the Museum are the Charters of the Mayor's court 1753, the recorder's Court 1798, the Supreme Court of madras 1800, The Letters Patents of 1862 and 1865, the Portraits of the first Chief Justice of the Supreme Court of Madras, the first Chief Justice of the High Court of Madras and the records relating to few cases that became sensational during the time when they were fought. The continuous request of the Southern Districts, the Government of India issued, in exercise of the power conferred by Section 51(2) of the State Re- organization Act, 1956,20 the Madras High Court (Establishment of a Permanent Bench at Madurai)Order, 2004. It was noticed on 06.07.2004 to come into effect on 24.07.2004. By virtue of the said order, a permanent Bench of the Madras High Court was directed to be established at Madurai with not less than five judges, as nominated by Chief Justice, to sit there and exercise jurisdiction and powers in respect of cases arising in the District of Kanyakumari, Tirunelveli, Tuticorin, Madurai, Dindigul, Ramanathapuram, Virudhunagar, Sivagangai,

21. G.O. Ms No. 75, SW & NMP dated 25. 02. 2002

22. G.O. Ms. No. I Additional Family Court, dated19.94.1990.

23. G.O, No. 1123, II Additional Family Court, dated 21.09.1994.

24. G.O, No.719, III Additional Family Court, dated 13.08.2010.

25. G.O, No. 392, Holiday Family Court, dated 15.07.2011.

Pudukkottai, Thanjavur, Nagapattinam, Tiruchirappalli, Perambalur and Karur.The Bench was inaugurated on July 24.2004, by the then Chief Justice of India Mr. R.C. Lahoti. It was presided over by Justice B. Subashan Reddy, the then Chief Justice of the Madras High Court. In its centenary celebration from 1862 -1962, it was followed by 150th anniversary (1862 -2012) in the 150 years history, the Madras High Court had 34 Chief Justice since its inception in 1862. HonourableMr. M.Y. Eqbal, Chief Justice, Is the 35th Chief Justice of the Madras High Court. So far, 317 Judges have adorned the Bench of the Madras High Court. 24 Judges of the Madras High Court had been elevated to the Supreme Court.

CONCLUSION

The Madras High Court has witnessed certain innovative trends to help the litigants to get justice quickly. The Madras High Court was the first High Court in India to introduce Holiday Family Courts and Evening Courts, which have proved to be a great success and have attracted the attention of the judiciary in other states also. It is the pioneer in starting Tamil Nadu Mediation and Conciliation Centre. The predominant character of the Madras High court is that despite the new challenges being facet, it is able to withstand the perils and still retain the past legacy. The High Court of Madras acts as a Court of record. In this respect, it enjoys as much powers as Supreme Court at Delhi does. Judiciary is indisputably the bulwark for bringing to the society, the aspirations as guaranteed in our Constitution, which Chartered High Court, on its part, has done well, to effectively safeguard people's rights in today ever changing and fast paced world. The High Court of Madras will continue to expound and fashion the law for the present and future to meet the ends of justice and uphold the cannons of the Constitution.

List of Chief Justices of Madras High Court from the inception and the period of their service

Sir Clley Harman Scotland (1862–2012)

Sir Walter Morgan (1871–1879)

Sir Charles Arthur Turner (1879–1885)

Sir Arthyr John Hammond Collins, Q. C. (1885–1899)

Sir Charles Arnold White (1899–1914)

Sir John Edward Power Wallis, P. C. (1914–1921)

Sir Walter George Salis Schwabe, K. C. (1921–1924)

Sir Murray Coutts Trotter (1924-1929)

Sir Horage Owen Compton Beasley (1929–1937)

Sir Alfred Henry Lionel Leach (1937–1947)

Sir Frederick William Gentle (1947–1948)

Dr. Pakala Venkata Rajamannar (1948–1961)

Justice Subramanya Ramachandra Iyer (1961–1964)[16]
Justice P.chandra Reddi (1965-1966)
Justice M. Ananthanarayanan (1966-1969)
Justice K. Veerasamy (1969-1976)
Justice P.s. Kailasam (1976–1977)
Justice P. Govinda Nair (1977–1978)
Justice T. Ramaprasada Rao (1978-1979)
Justice M.m. Ismail (1979-1981)
Justice K.b.n. Singh (1982-1984)
Justice M.n.chandurkar (1984-1988)
Justice A.s. Anand (1989-1992)
Justice Kanta Kumari Patnakar (1992-1993)
Justice K.a. Swamy (1993-1997)
Justice M.s. Liberhan (1997-1998)
Justice Ashok Agarwal (1998-1999)
Justice K.g. Balakrishnan (1999–2000)
Justice N.k. Jain (2000-2001)
Justice B. Subhashan Reddy (2001-2004)
Justice Markandey Katju (2004–2005)
Justice A.p. Shah (2005-2008)
Justice A. K. Ganguly (2008-2009)
Justice H.l. Gokhale (2009–2010)
Justice M. Yusuf Eqbal (2010-2016)

Role of Blockchain in Strengthening ESG Reporting: A Systematic Review and Directions for Future Research

Ms. Priyanka Aggarwal, Dr. Archana Singh** & Dr. Deepali Malhotra****

ABSTRACT

In recent years, ESG (environmental, social, and governance) reporting has emerged as a useful tool for gauging a company's commitment to sustainability. Inadequate data verification, inconsistency, and transparency make ESG-based sustainability reporting inadequate. Distributed ledger and blockchain technologies offer a transparent and trustworthy method of circumventing these obstacles. Using the PRISMA protocol and VOSviewer software, this paper plans to undertake a systematic assessment of 105 articles (2018-2022) on blockchain technology for ESG reporting in an effort to identify emerging patterns in the field. The study provides a comprehensive framework of 'Barriers, Mitigation Strategies, and Emerging Opportunities' related to the use of blockchain technology for ESG reporting.The results have implications for researchers and professionals alike.

Keywords: *Blockchain, ESG, Systematic Literature Review, PRISMA, VO Sviewer.*

1. INTRODUCTION

The emergence of blockchain technology as a possible tool for enhancing transparency and accountability in a range of sectors, including the healthcare industry, supply chain management, and the financial sector, is relatively recent (Dutta et al., 2020; Haleem et al., 2021). In addition, there has been a surge in interest in applying

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blockchain-based solutions to improve Environmental, Social, and Governance (ESG) reporting. This interest has been driven mostly by the potential benefits that blockchain technology offers (Saxena et al., 2022; Wu et al., 2022). A blockchain is a distributed, public, and electronic ledger of all transactions that have ever taken place (Monrat et al., 2019; Kaushik et al., 2017). The blockchain is a type of distributed ledger, which means that it is not maintained by a single company or institution but rather by thousands of computers all at once. Due to the fact that it is hosted on a distributed network of computers, the blockchain is incredibly difficult to hack. When a transaction is started, it is simultaneously confirmed by all of the computers that are connected to the network. When a transaction is initiated, it is confirmed by all of the computers on the network (referred to as "nodes") at the same time. If the vast majority of nodes agree that the transaction is legitimate, it will be added to the blockchain, at which point it will be impossible to remove. The simultaneous verification that occurs within the blockchain contributes to the network's high level of security. Also, in contrast to many other types of ledgers, the blockchain is completely open to public inspection. Anybody who has access to the blockchain may observe the origin and destination of all transactions. ESG reporting is an essential instrument for determining the level of social and environmental responsibility a corporation demonstrates.

It covers a wide range of concerns, including as energy, waste, climate change, gender equality, product safety, and stakeholder rights, and has emerged as a crucial measure of corporate sustainability and social commitment (Lokuwaduge&Heenetigala, 2016). Yet, the lack of data authentication, consistency, and openness has rendered ESG-based sustainability evaluation insufficient, and the lack of validated and standardized ESG data is a major concern. Blockchain technology has the ability to alleviate this challenge by providing a secure and transparent method for ensuring ESG data accuracy. Blockchain is a tamper-resistant, decentralized database of records, or "blocks," that can only be altered once all other blocks validate the change, ensuring the veracity of stored data (Hayes, 2014). Blockchain can aid in ESG compliance by boosting data reporting and supply chain transparency. Companies can collect verifiable data and develop trustworthy reports demonstrating their ESG credentials by employing blockchain-enabled ESG reporting technologies, which can support obligatory corporate and sustainability reporting.Companies can use blockchain technology to automate data collection at many points along the supply chain, increasing transparency, reliability, traceability, and efficiency in supply chain management (Gaur &Gaiha, 2020). This automation and real-time information availability can also help businesses notice difficulties quickly and reliably trace the problem back to its source. Furthermore, blockchain-based reporting systems can play an important role in boosting corporate ESG reporting by offering a dependable, standardized space for data collection and tracking, allowing for meaningful measurements of emissions and other environmental consequences (Dutta et al., 2022).Furthermore, by automating data gathering and boosting transparency, reliability, traceability, and efficiency in supply chain management, blockchain can increase supply chain sustainability. Thus, blockchain-based reporting solutions can help firms improve their ESG reporting by offering a dependable, consistent place for data collection and tracking, allowing for meaningful

measures of emissions and other environmental consequences.The purpose of this research is to give a comprehensive assessment of 105 papers (2018-2022) focusing on the usage of Blockchain technology for ESG reporting. The PRISMA protocol and VOSviewer software were used to discover emergent themes in the underlying study topic during the review. The study's further aims to present a comprehensive framework that covers "Barriers, Mitigation Strategies, and Emerging Opportunities" related with the use of Blockchain technology for ESG reporting, as well as to provide future research paths for the observed emerging trends. The findings of the study have ramifications for academics and practitioners in general, and they can assist promote sustainable development through transparent and accurate ESG reporting.

2. METHODOLOGY

This study aims to systematically review 105 articles (2018-2022) based on the adoption of Blockchain technology for ESG reporting, using PRISMA protocol and VOSviewer Software in order to identify emerging themes in the underlying research area.

2.1 PRISMA

For retrieving literature in the field of Blockchain and ESG reporting, this study used the PRISMA protocol (Figure 1).

The search was further refined based on the following inclusion-exclusion criteria:

1. Articles published in the English language only were included.
2. Subject area of interest was limited to Business, Management, Economics, Business Finance, Law, Operations Research Management Science, and Ethics.
3. Further, only those full articles which were published till September 2022 were included.

The data extraction and cleaning process is summarised as follows:

After applying the above data extraction and cleaning process, the final sample consisted of 105 articles which are considered good enough for bibliometric analysis. The data was extracted and then imported into Bibliometrix for further analysis. Figure 1 provides a view of the process.

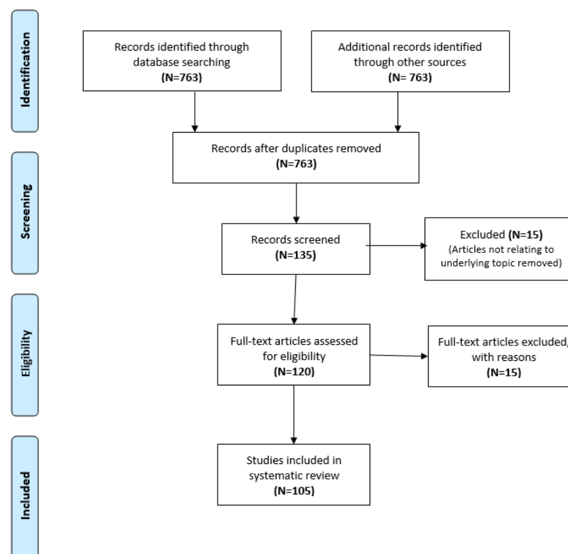

Figure 1. PRISMA Protocol

2.2 Thematic Analysis

To examine the existing research in the field of Blockchain and ESG reporting, the paper employs thematic analysis using VOSviewer software. Thematic analysis is a widely used method for analyzing qualitative data in social science research. It involves identifying patterns, themes, and categories within the data to develop an understanding of the research topic. In the context of Blockchain and ESG reporting, thematic analysis can help identify the key themes and topics that have been addressed in the existing literature.

3. FINDINGS

The emerging themes in the area of blockchain-based ESG reporting are given in Figure 2. The major themes identified are: (i) Barriers associated with the adoption of Blockchain-based ESG reporting tools, (ii) Role of Industry 4.0, Big data analytics and Innovation in the adoption of Blockchain-based ESG reporting tools for achieving Circular Economy, (iii) Adoption of Blockchain-based ESG reporting tools for Sustainable Supply Chain Management, and (iv) Linkages between Blockchain-based ESG reporting and Sustainability.

Cluster 1 – 'Red' Barriers associated with the adoption of Blockchain-based ESG reporting tools

ESG performance evaluations have become increasingly important for addressing environmental issues. Unfortunately, the traditional technique of ESG reporting still employs labour- and resource-intensive, less reliable manual paper methods (Liu et al., 2021).Due to its potential to improve corporate transparency, accountability, and

sustainability, blockchain-based ESG reporting systems have received considerable attention in recent years. Business monitoring, performance demonstration, and improvement can all be improved with the help of blockchain technology, allowing for more informed customer and investor choices. Nonetheless, the review of literature indicated a number of obstacles, such as a lack of standardization, poor data quality, a lack of understanding, high costs, and a restrictive regulatory environment, which have slowed the pace at which these technologies have been used. Businesses, governments, and technology providers all have a stake in seeing blockchain technology used for ESG reporting, and must collaborate to find ways to overcome these challenges. Authentication of ESG raw data, inconsistency concerns between ESG data and the final ESG report, and fewer transparency concerns between the ESG report and ESG standards were highlighted as the three main challenges to the production of a trustworthy and transparent ESG reporting by Liu et al. (2021). To address these obstacles, businesses can employ technological platforms, such as blockchain, to monitor their progress on ESG practices and enhancements. By generating a ledger of the work being performed, businesses can provide auditors, board members, or shareholders with access to the ledger in order to monitor progress and goal alignment. Moreover, blockchain technology can automate contract execution and give audit files in perpetuity, so boosting accountability and transparency (Raghavan, 2022). In conclusion, blockchain technology has the potential to improve ESG reporting's openness, accountability, and sustainability. To overcome the barriers to adoption and the difficulties in providing trustworthy and transparent ESG reports, stakeholders will need to collaborate. Companies may improve their ESG reporting and demonstrate their commitment to sustainability to all stakeholders by embracing blockchain technology and other digital platforms.

Cluster 2 – 'Green' Role of Industry 4.0, Big data analytics and Innovation in theadoption of Blockchain-based ESG reporting tools for achieving Circular Economy

Fourth Industrial Revolution (Industry 4.0) has ushered in a new era of technical advancements that are transforming the way organizations and industries work. These developments, which include Big Data analytics, artificial intelligence (AI), machine learning (ML), and blockchain, are creating new opportunities for organizations to become more competitive and efficient, while cutting costs and boosting customer satisfaction. For businesses to establish a circular economy, the adoption of blockchain-based ESG reporting systems is becoming increasingly crucial (Walden et al., 2021). With the help of Industry 4.0 technology, organizations can collect and analyze data more effectively, leading to a deeper understanding of the interconnectedness of the environment, society, and economy. This data can then be used to identify problem areas, which in turn can contribute to cleaner air, better investments, and innovative new business strategies. It is essential that data is collected, processed, and used efficiently in order for big data analytics to be a successful part of Industry 4.0. (Sachdev, 2020). Companies can gain a more thorough understanding of the social, environmental, and financial effects of their activities with the aid of big data analytics. They'll be able to make more informed decisions and streamline their processes as a

result. Adoption of blockchain-based ESG reporting systems relies heavily on innovation (Friedman & Ormiston, 2022). With blockchain technology, we can store, manage, and track ESG performance data in a way that is secure, distributed, and immutable. In the quest for a circular economy, this will aid companies in understanding the environmental, social, and economic consequences of their actions. Industry 4.0, Big Data analytics, and novel applications of blockchain-based ESG reporting tools are essential for companies seeking to develop a circular economy. Businesses can reduce emissions and adopt more sustainable practices by learning more about the social, environmental, and economic impacts of their operations with the help of these tools.

Cluster 3 – 'Blue' Adoption of Blockchain-based ESG reporting tools for Sustainable Supply Chain Management

Customers and regulators are placing greater emphasis on the necessity of an organization's adherence to ESG standards. This opens up opportunities for more open and efficient supply chain management (Park & Li, 2021). A key player in this process is blockchain technology, which provides a decentralized, immutable ledger that can be used to monitor the evolution of ESG standards along a supply chain (Khan et al., 2023). Companies need to identify the most useful resources in order to fully benefit from blockchain technology for ESG reporting. For this, it will be necessary to assess the various blockchain options and the criteria that must be satisfied. In addition, businesses need to weigh the pros and cons of using blockchain-based ESG reporting systems. Blockchain-based technologies and platforms like Hyperledger Fabric, Ethereum, and Quorum are available to businesses (Lawton, 2023). These systems provide a wide range of features, such as encrypted data storage, automated contract management, and decentralized ledgers. They can also be used for ESG requirements tracking, reporting, and monitoring. Moreover, businesses may use a variety of ESG standards, including those created by the Global Reporting Initiative (GRI) and the Sustainability Accounting Standards Board (SASB). Blockchain-based ESG reporting offers numerous advantages for businesses, including increased transparency and credibility. By utilizing blockchain-based tools and platforms, businesses can guarantee that their ESG standards are met and their supply chains are managed in an ethical manner. This will help build trust with clients and authorities while also encouraging cooperation between various parties. Blockchain-based ESG reporting solutions provide businesses with a secure and reliable approach to responsible and sustainable supply chain management. By using the proper measures, businesses may guarantee conformity with ESG standards and boost stakeholder trust and transparency.

Cluster 4 – 'Yellow' Linkages between Blockchain-based ESG reporting and Sustainability

Sustainability and ESG reporting are no exception to the growing reliance on technology in the contemporary business environment. With the emergence of blockchain technology, businesses can now track their ESG performance and related sustainability activities in a secure, transparent, and effective manner (Park & Li, 2021). Blockchain technology offers an immutable, time-stamped ledger that may be used to store and manage a range of ESG performance and sustainability-related data.With blockchain

technology, businesses can store information such as carbon footprint, energy consumption, staff diversity and inclusion indicators, and even assessments from external third-party evaluators (Wang et al., 2020). By utilizing blockchain-based ESG reporting, businesses can offer stakeholders with a full perspective of their sustainability progress and boost accountability to guarantee that ESG goals are met. This improves the degree of trust between corporations and their stakeholders and provides organizations with greater insight into how their ESG activities affect the environment. For the Fourth Industrial Revolution to work, blockchain will need to collaborate with other cutting-edge technologies such as the Internet of Things (IoT), digital twins (DT), cyber-physical systems (CPS), cloud, fog, and edge computing, and big data (Righi et al., 2020, Aoun et al., 2021). A system's ability to be productive, flexible, resilient, efficient, robust, and cost-effective is greatly enhanced by the data it collects and stores. Nonetheless, there are major concerns over the security and dependability of data. The unique properties of blockchain technology suggest that it may be possible to solve this problem by making information transparent and immutable (Wu et al., 2022). Moreover, blockchain-based ESG reporting has the ability to provide new collaboration and incentive opportunities. Businesses are able to construct token-based incentive systems to incentivise stakeholders to take action on sustainability initiatives and to collaborate with other organizations to develop novel solutions to global concerns. Overall, blockchain-based ESG reporting and sustainability activities present a significant opportunity to build a more transparent and efficient method for tracking and validating ESG performance.With blockchain technology, businesses can verify that their ESG objectives are accomplished and that their stakeholders have access to accurate and up-to-date information on their sustainability initiatives.

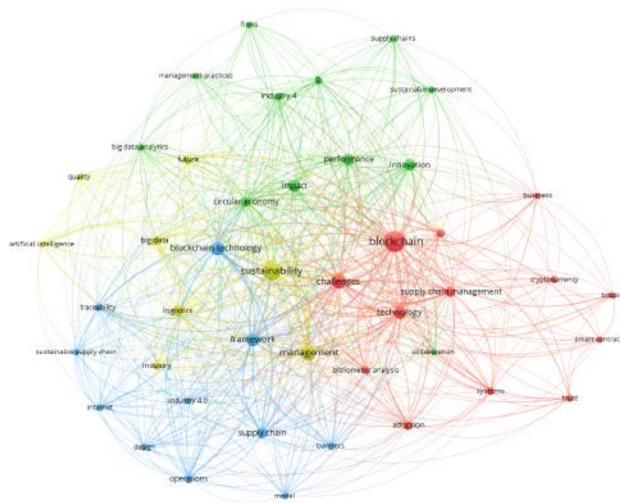

Figure 2: Keyword Co-occurrence Analysis using VOSviewer (Source: VOSviewer)

4. HOLISTIC FRAMEWORK

To propose a holistic framework in the form of 'Barriers, Mitigation Strategies and Opportunities' associated with the adoption of Blockchain technology for ESG reporting (Figure 3).

4.1 Barriers

Use of Blockchain technology for ESG reporting presents several obstacles that must be overcome.

- Cost: As with any new technology, Blockchain implementation might be prohibitively expensive. Businesses must invest in the technology, software, and staff required to implement and operate a Blockchain system. This can be a substantial financial burden for numerous businesses.
- Absence of standardization: The lack of consistency across ESG reporting frameworks and the absence of a universal data model for ESG data may impede the implementation of blockchain technology for ESG reporting.
- Lack of Knowledge: Another obstacle is the lack of expertise and comprehension of Blockchain technology.Developing a Blockchain network successfully demands specific knowledge. Businesses must locate professionals with the required abilities to install and administer their system.
- Absence of Laws and Regulations Blockchain technology is devoid of legal guidance and laws. Governments must establish a regulatory framework to provide guidance to businesses and investors, ensuring the technology is used responsibly and securely.
- Lack of Stakeholder Trust: Stakeholders must recognize and trust blockchain-based ESG reporting. Businesses will be required to demonstrate the precision, validity, and dependability of their data.
- Interoperability: It may be challenging to ensure interoperability between diverse blockchain platforms and ESG reporting frameworks due to the fact that different systems may employ different data types and standards.
- Complexity: Blockchain technology is challenging, and developing and implementing a blockchain-based ESG reporting system may necessitate a high level of technical proficiency. It may be difficult for smaller businesses or organizations with limited resources to employ this system due to its complexity.

4.2 Mitigating Strategies

ESG reporting is becoming increasingly essential for organizations to track for a variety of reasons, including promoting a positive corporate image and enhancing environmental sustainability. Using blockchain technology to monitor ESG metrics is one of the most effective methods. By utilizing blockchain technology, businesses

can ensure that their ESG data is accurate, trustworthy, and secure. Nevertheless, implementing blockchain technology for ESG reporting comes with its own set of obstacles and risks. To ensure a successful and sustainable transition, organizations must employ the appropriate risk mitigation techniques.

- Develop a Comprehensive Plan: Organizations should take the time to make a full plan for switching to ESG reporting based on blockchain. This plan should have clearly stated goals, a list of who is responsible for what, and a clear timeline for implementation.
- Examine potential roadblocks. As with any change, there could be problems along the way. Organizations should take the time to look at the risks, plan for what could go wrong, and come up with ways to deal with any possible problems.
- Secure the network: When using blockchain technology, security is the most important thing. Organizations should make sure their networks are safe by using two-factor authentication, encryption, and access control, among other protocols and procedures.
- Engage Stakeholders: Organizations should take the time to involve stakeholders, such as employees and investors, to make sure that everyone understands the benefits of blockchain-based ESG reporting as well as the possible risks of the change.
- Education and training: Education and training are important to make sure that employees and stakeholders understand blockchain technology and its benefits. This can include training programs, workshops, and seminars that teach stakeholders about blockchain technology, ESG reporting, and the benefits of putting the two together.
- Robust Governance Framework: Using blockchain technology for ESG reporting needs a strong governance framework to make sure that everything is open and accountable. This can include setting clear rules for data collection, validation, and reporting, as well as making sure that the right steps are in place to manage risks and make sure that the rules are followed.
- Collaboration and Standardization: Collaboration and standardization are important to make sure that blockchain-based ESG reporting is successful and lasts. Organizations should work together to create common standards for data collection, validation, and reporting to make sure data is correct, consistent, and comparable.

By taking the time to develop a comprehensive plan, analyze potential roadblocks, secure the network, and engage stakeholders, organizations can ensure a successful and sustainable transition to blockchain-based ESG reporting.

4.3 Opportunities

ESG reporting is becoming increasingly popular among businesses as a means of

providing transparency and accountability for the impact those businesses have on society. The use of blockchain technology presents a number of opportunities that could be beneficial to ESG reporting.

- Benefits of Immutability: One of the primary advantages of blockchain technology is that data stored on the blockchain is immutable, which means it is highly secure and cannot be altered. This is ideal for ESG reporting, where it is essential to maintain accurate records and prevent the addition of fraudulent data. By utilizing blockchain technology, businesses can ensure the accuracy of ESG data.
- Improved data accuracy: By leveraging the inherent data verification and validation capabilities of blockchain, ESG reporting can be made more accurate and trustworthy, thereby reducing the risk of inaccurate reporting.
- Streamlined reporting: Blockchain can streamline the process of collecting, authenticating, and reporting ESG data by automating data collection and removing the need for intermediaries.
- Improved stakeholder engagement: By facilitating stakeholder access to accurate and dependable ESG data, blockchain-based reporting can increase stakeholder engagement and confidence.
- New revenue streams: Businesses that implement blockchain-based ESG reporting may be able to attract socially responsible investors and consumers by leveraging their improved ESG performance.
- Cost Savings: Cost savings are an additional advantage of blockchain-based ESG reporting. By guaranteeing the accuracy of data, blockchain technology reduces the need for auditing and other costly third-party services. Moreover, blockchain technology can automate specific procedures, resulting in additional cost savings.
- Increased Transparency: Lastly, blockchain-based ESG reporting can increase transparency. Companies can ensure that stakeholders and the general public are aware of their ESG performance by providing direct access to data. This increased transparency is advantageous for businesses because it can aid in enhancing their reputation and public image.

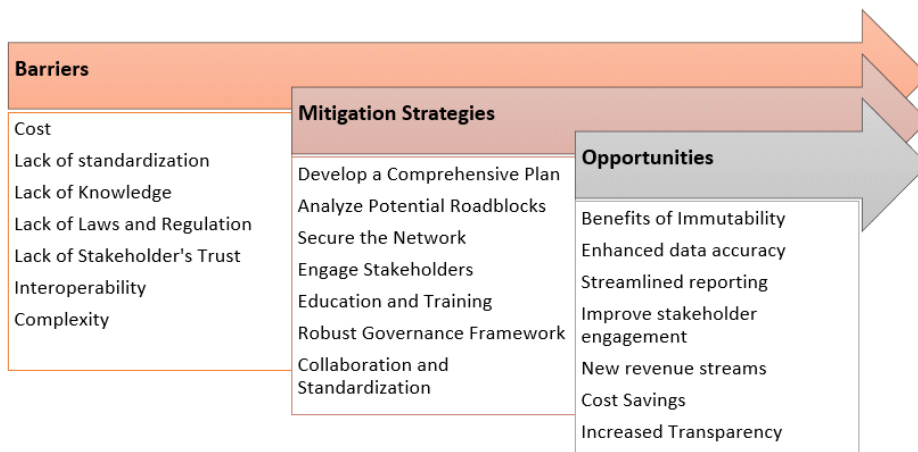

Figure 3: Conceptual Framework (Author's Compilation)

Overall, blockchain-based ESG reporting can provide numerous advantages for companies. By utilizing immutable data, cost savings, and increased transparency, companies can ensure accurate reporting of their ESG performance and build a positive reputation with stakeholders.

5. CONCLUSION

In order to examine the ESG and Blockchain technology relationship, we conducted a systematic literature review that included 105 articles written over a period of five years (2018-2022). A 2-step process consisting of: Systematic article selection using PRISMA criteriaand thematic analysis was being employed that helped in uncovering emerging research themes and trends in the underlying research area.The key principle of ESG reporting is to communicate the impacts of a company's ESG issues to all stakeholders. To process ESG-related data, companies can leverage technology tools such as data analytics, artificial intelligence (AI), and blockchain. By using new technology based on a robust framework for ESG reporting, companies can satisfy investors' information needs and facilitate strategic decisions by managers. A blockchain-enabled ESG reporting framework can help companies disclose direct and indirect effects, as well as societal and economic effects, to provide a comprehensive view of their sustainability performance. Through the use of blockchain technology, ESG data can be recorded in a tamper-resistant, decentralized database, ensuring data authenticity and transparency. Blockchain technology can also facilitate data standardization, data sharing, and data privacy, which are crucial for ESG reporting. The use of data analytics and AI can help companies process and analyze ESG data to identify patterns, trends, and opportunities for improvement. These technologies can also support predictive analytics to anticipate future ESG risks and help companies develop proactive strategies to address them.Thus, by leveraging technology tools such as data analytics, AI, and blockchain, companies can improve their ESG reporting

and demonstrate their commitment to sustainability to all stakeholders. Furthermore, the focus of this paper is to propose a 'Barriers, Mitigation Strategies, and Emerging Opportunities' framework related to the use of blockchain technology for ESG reporting.

6. FUTURE RESEARCH DIRECTIONS

Measuring ESG performance remains a challenge for companies, most of which are still in the early stages of quantifying sustainability and social impact. Finance professionals need to develop an ESG reporting framework for their companies that considers shareholder value and risk management. To achieve this, they need to establish policies, procedures, and mechanisms for efficient and consistent data management, flows, and controls. Access to detailed and accurate sustainability data, along with technology tools for data analytics, is also essential. One of the most important aspects that finance professionals need to consider is blockchain-based ESG data management and analytics. With numerous ESG data collected from deployed smart devices, it is crucial to use historical and real-time ESG data to support sustainability evaluation and autonomous decision-making. The potential of blockchain-based ESG reporting is vast, and there is much work to be done to explore its benefits. As the technology matures and adoption increases, several research areas should be further explored to fully realize its benefits. These include the development of blockchain-based ESG reporting frameworks, the exploration of blockchain's potential in impact investment, and the examination of blockchain's role in enhancing supply chain sustainability. In addition, comprehending the format and content of ESG reports, as well as having access to accurate and detailed sustainability data, are crucial for efficient and consistent ESG reporting. Finance practitioners must apply the same rigor and infrastructure to ESG reporting as they do to financial reporting. Companies can enhance their ESG reporting and demonstrate their commitment to sustainability to all stakeholders by leveraging blockchain technology and other digital platforms. As the technology matures and adoption increases, the following research areas should be investigated further to maximize its benefits:

- Development of standardized ESG metrics: As mentioned earlier, the major challenge in ESG reporting is the lack of standardization across different organizations, making comparison and analysis difficult. Blockchain technology has the potential to facilitate the generation of a set of universal metrics for ESG reporting, allowing for more accurate and consistent reporting across the industry.
- Integration with existing processes: For blockchain-based ESG reporting to be adopted on a large scale, it needs to be integrated smoothly into existing reporting processes. Research should be conducted to explore the best ways to do this, with a focus on creating a seamless user experience.
- Improvement of the user experience: One key benefit of blockchain technology is its ability to store and transfer large amounts of data, but this needs to be accessible to users. Research needs to be done to ensure users are able to comprehend and use the data efficiently and quickly.

7. LIMITATIONS

Systematic literature reviews are an extremely useful instrument for researchers, as they permit an organized synthesis of the research literature on a specific topic. Nonetheless, it is essential to observe that these reviews have limitations. The possibility of bias in the selection and synthesis of evidence is one of the major drawbacks of a systematic literature review. Because reviews are typically conducted by a single researcher, there is the potential that their own preferences and biases can influence the results.Another limitation of a systematic literature review is the potential for missing relevant studies. Because reviews are conducted using only published sources, there is the chance that some relevant studies were not included in the review. Additionally, reviews rely on search terms, so studies that are not indexed using the same terms could be missed.Finally, systematic literature reviews are not always comprehensive. Depending on the scope of the review, important or relevant areas may be left out. For instance, a review may only look at a limited time frame, or only studies from certain countries or from a certain population. In conclusion, while systematic literature reviews are an incredibly useful tool for synthesizing primary research, it's important to keep in mind their potential limitations so that potential bias or missing information can be accounted for.

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Protection of Refugees in Armed Conflict within the Framework of International Humanitarian Law

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ABSTRACT

Today the international community is facing one of the nastiest displacement crises since the Second World War. As per United Nations High Commissioner for Refugees data, as of December 2021 the number of people forcibly displaced worldwide has reached up to 60 million and it is estimated that there are about 32.5 million refugees around the world.Refugees are those persons who are compelled to run away from their country because of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. When in an alien territory, refugees have social, economic and psychological factors to their disadvantage. They are often isolated and impoverished, and suffer human rights abuses. Most of them live in developing countries whose already fragile resources and infrastructure can barely sustain the needs of their own nationals. The situation worsens when they are embroiled in an armed conflictinternational humanitarian law as incorporated in four Geneva Conventions of 1949 and three Additional Protocols, provides basic framework of rules and regulation applicable to armed conflicts. Within this framework protection can also beaccorded to the refugees living in the countries engaged in conflicts. Against this back drop thepresent paper focuses uponexamining the provision of four Geneva Conventions and Additional Protocols wherein in legal protection can be provided to refugees who are caught up in an armed conflict.

As is evident from the ongoing Russia Ukraine crisis, most flagrant violations of basic human rights norms occur during wars and armed conflicts resulting in mass refugee movements. Wars, external and internal armed conflicts, civil strife are some of the basic causes for the refugee exodus. Since the government of the state of nationality is unable or unwilling to provide protection to the refugees, they often

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are forced to seek protection from the international community.[1] Refugees urgently need asylum somewhere but at the same time they cannot claim residence in any country as a matter of right within the international system. They are deprived of their citizenship rights and consequently, homeless in the world.

In this fast-changing world, there are so many instances of such conflicts and horrifying accounts of human rights violations and inhuman practices. Therefore, there is a greater need of protecting basic human rights norms during such situations. International Humanitarian Law (IHL) is that branch of Public International Law, which aims for protection of individuals during such situations.

1. MEANING OF REFUGEES

The 1951 Convention Relating to Status of Refugee & its 1967 are theprincipal international instruments meant for providing protection to the refugees, and the definition of the term refugees as laid down in these instruments has majorly influenced theseveral regionalagreements aimed at protecting refugees and improving their plight. The Refugee Convention, for the first time eloquently laid down as to who can be termed as a refugee and the treatment, he or she should receive from nation states which have signed the Convention.[2] Art. 1A of the said convention defined refugee to be any person who:

1. "Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the protocol of 14 September 1939 or the Constitution of the International Refugee Organization; and
2. As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The Article 1-A of the 1951 Convention engulfs two categories of persons who are safeguarded by the convention. These two categories are:[3]

a) Statutory refugees i.e. those individualswho were covered within the protection ambit of previous international agreements or as per provisions of the International Refugee Organization.

1 Louise W. Holborn, "The Legal Status of Political Refugees", 32(4) *American Journal of International Law* 680 (1983).

2 Anne Von Oswald and Andrea Schmelz (ed.), *Migrants, Refugees and Human Rights Resource-Book* 10 (Network Migration in Europe, 2006).

3 Antonio Fortin, "The Meaning of Protection in Refugee Definition", 12(4) International Journal of Refugee Law 549(2000).

b) The second group includes thoseindividuals who were accorded refugee status for the very first time.

Two essentials arepertinent to both categories:

a) They must be outside the country of their origin, &
b) They must be there due to the events which happened prior to 1stJanuary, 1951.

A person possessing nationality meeting the above criteria will be considered as a refugee only if he is "outside the country of the nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, political opinion and are unable or owing to the fear of persecution, unwilling to avail the protection of the country of the nationality." A person not having the nationality but fulfilling the first two tests, are to be termed as refuges "if unable or, owing to well-founded fear of persecution, unwilling to return to the country of their habitual residence."[4]

1.1 Definition of Refugee under Protocol Relating to the Status of Refugees, 1967

The Refugee Convention 1951 was adopted with restricted geographical and temporal conditions to protect mainly persons who became refugees in the aftermath of World War II or due to the incidents occurring before 1 January 1951. However, after the adoption of the 1951 Convention, new refugee crises had arisen not falling within the scope of the definition of refugees in 1951 Convention. Therefore, 1967 Protocol was enacted which extended the ambit of the Convention to address the problem of mass movement which had escalated around the world.[5] It eliminated the geographical and temporal limitations which were a part of 1951 Conventionand gave it a universal coverage.

Art. 1 of the Protocol defined 'refugee' as a person who:

"Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, owing to such fear, is unwilling to return to it."

Over the period of time, the definition has been complemented by the additional regional refugee protection regimes, as well as by way of the furthergrowth of international law.

4 *Ibid.*

5 Martin B. Tsameyni and K.N Samuel Blay, "Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", 2 *International Journal of Refugee Law* 530 (1990) and Sara E. Davies, "Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol", 19(4) *International Journal of Refugee Law* 703 (2007).

2. INTERNATIONAL HUMANITARIAN LAW

IHL has been defined as: "International rules, established by treaties and customs, which are specifically intended to solve humanitarian problems directly arising from international or non- international armed conflicts and which, for humanitarian reasons, limit the rights of the parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or maybe, affected by conflict."[6]

There are twofold purposes of IHL. First, it aims at providing protection to non-combatants, or those persons are not taking any part in hostilities, and second, it recognized limitations upon methods&means by which hostilities are carried out.[7] It contains norms which are applicable both to international armed conflict & non-international armed conflicts (IAC/NIAC).[8]

The main norms of IHL are:

- Balance between military necessity &humanity,
- Restrictions on means &methods of warfare,
- Proportionality

Four Geneva Conventions 1949 enacted for the safety of the victims of armed conflicts are the chief sources of IHL. They are:

- First Geneva Convention –"Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field".
- Second Geneva Convention –"Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea".
- Third Geneva Convention –"Convention Related to treatment of prisoners of War".
- Fourth Geneva Convention –"Convention Related to the Protection of Civilian Persons in time of war".

The above Conventions have been complemented with three AdditionalProtocols:

- First Additional Protocol, 1977 relating to the "Protection of Victims of International Armed Conflicts".
- Second Additional Protocol,1977 relating to the "Protection of Victims of Non-International Armed Conflicts".
- Third Additional Protocol, 2005 relating to "Adoption of an Additional Distinctive Emblem".

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6 Y. Sandoz, "*Commentary on the Additional Protocols to the Geneva Conventions*" (ICRC, Geneva,1949).

7 U C Jha, "International Humanitarian Lawand the Doctrine of Command Responsibility", 7 *ISIL Yearbook of International Humanitarian and Refugee Law* 75(2007).

8 IA Cimplies a war between armed forces of two or more than two sovereign states. On the other hand, NIACimplies a conflict taking place within the territory of a State.

Today these Conventions have assumed the stature of customary international law and hence making them obligatory even on those countries which are not a party to these conventions.

3. PROVISIONS IN IHL FOR PROTECTION OF REFUGEES

Ostensibly, 4 Geneva Conventions, 1949 &Additional Protocols incorporate very few provisions under which protection can be provided to refugees, which can lead to an assumption that IHL cannot be used for their protection. However, on the contrary, this branch of international law is of very significant for the protection of refugee population as they are being increasingly becoming a victim of both IAC/NIAC.[9]

Refugees embroiled in an IAC come within the definition of "protected persons", which implies that they are protected by the provisions of the 4th Geneva Conventionand AP I. At the time of NIAC, refugees are anyways protected since they are, by definition, "civilians not taking an active part in the hostilities".[10] Similarly, as long as they take no active part in hostilities, refugees are protected by all the provisions of IHL which protects civiliansduring war. They are furthermore protected by certain specific provisions discussed below-

3.1 General Provisions- Protection of Refugees as Civilians

As civilians, refugees are covered by the rules providing general protection to the civilian population in both IAC/NIAC.In this regard, IHL provides specific protection to civiliansagainst indiscriminate violence or attacks. The retaliation aimed at civilians the with the objective of spreading terror amongst them are proscribed within the framework of AP1.[11]

Furthermore, IHL requires that all attacks whether in international or non-international armed conflict should be strictly restricted to combatants and military objectives, namely to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[12] Also, so far as, civilian property is concerned, Additional Protocol I requires that Civilian objects should not be attacked.[13]

9 Stephan Jaquemet, "The Cross-Fertilization of International Humanitarian Law and International Refugee Law",83(843) IRRC 653(2001).

10 Art 4 of Additional Protocol II provides that –"all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices". Common art.3to the 4 GC also provides- "same guarantee to afford to persons who are not, or are no longer, taking active part in hostilities in a non-international armed conflict".

11 A.P I, Art. 51, para 2; A.P II, Art. 13, para 2.

12 A.P I, Art.52, para.2.

13 A.P I, Art. 52, para. 1.

Also, relevant here is Art. 3 common to the 4 Geneva Conventions which provides bare minimum protection that conflicting parties must essentially provide to individuals who are not taking any active part in non-international armed conflict.

3.1.1 Prohibition on displacement

During occupation, the Fourth Geneva Convention accords protection to civilians present in occupiedregions against forcible transfer or deportations to other places. To this extent Art.49, paragraph 1 of the Convention reads-*"Individual or mass forcible transfers, as well as deportations of protected personsfrom occupied territory to the territory of the Occupying Power or to that of anyother country, occupied or not, are prohibited, regardless of their motive."*

There is a small exception which is also carved out for this rule i.e., the occupying power can transfercitizens from the occupied region if such movement is imperative for the protection of the civilian population or there is an impending military reason for the same. However, even in this scenario, transfer or deportation of civilian population should not be completely outside theoccupied region unless absolutely necessary for substantial reasons. Moreover, the convention further provides that once the hostilities in the region come to an end, civilians must be brought back to their homes.[14]

In case of non-international armed conflict as well there is a prohibition of displacement of civilian population unless it is absolutely necessary for military reasons.[15]

3.1.2 Protection during displacement

Even thoughIHL prohibits displacement of civilians during armed conflict yet such displacement regularly occurs in practice. In such situations as well, civilians are entitled to various protections and safeguards. In this regard, Article 17, of Additional Protocol II provides guidelines which must be followed whenever evacuation of civilian becomes absolutely imperative. These guidelines provides that transfers must be done in reasonable conditions ensuring health, hygiene, safety and nutrition of the person displaced. Also, during displacement, such civilians must be guaranteed suitable accommodation facilities and efforts must be made to ensure that members of the similar family must not be separated.

4. SPECIFIC PROVISIONS FOR PROTECTION OF REFUGEES

Apart from the general protection mechanism discussed above, IHL contains certain specific provisions under which protection can be provided to refugees, provided they are not taking active part in the hostilities.

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14 Art. 49, para. 2, GC IV.

15 A.P II, Art. 17.

4.1 Protection as aliens in the territory of a party to a conflict

Those provisions of the Fourth Geneva Convention under which protection is provided to aliens in the territory of a party to a conflict, are applicable to refugees as well. These are:

- Right to leave the country of conflict except in cases where their said exit may be against the national interests of the country of asylum;[16]
- To continue to have basic protections and access to entitlements which were available to aliens before the start of hostilities;[17]
- No protected person should be moved to a nation where may have reason to fear persecution because of his political opinions/religious beliefs.[18] This provision in Fourth Geneva convention is an early recognition of the principle of non-refoulement which later came to be formally incorporated in 1951 Refugee Convention.

5. ADDITIONAL PROTECTIONS FOR REFUGEES

Apart from the above provisions applicable to aliens, which by implication can be made applicable to refugees as well, the Fourth Geneva Convention incorporates two additional provisions specifically applicable to refugees. These are:

- Refugees shouldn't be treated as enemy aliens and, hence, must not be subjected to measures of control which, otherwise would have been imposed upon them on account of their nationality[19] This provision is the implied recognition of the fact that refugees, by fleeing their country of origin, have severed all their ties with it and thus do not pose a potential threat to the country of refuge.
- There may be cases where refugees may take refuge in a country which is subsequently occupied by his country of origin. If this is the case, then refugees can be put under arrest, prosecuted, sentenced or transported from the occupied territory only for wrongdoingsdonesubsequent to the occurrence of conflicts, or for crimescompletely unrelated to the conflict,doneprior to the start of the hostilities.

5.1 Refugees as protected persons under AP I

Additional Protocol I, in Article 73 for the first time expressly recognized refugees as persons in need of protection for the purposes of Parts I and III of the 4thConvention. Being identified as protected persons, refugees become entitled to various essential guarantees like the entitlement to leave,[20] grounds and procedures governing their

16 Art. 35, Geneva Convention IV.

17 Art. 38, Geneva Convention IV.

18 Art. 45, paragraph 4, Geneva Convention IV.

19 Art, 44, Geneva Convention IV.

20 Art. 35 to 37 & 48 of Geneva Convention IV.

being taken in captivity or assigned residence,[21] along with protection against deportation and forcible transfer.[22]

But for being recognized as protected person, Article 73 requires two cumulative conditions to be fulfilled-

a. Firstly, such persons must have been conferred with refugee status as per the relevant international instrument (1951 Refugee Convention, 1967 Protocol and other regional instruments) to which the concerned country is a party or as per the domestic law of the country of asylum or residence.
b. Secondly, to be termed as protected persons, such persons must have been conferred with refugee status before the beginning of hostilities. This implies that all those persons who have been recognized as refuges after the beginning of the armed conflict or those who have become refuges because of war will have to be excluded from the category of protected persons.

It is submitted that, so far as protection of refugees is concerned, these conditions which make a difference amongst those identified as refugees prior to the commencement of hostilities and those identified thereafter, are a major drawback of IHL and have been often, rightfully critiqued as making an illogical and superfluous distinction, which is contrary to the underlying humanitarian principles of Geneva Conventions.

5.2 Refugees as non-nationals of a party to the conflict

In case of those refugees who fail to satisfy the conditions incorporated in Article 73 or if they are in country which is not a party to AP-I, they can avail the protection under the category of protected persons as defined in Article 4 of GC IV. This article accords provides protection to thoserefugees who are in the dominion of a Party to the conflict or Occupying Power of which they are not citizens. In these circumstances, such refugees will be entitled to the protection guarantees that are incorporated in GC IV along with the specific protection granted by Article 44 which reads: *"In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government."*

The content of Article 44 of GC IV recognizes that those refugees who are not guaranteed protection by their own country should not be treated as a 'enemy alien' for the mere fact that they have the nationality of the other party to the conflict.Also, Article 44, in comparison to Article 73, in its application is not restricted to those individuals who were identified as refugees prior to the commencement of hostilities, but also includes within its protection ambit those persons who flewfrom their country of origin when the hostilities were going on. Additionally, Art. 44 is much broader in nature in terms of protection of refugees as it refers to all citizens of an enemy nation who do not have the protection of any government. Consequently, its protection

21 Art. 41 to 43 & 78 to 133 of Geneva Convention IV.

22 Art. 45 & 49 of Geneva Convention IV.

ambit is not confined to refugees as defined under 1951 Refugee Convention but also covers those who can be protected as refugees under domestic law or other international instruments.

6. POINTS OF DIVERGENCE BETWEEN REFUGEE LAW AND IHL

On the face of it, IHL is the law which is applicable to both IAC & NIAC, and hence often there is a misconception that rules of IHL cannot be used directly for the protection of refugees. However, as seen above, the fact remains that, IHL does incorporate certain provisions which can be used for the protection of refugees who are embroiled in an armed conflict. In fact, IHL goes on to fill in certain lacunas that are there in international refugee law so far as protection of refugees in case of an armed conflict is concerned.

1. Under the 1951 Refugee Convention, state parties can derogate from the according the protection of the Convention by taking "provisionally measures "against asylum-seekers or refugees "in time of war or other grave and exceptional circumstances".[23] Also the Convention does not any provision which prohibits state parties from waiving of certain set of core rights in times of war, implying that all refugee rights can be set aside by a state in armed conflict.In such circumstances, IHL has an edge since it contains certain general and specific provisions under which war refugees can be provided protection.
2. 1951 Refugee Convention obligates the state parties to give same treatment to refugees, barring the exceptions, as is accorded to aliens generally.[24] During an armed conflict, aliens are probably the first one to have their rights curtailed or abridged, thereby having an adverse impact on refugees as well. Here, Article 44 of the Fourth Geneva Convention which has already been discussed above becomes relevant as it refers to all citizens of an enemy nation who do not have the protection of any government.
3. The four 1949 Geneva Conventions along the three Additional Protocols are more universal in nature since they are ratified by more States in comparison to the 149 state parties to the Refugee Convention and its Protocol.This implies that rules of international humanitarian law will be applicable also to those countries which may not be parties to 1951 Refugee Convention.
4. The rules on denunciation under both branches of law are different. While a denunciation of the 1949 Geneva Conventions and their Additional Protocols "shall not take effect until peace has been concluded", a denunciation of the 1951 Refugee Convention automatically takes place one year from the date on which it is received by the Secretary-General of the United Nations.
5. Contrary to international refugee law, violation of IHL is taken care of by a well-developed system of individual criminal responsibility. In this regard, Article 8 of Rome Statute of the International Criminal Court provides that

23 Art. 9 of the 1951 Convention.

24 Article 7 of the 1951 Convention.

"the Court shall have jurisdiction over war crimes, including those committed during armed conflicts that are not international in character." Additionally, Article 25(1) with regard to individual criminal responsibility categorically provides that "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

7. CONCLUSION

Both international human rights law as well as refugee law identifies that in certain circumstances there can be curtailment or restrictions upon certain rights and freedoms guaranteed in these international instruments. This implies that some of the entitlements as guaranteed within the framework of international human rights law can be deferred during a period of armed conflict. In such cases, IHL which is applicable only in case of international armed conflict or non-international armed conflict assumes significant importance for ensuring that basic rights of people embroiled in such conflicts are protected. When an individual fearing for violation of his civil and political rights flees his country of origin and seeks asylum in another country, human rights and refugee law can again be made applicable to take care of his protection needs.

As seen from above, IHL within its protection ambit has numerous provisionswhich are applicable for the protection of refugees. Thesepersons are protected by the general rules that protect the civilians against the effects of hostilities and against forcible transfers or deportations. Refugeesare furthermore protected by specific rules, speciallyadopted to ensure their protection.Needless to say, these provisions do not exclude application of the provisionsof the 1951 Refugee Convention, so that thesame person may, according to the circumstances, be protected by IHL, international human rights and by refugee law. In fact, in case of challenges posed by the contemporary armed conflicts, no single branch of international law can offer a definitive protection to those affected including refugees. The reach of internationalprotection can only be strengthened through a harmonizing, and thereby cumulativeapproach of the branches of international law applicable in times ofarmed conflicts as whatever may be the nature of the regime its ultimate objective, mandate & vision is the protection of the life and dignity ofall human beings including refugees.

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Action or Inaction: Radioactive Waste Management in Times of Covid Arena: A Critical Study with Reference to Indian Subcontinent

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ABSTRACT

The gripping effect of Covid-19 pandemic is still visible. Even after a lot of research has been undertaken, the issue of radioactive materials getting deposited on the surface of the earth is a query which still needs a resolution. When discussing the effects of radiation on genetics, it is well knowledge that radiation may have a broad variety of negative effects. Damage to DNA strands is caused by radioactive contamination, which, when left unchecked for fairly long periods of time, might eventually result in various types of genetic fragmentation. It is known that the degree of the genetic mutation, which may lead to changes in the DNA composition, can vary. This variation is caused by the fact that the quantity of radiation to which an organism has been exposed and the kind of radiation both play a role in the process. This paper undertakes to understand the changing dimensions of the radioactive waste and analyse the action or inaction of the Indian Government with reference to resolving the issue of Covid-19 pandemic.

Keywords: *Radioactive waste, Bio-medical waste, Indian Government, Covid-19*

INTRODUCTION

In order to safeguard people and the environment, radioactive waste management refers to the proper treatment, storage, and disposal of liquid, solid, and gas discharge from nuclear industrial activities or any activity which might have involved the aspect of using radiotechnology.[1] These discharges must be properly treated, stored, and disposed of in order to protect people and the environment. Whether for medical or industrial usage, nuclear materials will always produce some kind of radioactive

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1 Radioactive waste management, Nuclear Energy Agency (NEA), https://www.oecd-nea.org/jcms/c_12892/radioactive-waste-management (last visited Sep 15, 2022).

waste. Nuclear power is the largest source of these pollutants due to both the greater quantity generated and its longer lifetime. All radioactive wastes, regardless of origin, need careful and prompt management.

According to its amount of radioactivity and how long it will stay dangerous, radioactive waste is often divided into three categories: low-level waste (LLW), intermediate-level waste (ILW), and high-level waste (HLW). While the majority of HLW is securely preserved in designated facilities, the disposal of LLW and most ILW is an established procedure.[2] The scientific and technological community recognises the viability of HLW permanent disposal in deep geological repositories, but public society in many nations has not yet agreed.[3]

The body may disseminate radioactive materials given orally, intravenously, or intracavitary, or they may be kept selectively in certain organs. With passing time since the radioactive substance was administered, the patient becomes smaller. This decrease occurs in part from the radioactivity of the substance being used naturally decaying and in part via excretion of the bodily components.[4]

Radionuclides have a long history of usage in medical practise. Different radionuclides may be used widely in contemporary medicine for both diagnostic and therapeutic reasons due to the qualities of specific radionuclides, their marketability, and reasonable cost.[5] Despite the development of non-invasive medical techniques, Ionizing radiation exposure, the usage of sealed radiation sources, and the demand for unsealed radionuclides are all rising annually in both developed and developing nations. An greater use of radionuclides is the consequence of their rising use. Even in developed nations, the output of radioactive waste is declining, disposal prices are rising, and there are fewer disposal choices available.

Any activity in the nuclear fuel cycle that results in the production or use of radioactive material generates radioactive waste. It's concerning that nuclear wastes need special management since they include radioactive material that emits radiation. When deciding whether or not to support nuclear power, public trust in the secure disposal of radioactive waste is crucial. Not all nuclear waste is as harmful or difficult to manage as other hazardous industrial pollutants.

One of the primary goals of our nuclear energy program has been the secure storage of radioactive waste. Globally, in accordance with international legislation, a full and consistent set of principles and standards for waste management is being implemented. Care would be taken in the handling of radioactive waste to reduce exposure to radiation for workers, the public, and the environment.

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2 Categorisation of radioactive waste | ENSREG, https://www.ensreg.eu/safe-management-spent-fuel-and-radioactive-waste/categorisation-radioactive-waste (last visited Sep 15, 2022).

3 Backgrounder on Radioactive Waste, NRC Web, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html (last visited Sep 15, 2022).

4 Categorisation of radioactive waste | ENSREG, *supra* note 2.

5 L. Føyn, *Radioactive Wastes*, *in*Encyclopedia of Ocean Sciences 2331 (John H. Steele ed., 2001), https://www.sciencedirect.com/science/article/pii/B012227430X00057X (last visited Sep 15, 2022).

Handling, treatment, conditioning, transport, storage, and disposal are all facets of waste management. Besides ensuring the highest level of safety in the handling of radioactive waste, recent technology breakthroughs in India have made it feasible to recover valuable radionuclides from nuclear waste for social purposes.

RADIOACTIVE WASTE MANAGEMENT IN HOSPITALS

Radioactive materials are used in healthcare institutions for both diagnostic (tissue analysis in vitro and imaging) and therapeutic treatments. There are numerous different types of hazardous material, including clothes, biological waste (pathological waste), medical devices polluted with trace levels of particular isotopes, and radiation sources used in radiation treatment (e.g. a cobalt block). Bodily functions and organs may turn into radioactive pathological waste when radioactive substances are injected into patients' bodies, such as iodine to cure a damaged thyroid gland or iridium pellets to eliminate prostate cancers. A method called radioimmunoassay involves infusing radioactive antigens into the circulation to measure the amounts of biochemicals present in the body. Additionally, this produces radioactive clinical waste. Tissue wipes, cleaning agents, and packaging materials might all contain radioactive waste.

It is genotoxic to consume radioactive materials. The good news is that a lot of radioactive substances employed inside the body have very brief half lifetimes. In order to minimise side effects and ensure that leftover radiation does not damage healthy tissue, doctors chose fast-decaying isotopes.[6] Because of this, garbage containing certain isotopes has a chance to decrease its radioactivity fast, posing less of a concern for storage and disposal. To find the optimal method for storage and disposal, radioactive materials must, however, be examined for each situation and application.[7] For instance, pellets used in brachytherapy (sealed source radiation) are constructed from substances with lengthy half-lives. Iodine-125, palladium-103, and iridium-192 are typical brachytherapy isotopes with half-lives of 60 days, 17 days, and 74 days, respectively. Cobalt-60, which is used in radiation therapy for cancer patients, has a half-life of over 5 years and is typically the most problematic radiation source in a hospital.[8]

In contrast to the radioactive waste created by the activities of the nuclear fuel cycle, the radioactive waste generated by the medical sector does not provide a substantial long term waste management concern.[9] The fact that biological waste has a very short half-life and a low radiotoxicity level are two of its most essential qualities.

6 Jacklin Kwan published, *How radioactive is the human body?*, LIVESCIENCE.COM (2021), https://www.livescience.com/radiation-human-body (last visited Sep 15, 2022).

7 C Lee & G Lowe, *Isotopes and delivery systems for brachytherapy*, *in*RADIOTHERAPY IN PRACTICE - BRACHYTHERAPY 0 (Peter Hoskin & Catherine Coyle eds., 2011), https://doi.org/10.1093/med/9780199600908.003.0010 (last visited Sep 15, 2022).

8 Christopher Mayer & Abhishek Kumar, *Brachytherapy*, *in* STAT PEARLS (2022), http://www.ncbi.nlm.nih.gov/books/NBK562190/ (last visited Sep 15, 2022).

9 Radioactive Waste Management in Hospitals | Daniels Health, https://www.danielshealth.com/knowledge-center/radioactive-waste-management-hospitals (last visited Sep 15, 2022).

The amount of energy and emitters that are included in biomedical waste is normally modest, and it also typically has a low total and specific activity.[10] The quantities of trash as well as any other hazardous features linked with the waste, such as the biological and chemical dangers, are important factors to take into account.

An efficient program for the management of biomedical radioactive waste is one that adheres to the tenets of waste prevention and waste reduction, while also making provisions for the safety of personnel and the protection of the environment in a manner that is in line with the requirements set forth by the regulatory authority.This kind of management need to include all of the connected dangers that might be discovered in the garbage.

The program for managing radioactive waste must be all-encompassing and should take into account every facet, beginning with the acquisition of radionuclides and continuing all the way until the final clearing of waste packages from the plant before disposal or release. Radioactive waste may only be exempted from further regulatory oversight if a meticulous program of waste flow management and monitoring of residual radioactivity is put into place. In most cases, biomedical waste may be treated most effectively on-site via decay storage, which poses little concerns during transfer and maintains ALARA exposure thresholds.[11] It is essential that trash be segregated both at the time and location where it is produced, since quantitative assessment of isotope activity may be challenging in situations when waste packages include a heterogeneous mixture of - emitters.[12]

The creation of standardized documentation for all waste management processes is an essential component of efficient waste management. These procedures will specify the requirements for actions such as waste segregation at the source and the use of suitable containers and receptacles for the accumulation of trash. Every member of the team needs to have the proper training in order to effectively carry out these operations. During the process of waste management, responsible employees should be designated for each step of the process. Additionally, management should devote their full support to the execution of the overall waste policy.[13]

It is vital to gather facility-specific information as part of the assessment of a waste management program. This information should be as particular as possible. The analysis of these data will serve as the foundation for identifying possible possibilities for further optimization of waste management.[14] The following should be included

10 Radheshyam Jadhav, *Where did Covid-related biomedical waste go?*, (2022), https://www.thehindubusinessline.com/data-stories/data-focus/where-did-covid-related-biomedical-waste-go/article65340791.ece (last visited Sep 15, 2022).

11 ALARA Program | Radiation Safety | University of Pittsburgh, https://www.radsafe.pitt.edu/dosimetry/alara-program (last visited Sep 15, 2022).

12 Radioactive Waste - an overview | ScienceDirect Topics, https://www.sciencedirect.com/topics/earth-and-planetary-sciences/radioactive-waste (last visited Sep 15, 2022).

13 Radiation Monitoring and ALARA Exposure Limits, Environment, Health & Safety, https://ehs.wisc.edu/labs-research/radiation-safety/radiation-monitoring/ (last visited Sep 15, 2022).

in the data that is to be stored in a data management system to enable for the tracking of waste flows from their point of origin to their ultimate disposal:

1. Information on any and all features of the radionuclides used inside the plant as well as the waste that is produced;
2. A reference to the authorizations and specifics of the routes that are permitted for trash disposal;
3. Duty of the organization for the radioactive waste management program (including collection, transportation, storage for decay, and clearance);
4. A discussion of the practices that are now put into place for the administration of radioactive waste;
5. Detailed instructions on the procedures that are used to quantify and verify the radioactive material and activity included in each waste package;
6. Information on the dosage rate and the contamination;
7. The many kinds of packaging that are appropriate for the various kinds of radioactive medical waste;
8. Information on the decay storage and pre-treatments of radioactive waste from medical facilities;
9. Inclusion of a reference to quality control methods and, if applicable, auditing as a component of an overall quality assurance program;
10. Information to be used in determining whether or not all regulatory standards are being fulfilled;
11. A confirmation of the accuracy of the measurements taken.[15]

RECYCLING AND OTHER EFFORTS TO REDUCE WASTE

The avoidance of waste is a vital first step in the implementation of any plan for managing radioactive waste. The necessity to employ radionuclides should always be justified when designing experiments or preparing a patient diagnostic, and only the amounts that are necessary should be acquired.[16]

In the case of medical treatments, this decision is made based on an analysis of the individual benefits and risks involved, but in the case of research, crucial factors include the availability of an emerging method and the high costs of managing radioactive waste. In addition, the general public is becoming more aware of the

14 Specific Instruction for Medical Waste, (2020), https://www.radsafe.pitt.edu/program-areas/waste/specific-instruction-medical-waste (last visited Sep 15, 2022).

15 *Id.*

16 Storage and Disposal Options for Radioactive Waste - World Nuclear Association, https://world-nuclear.org/information-library/nuclear-fuel-cycle/nuclear-waste/storage-and-disposal-of-radioactive-waste.aspx (last visited Sep 15, 2022).

dangers associated with the dumping of radioactive waste into the environment.[17] The institution that generates garbage should be concerned about this for a number of reasons, including how the public will judge their corporate image and how it will affect their ability to make a contribution to sustainable environmental and global development. As replacements for radio-immunoassays, calorimetric or chemiluminescent tests may be used. Alternatively, radionuclides with shorter half-lives can be used. This is because the shorter decay durations will allow for storage for decay and disposal at clearance levels.

A management system must have a description of the procedures and supporting material that describe how work is to be planned, reviewed, carried out, documented, evaluated, and improved. In the design of work processes, a thorough sequence of stages in the activities for pre-treatment, treatment, conditioning, and disposal of wastes should be taken into consideration.[18] These steps include:

i. characterisation of waste at each step in the overall waste management program;
ii. analytical methods such as sample procedures for waste characterization or process control;
iii. monitoring of discharges;
iv. monitoring for clearing purposes;
v. non-destructive examination and testing;
vi. non-destructive examination

Establishing and documenting the identification of objects should be done on the basis of the relevance of the items to either the safety and environmental protection or the isolation of trash. The following information must be included in the records:

(a) the origin of the waste and the procedures that created it;
(b) the pre-treatment of the waste;
(c) the clearing of the trash;
(d) the discharge of the waste;
(e) characterization of the waste;
(f) treatment of the waste; and
(g) the design of the containers and/or packages as well as the equipment, structures, systems, and components for the pre-treatment and treatment of the waste.

17 V. Valdovinos, F. Monroy-Guzman & E. Bustos, Treatment Methods for Radioactive Wastes and Its Electrochemical Applications (2014), https://www.intechopen.com/chapters/undefined/state.item.id (last visited Sep 15, 2022).

18 *Id.*

CHANGING DIMENSIONS OF RADIOACTIVE WASTE WITH REFERENCE TO COVID 19

Waste management has been greatly impacted as a result of efforts to halt the pandemic caused by the COVID-19 virus as well as restrictions placed on commercial activity, travel, and the industrial sector. The management of waste is very important for human growth and health outcomes, particularly during the COVID-19 pandemic. The indispensable service that is supplied by the waste management industry guarantees that the atypical mounds of rubbish that pose threats to people's health and accelerate the spread of COVID-19 are not allowed to accumulate.

There have been claims that an increase in plastic consumption may be attributed to the lockdown period brought on by social distancing measures used to combat the spread of COVID-19. At every point in their lifecycle, from production to end-of-life disposal, plastics are bad for the environment. It has been hypothesized that the presence of plastics refineries contributes to a rise in the rates of death, disease, and disability by increasing the population's exposure to potentially dangerous chemicals. life years adjusted.[19] Therefore, the increased usage of plastics during the lockdown and stay-at-home measures serves as a conduit for contamination between pathogens of animal and human origin, which increases the spread of illnesses. It has been reported that over a million synthetic face masks and gloves have been discarded on sidewalks in cities, contributing to the pollution that already exists there.[20]

As a result of millions of individuals using and discarding face shields, surgical masks, gloves, and PPE suits, which were formerly used solely in hospitals but are now an essential part of daily life, the dilemma of plastic and biomedical waste is becoming worse with each new case of Covid.[21]According to the Central Pollution Control Board (CPCB), India produced 45,308 tonnes of COVID-19 biomedical waste between June 2020 and May 10, 2021. This amounts to 132 tonnes of rubbish generated every day as a result of COVID-19.

The additional 17 percent rise in biomedical waste production is related only to the pandemic, and it comes on top of the 615 tonnes of biomedical waste a day that was being created before COVID-19.[22]

Like the rest of the world, the COVID-19 pandemic boosted demand and use of single-use plastic goods in India, particularly in the biomedical, pharmaceutical, and food-and-delivery sectors. This has led to a dramatic increase in the amount of garbage generated by various sectors of the economy.[23] The plastic garbage produced by the

19 Atanu Kumar Das et al., *COVID-19 pandemic and healthcare solid waste management strategy – A mini-review*, 778 Sci. Total Environ. 146220 (2021).

20 Samuel Asumadu Sarkodie & Phebe Asantewaa Owusu, *Impact of COVID-19 pandemic on waste management*, 23 Environ. Dev. Sustain. 7951 (2021).

21 Hassan El-Ramady et al., *Planning for disposal of COVID-19 pandemic wastes in developing countries: a review of current challenges*, 193 Environ. Monit. Assess. 592 (2021).

22 Ibid

23 Sarkodie and Owusu, *supra* note 20.

shift in consumer habits brought on by the pandemic is yet unclear, but it is known that biomedical waste production in India has grown by 17% in the last year (2020–2021).[24]

In August of 2021, it was predicted that between 4.4 and 15.1 million tons of plastic garbage connected to the epidemic would have been produced worldwide, with around 25,000 tons having already made its way into the seas.[25] Nearly 90% of this was identified as having originated in healthcare facilities, mostly in the form of plastic wrap, gloves, bottles, and syringes. Discarded face masks may be the most conspicuous piece of plastic from the epidemic that is now contaminating the seas, but they only make up around 12-13% of the plastic wastes that have been produced thus far.[26]

Between August 2020 and June 2021, the Central Pollution Control Board (CPCB) estimates that India generated 47,200 tons of biological waste connected to COVID-19. This trash includes personal protective equipment (PPE) kits, face masks, gloves, needles, and other medical objects contaminated with blood or other human fluids. This is in addition to the pre-COVID standard of over 600 tons of biological waste being created per day.[27]

As a result of the ongoing economic crisis, the typical customer is becoming more price conscious, and as a result, items that are economical are being prioritized above those that are ecologically friendly. Customers who are short on money should prioritize purchasing food items that are packaged in plastic since these products are almost always less costly. And although takeaway has been a lifesaver for a lot of establishments, it's also adding to the increasing mountain of single-use plastic throughout the world. A significant portion of this kind of plastic cannot be recycled.[28]

However, the waste management industry in India was not ready for the increase in biological waste that resulted.[29] Since September 2020, COVID-related garbage in Mumbai has increased by a factor of three, straining the city's already-overburdened waste disposal infrastructure.

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24 By Avee Mittal & 2021 Mar 17, *The Changing Face of Waste Management in the COVID Era -*, Environmental Protection, https://eponline.com/articles/2021/03/10/the-changing-face-of-waste-management-in-the-covid-era.aspx (last visited Sep 15, 2022).

25 COVID-19 and the changing nature of waste, Mongabay-India (2022), https://india.mongabay.com/2022/01/covid-19-and-the-changing-nature-of-waste/ (last visited Sep 15, 2022).

26 Yiming Peng et al., *Plastic waste release caused by COVID-19 and its fate in the global ocean*, 118 Proc. Natl. Acad. Sci. U. S. A. e2111530118 (2021).

27 Dave Ford, *COVID-19 Has Worsened the Ocean Plastic Pollution Problem*, Scientific American, https://www.scientificamerican.com/article/covid-19-has-worsened-the-ocean-plastic-pollution-problem/ (last visited Sep 15, 2022).

28 *Id.* at 19.

29 Ashish Dehal, Atul Narayan Vaidya & Asirvatham Ramesh Kumar, *Biomedical waste generation and management during COVID-19 pandemic in India: challenges and possible management strategies*, 29 Environ. Sci. Pollut. Res. 14830 (2022).

Wuhan, China, produced 250 tons of biomedical waste per day at the height of the pandemic in February and March of 2020. Despite this fact, there are growing concerns about unaccounted-for biomedical waste and underreported waste generation in Indian cities.

Although the Central Pollution Control Board (CPCB) claimed that India's 198 biomedical waste treatment facilities (incinerators) could handle about 800 tons per day of biomedical waste, a lot of the improperly disposed waste can be found in landfills and as litter along roads, beaches, and open dumps near hospitals and crematoriums.[30] As an added note, personal protective equipment (PPE) kits, masks, face shields, and gloves are frequently found in the trash of many countries, including India.

LEGAL PROVISIONS RELATING TO BIOMEDICAL WASTE IN INDIAN SUBCONTINENT

In India, the average waste generation rate in a hospital is 1-2 kg per bed per day, while the average waste generation rate in a clinic is 600 gm per bed per day. Of this waste, more than 15% is hazardous or infectious, and this hazardous waste is mixed with the remaining waste, which results in the contamination of the entire waste stream. Because of this, there is a need for laws and regulations that are appropriate, effective, and efficient regarding the separation of trash and its disposal. The social duty and legal obligation for the environmentally responsible handling of these wastes falls not only on the shoulders of the government but also on the general people. Therefore, it is imperative that these wastes be collected, transported, and disposed of in an appropriate manner in order to protect the environment. In order to standardize and simplify these processes, the Government of India issued a set of guidelines and rules in the year 1998 that were collectively referred to as the Biomedical Waste (Management and Handling) Rules, 1998.[31]

Recommendations on the disposal of COVID-19-related biological waste have been produced by the World Health Organization and the Government of India. These guidelines address a variety of topics, such as the correct segregation of waste and the protection of sanitation workers, among others. Nevertheless, during the pandemic there was a disruption in the disposal chain of conventional biological waste, which included sorting, segregating, transporting, temporarily storing, and managing the trash. There is still a lack of attention paid to the correct separation of trash into dry and moist categories, and this is having a ripple effect across the whole disposal chain.

The provision of appropriate personal protective equipment kits, soap, and water, which are fundamental need during this epidemic, is seldom made available to sanitation

30 CPCB | Central Pollution Control Board, https://cpcb.nic.in/covid-waste-management/ (last visited Sep 15, 2022).

31 Authorisation under Bio-Medical Waste (Management and handling) Rules,1998 | Maharashtra Pollution Control Board, https://mpcb.gov.in/consentmgt/authorize-bmw (last visited Sep 15, 2022).

personnel. Municipal corporations in general pay these employees less than they are worth, and in cases when the job in question is outsourced to contractors, safety rules are only sometimes adhered to. In most cases, the appropriate checks and balances to protect the safety of employees are not maintained.[32]

Because efficient administration is essential to achieving a cleaner and more environmentally friendly workplace, these regulations are routinely analyzed, modified, and brought up to date as required. The government of India made the decision in 2016 to publish a new set of rules known as the Biomedical Waste Management Rules, 2016, which superseded the previous ruleset and included a number of modifications and additions. This was done with the intention of enhancing the facilities for the collection, segregation, treatment, and disposal of biomedical waste that is generated by hospitals and laboratories in an effort to reduce environmental pollution. Incineration, microwave heating, autoclaving, and chemical treatment are among the several treatment methods that have been found.

These guidelines have been overhauled entirely in order to bring the country into compliance with international standards for the management and control of biological waste. The word "handling" is also going to be eliminated from the name, which will result in more transparency about the administration and repercussions of the regulations.[33] The following is a list of some of the most recent and important additions to the rules:

1. As a result of this rule expansion, wastes from surgery camps, blood donation camps, and vaccine camps are now considered to fall within the purview of the regulations as well.
2. The duties of occupiers (a person who has administrative control over the health care facilities that are generating biomedical wastes) and operators (a person who controls the facilities of collection, reception, transportation, treatment, and disposal of biomedical wastes) are unambiguously specified in these rules. Occupiers have administrative control over the health care facilities that are generating biomedical wastes. Operators control the facilities.
3. The establishment of a barcode system for the transportation of biological waste that is destined for treatment or disposal.
4. The operator or occupier must ensure that the biomedical waste register is kept up to date on a daily and monthly basis on the website, as well as ensure that all records pertaining to the operation of the hydroclaving, incinerating, and autoclaving processes are kept up to date for a period of five years.

32 Biomedical Waste Management in India: Still a looming concern, https://www.downtoearth.org.in/blog/health/biomedical-waste-management-in-india-still-a-looming-concern-63896 (last visited Sep 15, 2022).

33 Medical Waste | Background | Environmental Guidelines | Guidelines Library | Infection Control | CDC, (2019), https://www.cdc.gov/infectioncontrol/guidelines/environmental/background/medical-waste.html (last visited Sep 15, 2022).

5. The procedure for effectively managing biological wastes, including its separation, packing, transportation, and storage, has been refined, and the waste itself has been divided into four categories, down from ten. This makes for more efficient management.
6. There should be a distance of 75 kilometers between a common biomedical waste treatment facility and an onsite treatment or disposal facility. It is also the responsibility of state governments to provide the land available for the construction of a centralized facility for the treatment and disposal of biological waste.
7. It is recommended that the usage of chlorinated plastic gloves, bags, blood bags, and other similar items be phased out gradually.
8. Mandatory on-site processing of all microbiological waste, blood bags, and laboratory waste prior to disposal at a common biomedical waste treatment facility or on-site. It is essential that the procedure for sterilization and disinfection adhere to the standards set out by either the World Health Organization or the National AIDS Control Organization (NACO).[34]

The Biomedical Waste Management Rules, 2016 were also modified and brought up to date in order to enhance compliance and to make the implementation process more robust for the sake of improving the environment. The Indian government issued the Bio-Medical Waste Management (Amendment) Rules, 2018 in the year 2018. Some of the most significant changes to the regulations for 2018 are as follows:

1. The complete and total elimination of chlorinated plastic products, such as bags and gloves, from the biomedical waste producers, which may include hospitals, dispensaries, animal kennels, clinics, nursing homes, blood banks, and other similar establishments.
2. All organizations are required to upload their most recent annual report to their respective websites within two years of the publication of these guidelines.
3. In order to properly manage biomedical waste, all operators of common biomedical waste treatment and disposal facilities are required, in accordance with the instructions published by the Central Pollution Control Board, to construct both a global positioning system and a barcoding system.
4. The State Pollution Control Board is responsible for compiling, reviewing, and analyzing the information that is received from the operators. In addition, the State Pollution Control Board is required to send these reports to the Central Pollution Control Board, which maintains detailed information regarding waste generation by district.

Lack of finances will be one of the primary obstacles that will be encountered by healthcare facilities and hospitals in the process of implementing these regulations and recommendations. This is due to the fact that in order to phase out chlorinated plastic bags and to develop a worldwide positioning and a barcode system for

34 *Id.*

biomedical waste, a substantial expense will be paid, and the time span for the same is extremely short, which is two years. In addition, the time period for the same is very short, which is two years.

The usage of incinerators and the risks that come with it is still another significant obstacle. India had a surge in the number of incinerator installations after the first regulation implementation in the year 1998. The method that relies on a high temperature is the one that eliminates the infection, and in the process, it also destroys the substance that the microorganisms call home. The fact that this process results in the production of a variety of toxic by-products, such as dioxins and other by-products of incomplete combustion, is one of the system's major drawbacks. Particles are produced as a by-product of incineration and the subsequent dissociation of waste components, and these particles are referred to as the results of incomplete combustion. Metals, rather of being eliminated by this process, are instead spread into the environment, producing severe issues for human health. These poisons have a propensity to gather in fatty acids and then go further up the food chain. The human immune system and endocrine system are both harmed as a result of this.[35] The building and usage of incinerators are prohibited in some foreign nations, such as the Philippines and Denmark; hence, the government of India need to implement measures that are analogous to these restrictions in order to remove these pollutants from the environment.[36]

According to figures from the Ministry of Environment that were given to the Rajya Sabha at the beginning of this month, the nation produced 651.23 tonnes of BMW each day in the year 2020.[37] The daily production of BMW grew by about 962.31 tonnes between May 2020 and March 2022 as a direct result of the pandemic caused by the Covid-19 virus.[38]Therefore, sixty percent of the approximately 1,613.54 tonnes per day of BMW that was produced during this time period was attributable to Covid.

According to Jugal Kishore, Director Professor and Head of the Department of Community Medicine at Vardhman Mahavir Medical College and Safdarjung Hospital, biomedical waste rules have been in place for some time and are being adhered to very precisely in their facility; however, he cautioned that everyone should exercise caution and be aware of their surroundings.[39]

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35 Dehal, Vaidya, and Kumar, *supra* note 28.

36 Incineration Not a Solution, Green Groups Warn Western Brands Found Polluting the Philippines - GAIA, https://www.no-burn.org/incineration-not-a-solution-green-groups-warn-western-brands-found-polluting-the-philippines/ (last visited Sep 15, 2022).

37 Maharashtra topped in bio-medical waste generation in past year: Report, The Indian Express (2021), https://indianexpress.com/article/cities/mumbai/maharashtra-topped-in-bio-medical-waste-generation-in-past-year-report-7455517/ (last visited Sep 15, 2022).

38 Jadhav, *supra* note 10.

39 Jugal Kishore et al., *Awareness about biomedical waste management and infection control among dentists of a teaching hospital in New Delhi, India*, 11 Indian J. Dent. Res. Off. Publ. Indian Soc. Dent. Res. 157 (1999).

We have a responsibility to make certain that the individuals working in health care and the surrounding environment are kept risk-free. The biomedical regulations in India are stringent, and they are being adhered to. During past epidemics, such as swine flu or Nipah, same preventative measures were advised to be taken.[40] The CPCB's rules are helping to ensure that the necessary stringent precautions are taken. Segregation of these things (biomedical waste) at the time of waste formation, which might be much greater during outbreaks, is the most effective method for managing this kind of trash. As a result of being understaffed and overcrowded, hospitals face a significant obstacle in the form of the possibility that infectious trash may get mixed up with routine medical waste.

When the Centre for Science and Environment (CSE) performed a research in Jharkhand (2017), similar problems were also detected. The study found that hospitals and nursing institutions in Jharkhand flagrantly flouted BMW rules with regard to segregation, collection, storage, treatment, and disposal. It was also deduced that the majority of the central and eastern areas of the nation, such as Bihar, Uttar Pradesh, Chhattisgarh, Odisha, and West Bengal, are considerably breaking the law to a far greater extent than other parts of the country.

At first glance, it would seem that the nation is well prepared to deal with the increased strain that will be placed on it. In a report that was submitted up to the National Green Tribunal (NGT) on January 14, 2021, the CPCB said that the nation's 198 common biomedical waste treatment and disposal facilities, together with the numerous such captive facilities located inside hospitals, had a combined capability to process 826 tonnes of biomedical waste every single day.[41]

THE ASPECT OF 'ACTION' OR 'INACTION' WITH REFERENCE TO RADIOACTIVE WASTE

If we travel to health centres and hospitals in more rural locations, we will find that these standards regarding biological waste are not effectively followed for a variety of reasons, including a lack of training and frequent staff turnover among medical professionals.[42] In order to guarantee that such trash does not wind up infecting other people, stringent monitoring is essential. Also, we need to make sure that individuals who are at home properly dispose of their used tissues, paper towels, and other items so that they do not end up spreading the disease on to anybody else, including the workers who collect rubbish. What we need instead is for everyone to exercise extreme prudence.In addition, to the rules specified that CBWTF operators "*must guarantee frequent sanitisation of staff engaged in handling and collecting of biomedical*

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40 Jugal Kishore, *Biomedical Waste Management Practices in a Tertiary Care Hospital in Delhi*, 3 Int J Healthc. Edu Med Inf. 2016 334 13-17 13 (2016).

41 COVID-19 will place India's biomedical waste management under terrible strain, https://www.downtoearth.org.in/news/waste/covid-19-will-place-india-s-biomedical-waste-management-under-terrible-strain-77714 (last visited Sep 15, 2022).

42 *Id.*

waste and that they should be equipped with suitable personal protective equipment including three-layer masks, splash-proof aprons/gowns, nitrile gloves, gumboots, and safety goggles."[43]

It instructed the facilities to collect the garbage from the COVID-19 ward using specially designated vehicles and requested that they disinfect those vehicles after each journey. The pollution watchdog suggested that COVID-19 trash should be disposed of promptly upon arrival at facilities and emphasized that they should not allow "any worker displaying indications of sickness to operate at the facility." This was one of the recommendations made by the environmental watchdog.

In addition to the regulations that are already in place concerning the management of biomedical waste, the CPCB made it clear that these guidelines must be adhered to by all parties involved. This includes isolation wards, quarantine centres, sample collection centres, laboratories, urban local bodies, and CBWTFs.In furtherance to this, it was noted that these recommendations are based on current understanding of COVID-19 as well as existing practices in the management of infectious waste created in hospitals when treating viral and other contagious illnesses, and that they would be updated as necessary.

In spite of the fact that the BMWM Act has been in place since 1998 and that it has been amended in the recent past, there is still a lack of systematic measures to reduce the dangers connected with such waste in many parts of the nation. According to a source from the CPCB, *"compliance with laws is still actively being worked on around the nation, and the legislation in several states is now well-established."* There is an absence of concern, desire, knowledge, and expense factor in effective biological waste management, and the legal responsibility has been reduced to a mere paper formality.[44]

CONCLUSION

Before the pandemic, the handling of medical wastes in the vast majority of underdeveloped nations was quite rudimentary. In our present circumstances, the inappropriate handling and disposal of these wastes may further expedite the spread of COVID-19, posing a severe concern for employees in the medical and sanitation industries, patients, and all of society as a whole. As a result, it is of the utmost importance to have a discourse about the newly arising difficulties in the management, treatment, and disposal of medical wastes in poor nations both during and after the COVID-19 epidemic. It is essential to identify the most effective methods of waste disposal in light of the restrictions and constraints that developing nations work under.

43 Guidance for Reducing Health Risks to Workers Handling Human Waste or Sewage | Global Water, Sanitation and Hygiene | Healthy Water | CDC, (2022), https://www.cdc.gov/healthywater/global/sanitation/workers_handlingwaste.html (last visited Sep 15, 2022).

44 Biomedical Waste Management in India, *supra* note 31.

Analysis of the Changing Needs of Laws in the Growing World of Artificial Intelligence and Block Chain Technology

*Ms. Trapti Varshney & Ms. Saujanya Khatri**

ABSTRACT

The study of law and information technology is inherently incompatible because traditional law, for the most part, is slow to adapt to technological advancements and is largely constrained by national borders, whereas technology develops quickly and embraces ideas like internationalization and globalization. Nevertheless, the notion of the rule of law runs counter to the notion that acceptance of the law is limited to national boundaries. Yet, a significant threat to the rule of law is about to materialize in the form of an attack from artificial intelligence technology (AI). AI is starting to make its way into digital decision-making systems and is effectively replacing human decision-makers as the field of research makes considerable strides. One of the best examples of this development is the use of AI by judges to assist in decision-making. Practically speaking, this gadget is frequently referred to as a "black box" due to its complexity and legal restrictions. Because of the lack of transparency and the limited capacity to understand how these systems function, which are increasingly being used by the institutions of governance, the traditional theories underpinning the rule of law are being questioned. This is especially true when it comes to concepts like openness, fairness, and explain ability that are directly tied to the rule of law. This article explores the technology of AI in relation to it, emphasizing the rule of law as a mechanism for human flourishing. The extent to which the rule of law is being compromised as AI grows more prevalent in society is examined, along with the question of whether it can still exist in a technocratic society.

INTRODUCTION

This dissertation answers those queries by offering a high-level overview of AI and its application in the legal field. The topic, although is complex yet will be understood by individuals without a background in technology. First, I will go over AI in general

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and then discuss artificial intelligence and how it is utilised by attorneys to practice law, by persons and businesses that are subject to the law, and by government authorities to enforce the law. The goal of this dissertation is to present a debunked, realistic vision of artificial intelligence that is grounded in the technology's actual capabilities and problems arising out of it. This is designed to contrast with talks that are distinctly futurist in nature regarding AI and the law. The rule of law still bears the goal of being, "analogous to the notion of the "good," in that everyone is for it, but has differing ideas about what it is," for the most part. If the rule of law is a concept that is valuable to hold onto as a barometer of a "good" that is deserving of pursuit, then it should be troubling that for a second year in a row, it fell in more nations than it improved in, indicating a general weakening of the rule of law globally.

Digital decision-making systems are being used to support human decision-making, and this role is progressively being delegated to computers, with governance being no exception. Most of these decision-making systems are "black boxes," incorporating incredibly sophisticated technology that is essentially beyond the cognitive capabilities of humans.

The law also restricts openness to some extent. These factors together pose a challenge to the rule of law. The rule of law's requirements, such as insight, transparency, justice, and explain ability, are practically impossible to meet in this context, which raises concerns about how feasible the rule of law is in a technocratic society. The rule of law is briefly described in Section 2 of this article to give a general overview of this intricate idea and to serve as the foundation for the analysis that follows. The technological idea sheds light on the intricacy and opacity of these technologies.

LITERATURE REVIEW

1. **"Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age"** by Kevin D. Ashley. This book explores how AI can be used in legal practice and provides a practical guide to using legal analytics tools.
2. **"Robotics, AI and the Future of Law"** by Frank Pasquale.
3. **"The Future of the Professions: How Technology Will Transform the Work of Human Experts"** by Richard Susskind and Daniel Susskind. While not specifically focused on AI and law, this book provides insights into how technology is changing the nature of professional work, including the legal profession.
4. **"AI and Legal Reasoning"** by D. Charles J. Batey. This book explores the philosophical and theoretical foundations of AI and how they relate to legal reasoning.
5. "AI for Lawyers: How Artificial Intelligence is Revolutionizing the Legal Profession" by Noah Waisberg and Michael Simon.

OBJECTIVES OF STUDY

- The researcher will go to great lengths on the effects of artificial intelligence on society and the need for a legal system which reduces the risks associated with is advancement. the advantages,
- Moreover, the researcher will provide with an overview of laws which are right now prevailing regarding application of artificial in intellectual property rights, which will include a detailed comparison of United States of America, India and Unite kingdoms law related to the same.

Thus, by this dissertation researcher aims to give a succinct explanation of how law and artificial intelligence interact. The aim of dissertation is to identify major issues, arrange them methodically according to the examination of legal materials, and describe 1 them in general, virtually disregarding particulars of individuals and government.

HYPOTHESIS

Artificial intelligence will be utilised more and more to automate legal processes, forecast legal outcomes, and develop new legal frameworks as it develops. The legal profession will become more effective and cost effective as a result, but this may also spark questions about fairness, openness, and the place of human judgement in the legal system. Long-term developments in AI may potentially lead to new varieties of "artificial law," which might contradict established legal principles and conventions. The capacity of legal practitioners to comprehend and successfully employ these technologies while ensuring that they are used responsibly and in the interests of justice will ultimately determine how AI in the legal industry develops.

RESEARCH METHODOLOGY

Research means to find out and examine again. There are various types of Research this project is based on Doctrinal method, legal research; basically, this type of research methodology requires research from sources like books, guidelines, regulations, and Legislations. The research also involves a content analysis of old records, journals, government documents, conferences, law commission reports, legal reporters, reference materials, scientific papers in books, articles, and e-journals, magazine articles, series of documentaries on YouTube, newspaper stories, national parliament debates, and so forth. An interdisciplinary approach is being used to investigate the patentability of AI. Both primary and secondary data are used in the study

RESEARCH QUESTIONS

1. The whole research in this dissertation is based upon the problem of incompetency of existing laws to cater to the need of the society, which with each passing day is depending more and more upon artificial intelligence.
2. Furthermore, the dissertation problem involves the ever-existing contradictions between the application of artificial intelligence in various regimes and prevailing laws.

3. In the end, the dissertation deals with the problem of lack of legislative actions of the Indian government about the artificial intelligence, due to which the whole regime has become vulnerable. 4. The dissertation delas with the problems with respect to existing legal framework and block chain technology.

ARTIFICIAL INTELLIGENCE

Researchers have used AI technology to automate certain challenging jobs, like playing chess, translating languages, and driving cars.[1] What sets these AI tasks apart from other forms of automated labor? It's because they all share a characteristic in that they all make use of the higher-order cognitive processes associated with human intellect. Comparatively, when people translate across languages, higher-order brain areas involved in comprehending symbols, context, language, and meaning are active. Drivers of cars engage a variety of cognitive functions, including those linked to vision,[2] spatial recognition, situational awareness, movement, and judgement. Engineers automate a process when it requires mental effort to do it, to put it simply.

MACHINE LEARNING

The term "machine learning" refers to a group of AI methods that have some things in common. In essence, most machine learning techniques operate by finding insightful patterns in vast volumes of data. These systems can then exploit these patterns to do a variety of tasks, like driving a car or spotting fraud, in ways that frequently result in practical, intelligent-appearing outcomes.

I spend a little more time concentrating on machine learning because it is now the most popular approach in AI. It's critical to define what learning means in the context of machine learning at the outset. One may infer from the name that these systems are learning similarly to how people do. Yet, that is untrue. Instead, the term "learning" is simply used as a crude metaphor for how people learn. For instance, when people learn, we frequently gauge success in terms of functionality and whether a person is improving over time at a specific task through experience. [5]Like how humans learn, machine-learning systems can be loosely described as functionally "learning" in the sense that they can also enhance their performance on specific tasks over time.

They accomplish this by looking at more data and discovering new patterns. It's crucial to note that the term "learning" does not mean that these systems are creating higher-order neural circuits that are like those found in human learning. Instead, these algorithms enhance their effectiveness by looking at more data and finding more patterns that help with improved automated decision-making.[6]

Let's try to develop an intuitive understanding of how machine learning algorithms employ data patterns to build smart outcomes. Think of a standard spam filter for email. Most email programs employ machine learning to automatically identify and direct unwanted, unsolicited commercial emails into a separate spam folder. How can a machine-learning system of this kind recognize spam automatically? The secret is frequently to "train" the system by providing it with several examples of spam emails and numerous examples of emails that are "desirable."

After patterns have been found in these sample emails, the machine learning algorithms may use them to predict whether a new email is likely to be spam or requested. For instance, consumers typically have the choice of whether to classify a new email as spam or not when it arrives. Every time a user marks an email as spam, they are giving the algorithm a training example. This tells the machine- software that this is an example of a spam email that has been confirmed by a human and should be examined for telltale patterns that might separate it from requested emails.[7]

LEGAL CHALLENGES INDIA DUE TO ARTIFICIAL INTELLIGENCE AND BLOCKCHAIN TECHNOLOGY

You can't regulate this technology, so what requires regulation is the application of it. Example of a bank sharing KYC information between banks all using blockchain. Now it has to be seen whether it suits the regulatory framework or whether any amendments are required or do we need any revised set of framework or new laws.

LEGAL CHALLENGES RELATED TO AI IN INDIA

1. Privacy Concerns: India has a complex legal framework related to privacy, and the Aadhaar Act, 2016, which established a unique identification system for Indian residents. The use of AI in surveillance raises significant privacy concerns, and there have been several legal challenges related to this issue. For example, in 2018, the Indian government introduced a proposed
2. Personal Data Protection Bill, which has been criticized for not providing enough protection for privacy rights. The bill is still under consideration by the Indian Parliament.
3. Bias and Discrimination: can have difficulty recognizing people with darker skin tones, leading to misidentification and false arrests. There have been several legal challenges related to AI bias and discrimination in India. In addition to the Delhi High Court case mentioned earlier, in 2020, a group of activists filed a petition in the Supreme Court challenging the use of facial recognition technology by police and other government agencies.
4. Intellectual Property: AI-generated content raises questions about who owns the copyright. In the case of Agara Labs and Google mentioned earlier, Agara Labs claimed that Google had infringed on its patent for a voice-based AI system for call centers. The case is still ongoing, and it highlights the challenges of determining ownership and intellectual property rights in the rapidly evolving field of AI.[8]
5. Liability and Responsibility: As AI systems become more sophisticated, they are increasingly being used to make decisions that have significant consequences, such as in healthcare, finance, and criminal justice. However, it can be difficult to assign responsibility if something goes wrong, leading to legal challenges related to liability. The writ petition filed by the National Law School of India University seeks to address this issue by establishing a legal framework

for regulating the use of AI and assigning liability in case of harm caused by AI systems.

6. Contractual Obligations: Smart contracts, which are self-executing contracts, are a key application of blockchain technology. However, the legal status of smart contracts is yet to be defined in India. There is a need to develop a legal framework for smart contracts to ensure their enforceability and validity.
7. Cybersecurity: The use of AI and blockchain technology requires secure and reliable systems to prevent cyber-attacks and data breaches. However, the existing cybersecurity regulations are inadequate to address the unique challenges posed by these technologies. Govt position- the approach of the government lately has been a bit of a wait and watch approach. As it is a very cautious step to process and regulate this technology, over regulation will stifle development and any technological advancement and under regulation will put them into a position which they don't want to be in.[9] Because then it will lead to a lot of discrepancies which regulators will keep pulling people on when there is no clear law. Now it cannot be termed as a perfect approach but a cautious and fair one trying to understand what is happening in the market and then formulating something because overreacting or under reacting both will harm in this case.

IMPACT OF THESE TECHNOLOGIES ON INTELLECTUAL PROPERTY RIGHTS

What is intellectual property (IP)? According to phrase modification organizations, "are the rights granted to humans over the creations in their brains" is defined by the Oxford Dictionary as "a person with a highly developed intellect." The use of AI and blockchain technology in India has significant implications for intellectual property rights (IPR), particularly regarding copyright and patent law.

Regarding copyright, AI systems can create works that can be considered original and, thus, eligible for copyright protection. For instance, AI-generated music, literature, or artwork can be protected under Indian copyright law. However, the question arises as to who owns the copyright for such works. Under Indian copyright law, the author of a work is considered the first owner of the copyright. Still, it is not clear whether the creator of the AI system or the owner of the data used to train the AI system should be considered the author of the work.[10] This ambiguity creates significant challenges for copyright law in India. Regarding patent law, blockchain technology can create new forms of IP, they can be used in a variety of industries, from finance to real estate. However, the legal status of smart contracts is yet to be defined in India, which raises concerns about their enforceability and validity.

In the case of decentralized applications (dApps), blockchain technology can create new forms of software that can be used in various industries. These dApps can be used to create new products, services, and business models. However, the legal status of these Apps is unclear under Indian patent law, which creates significant challenges for their protection and enforcement. Artificial Intelligence:

1. Ownership of AI-generated works: The use of AI in the creation of works such as music, art, and literature raise questions about ownership. Who owns the rights to a piece of music generated by an AI system, for example? Is it the creator of the AI system or the person who owns the system and activates it?
2. Licensing and royalty payments: The use of AI in the creation and distribution of content can also complicate the licensing and royalty payment process. For example, if an AI system is used to create a piece of music, who is entitled to receive the royalties? Is it the creator of the AI system or the person who owns it?
3. Patentability of AI inventions: The patentability of AI inventions is also a contentious issue.

   Some argue that AI inventions should be eligible for patent protection, while others believe that AI systems lack the necessary human input and therefore should not be patentable.
4. Liability for AI-generated content: AI systems can create content that infringes on IPR, and determining liability for such infringement can be difficult.
5. Data protection and privacy: The use of AI systems raises concerns about data protection and privacy. Who owns the data generated by an AI system, and how can it be protected?

BLOCKCHAIN TECHNOLOGY

1. Infringement detection: The use of blockchain technology to create decentralized platforms for sharing and distributing content raises concerns about the detection of infringement. With the anonymity afforded by blockchain, it can be difficult to identify infringers and enforce IPR.
2. Licensing and royalty payments: The use of blockchain technology can also complicate the licensing and royalty payment process. With decentralized platforms, it can be difficult to track and distribute royalties to the appropriate parties.
3. Trade secrets protection: The use of blockchain technology can make it easier for trade secrets to be stolen and disseminated. With decentralized platforms, it can be difficult to control access to sensitive information and prevent unauthorized disclosure.
4. can raise questions about the enforceability of IPR agreements.
5. Interoperability: The use of multiple blockchains for the same purpose can create challenges for interoperability, which can make it difficult to enforce IPR across different platforms. These are just a few of the challenges that are arising in the field of IPR due to the use of AI and blockchain technology. As these technologies continue to evolve, it is likely that new issues will emerge, and the legal landscape will need to adapt accordingly.

LEGAL COMPLEXITIES IN BLOCKCHAIN TECHNOLOGY LEGAL ISSUES IN BLOCKCHAIN TECHNOLOGY

Blockchain technology presents a number of legal issues that are still being addressed by lawmakers and regulators. Some of the key legal issues include:

1. Data privacy and security: Blockchain technology involves the storage and transmission of data, which may contain personal information. Ensuring the privacy and security of this data is a critical legal issue.
2. Intellectual property rights: Blockchain technology allows for the creation and storage of digital assets, including intellectual property such as patents and trademarks. Legal issues around ownership, transferability, and licensing of these assets are still being addressed.
3. Smart contracts: Smart contracts, which are self-executing contracts that are coded onto the blockchain, raise legal issues around contract enforcement, liability, and dispute resolution.
4. Anti-money laundering (AML) and know your customer (KYC) regulations: Blockchain technology can be used for anonymous transactions, which can make it difficult to comply with AML and KYC regulations.
5. Jurisdictional issues: Blockchain technology operates globally, which can make it difficult to determine which laws and regulations apply to transactions that cross national borders.
6. Taxation: Blockchain technology can create challenges for taxation authorities, as the decentralized nature of blockchain makes it difficult to determine the location of assets and transactions for tax purposes.

These are just a few examples of the legal issues surrounding blockchain technology. As technology continues to evolve, it is likely that new legal issues will emerge, and it will be important for lawmakers and regulators to keep pace with these developments.

CONCLUSION

The rule of law is a nebulous concept in law, and the more one tries to define it, the more ambiguous it seems to become. The definition of the rule of law spans a wide range; it is seen as a political ideal, a way to prevent the abuse of power, as well as to make sure that society upholds principles, such human rights. The idea of the rule of law is one that is valued as being worth preserving despite being vulnerable to political exploitation.

AI is a prime example of how contemporary technology is being utilised in society more and more. AI systems are being utilised to assist human decision-makers in practically all industries as machine learning techniques advance. It should be expected that more control and responsibility will be given to these technologies as they improve in helping with decision- making.

It is crucial to pay attention to the fact that these technologies are undermining the principles of the rule of law as a notion in traditional law. One aspect of AI's possible negative effects on the rule of law that sticks out when discussing these problems is the way that it might impede human development. Human agency can be a cornerstone of society, therefore even while this may not typically be the first association regarding the concept of the rule of law, it is nonetheless vital to discuss.

How to minimize AI's negative consequences on society while maximizing its good ones will be the challenge of the future. In other words, how to promote innovation while balancing it with societal demands. It will be 16 16 20 challenging to decide which principles to measure technology against. In this sense, it is proposed that the fundamentals of the rule of law provide a strong framework for determining the composition of every community.

The significance of protecting the Rules resides in this. This article aimed to present a clear-cut, demystified understanding on AI and law. Now, AI is neither magic nor not. Intelligent in the sense of human cognition. Instead, by utilizing patterns, rules, and heuristic proxies that let it make helpful decisions in certain, constrained circumstances, modern AI technology can deliver intelligent results without intelligence.

Nevertheless, the capabilities of present AI technologies are limited. Notably, it struggles to deal with abstractions, comprehend meaning, apply knowledge across different activities, and manage entirely unstructured or open-ended jobs. Instead, most jobs where AI has succeeded (such as chess, credit card fraud, and tumor identification) include highly organized areas with distinct right and wrong responses as well as robust underlying patterns that can be algorithmically recognized.

Understanding AI in the context of law requires a grasp of both the advantages and disadvantages of present AI technology. It assists us in developing a realistic knowledge of the areas where AI is likely to have an impact on the administration and practice of law, as well as the areas where it is not likely to. 1 Similarity Report

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8 NALSAR university of Hyderabad university journal; "India journal intellectual property law" [volume 11 2020}

10 NALSAR university of Hyderabad university journal; "India journal intellectual property law" [volume 11 2020}

A Study on the Scope of Mediation in Matrimonial Disputes with A Special Reference to the Role of Non-governmental Organizations in India

*Ms. Souradipta Bandyopadhyay**

ABSTRACT

India's judiciary is overburdened with litigation. The judges are having trouble concluding all of the cases in a timely manner. That inevitably leads to some way in which both the complainants' and the victim's rights are being violated. There is a demand for an additional platform where quick relief can be arranged at a reasonable price. The ADR, in particular the mediation process, has demonstrated its efficacy and is emerging as a useful tool for reducing the rising matrimonial disputes in India. It is becoming more and more popular because it is non-coercive and requires less technicalities. India's current judicial system has to be extended sooner rather than later. Therefore, in this situation, nongovernmental organisations that selflessly assist people can step in to offer assistance.The goal of this research is to determine the application of mediation as well as the root causes and causes of conjugation disputes in India. Additionally, the article has concentrated on the function of nongovernmental organisations and how they can help find a solution. The data collected for this study, which is solely doctrinal, was gathered from primary and secondary sources.

Keywords: *Marital Dispute, Mediation, Alternative Dispute Resolution, Judicial Pendency.*

INTRODUCTION

"Injustice anywhere is a threat to justice everywhere."

- Martin Luther King

The legal system in India for delivering justice is currently overwhelmed by the sheer volume of cases it must handle. The complexity of the legal processes and the unavailability of adequate accommodations in every sector are the causes of this. In the present day, disputes over any interest are a typical occurrence, and innumerable laws will be established on those disputes. The issue emerges, nevertheless, when

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the court finds it difficult to resolve the issue in a fair amount of time.The core concept of legal necessity and the concept of access to justice are closely related.Indian society is divided into multiple cultures and religions and each religion has personal legislation or a set of laws to deal with marital issues. Despite being directive principles of the State policy under the Indian Constitution, the Uniform civil code is a far cry in this country.The result is that the courts are flooded with cases of different nature relating to family matters or marital disputes. This burden also has a direct impact on the justice delivery system.Again, when it comes to marital disputes, there exists a considerable amount of people who don't want to resort to court to resolve that. As the process not only takes an innumerable amount of time but also is expensive. Some masses are cynical about hiring an advocate as well. In India, every citizen enjoys the fundamental rights relating to Equality before the law and equal protection of Law, yet these above-stated problems somehow have cast a shadow upon the enlightened image of the Indian judicial system.

This has been a common problem for almost every country until the USA took a pioneering role in refining the legal system through discovering procedures for speedy settlement of cases. This new system is termed *"Alternative Dispute Resolution"* also known as ADR.These procedures emerged as an alternative to the rigorous court process without any undue delay. Also, these processes provide a platform where parties can settle their dispute by participating at a minimum cost. The maxim of *Justice delayed is justice denied* is a cornerstone for any legal system of a country. The ADR mechanism came as a provider of quickly accessible justice at a cheaper cost. The introduction of this system in Indian society has paved a new way for the courts. Marriage in Indian society is considered a sacred union between two people. This union between two people is not only a social obligation but also raises legal commitments as well. It is the mutual duty of these two-person that the union stays stable. That requires patience, sacrifice, respect towards each other, and tolerance. Differences of opinion or value are a part and parcel of life, however, these differences sometimes raise disputes among married couples or among their family in-laws that are termed marital disputes. Conflict among family members is a common incident, this might arise due to misunderstanding or by drawing a wrong conclusion. Families nowadays are often struck by such conflicts which often amounts to separation or divorce.The term family itself has evolved in the flow of time. Presently a family might consist of unmarried parents who both might be male or even they might indulge in a live-in relationship or their child might be adopted. With this fast-changing scenario, arbitration, conciliation, and mediation as an alternative to court proceedings are becoming more popular.

THE CONCEPT OF ALTERNATIVE DISPUTE RESOLUTION

In a simple sense, the term alternative dispute resolution defines the processes where a conclusion arrives through the consent of the parties. In this process, the parties are free to choose the outcome of the dispute, especially in the case of negotiation, arbitration, and mediation. This method brings both the parties to the negotiating table outside the court, identifies and pinpoints all the issues, discusses the relevant

facts, provides a solution through discussion, and ultimately resolves the issue by delivering an award that binds the parties. There is a lot of scope for flexibility in the utilization of ADR methods. This flexible nature is available not only in the procedure but also in the concluded solutions that are discovered to the issue. Also, the rigid nature of the utilization of precedent as used in the adversarial method of dispute resolution will not hinder the way of finding a solution to the issue creatively. This method not only addresses the dispute but also pinpoints the emotion behind the dispute. The nature of the ADR method is that if the proceeding is to be successful first the ego, misunderstanding, and the emotion existing between the parties have to be addressed and sorted out. Once it is done, resolving the issues becomes much easier. The mediation and conciliation process especially has proven effective in this regard.There are some well-known alternative dispute resolution techniques widely practiced throughout the world. Some of these are gaining popularity in India as well. The most popular methods are as follows,

i. Negotiation or Assisted Negotiation
ii. Conciliation
iii. Mediation
iv. Evaluation
v. Partnering
vi. Facilitation
vii. Arbitration
viii. Dispute Review Board or Dispute Adjudication Board
ix. Claims Appeals committee
x. MEDALOA (Mediation and Last Offer Arbitration)
xi. Rent a Judge (private judging)
xii. Supervised Settlement Procedure
xiii. Summary Jury Trial.

The major difference between the ADR process and the judicial process is that in the judicial process a judge monitors the dispute keeping in mind the prevalent legal moorings, hears arguments, examines valid shreds of evidence, and after that only delivers a conclusive verdict. Here in this process as the parties are represented by their respected lawyers, they always keep distance not only from the Judge but from themselves as well. As a result of this, there is only either a win or loss situation.Conflict in families is rarely resolved by proceedings adversarial nature; in many instances, it is compounded to make things worse. Alternatives like mediation and collaborative law should receive more backing and encouragement and be broadly accessible across the nation.However, in the case of ADR processes, the dispute is mostly resolved through a neutral third party who is generally selected by the parties. This third party is generally aware of the nature of the dispute and the resolution procedure is less formal, and less technical than agreed by the parties. The confidentiality of the

case is always protected and the issue is resolved expeditiously with fewer expenses. There always remains a win-win situation in this process as the dispute is always resolved by the agreed consent of the parties.Dispute or conflict of interest is constant for any society in the world. It requires mitigation for the restoration of peace and the sustainability of the society itself. In India, the judicial system has certain lacunas and some major weaknesses. Thus the ADR process has emerged as a substitute for a way out.Almost every court in India is burdened with an increasing number of matrimonial dispute-related cases and most of them are pending. These types of cases are not right for reference to the regular court as they are private. The clashes in the courtroom often frustrate the parties in cases of this nature. To sustain the sacred bonds between the parties and to resolve the dispute smoothly procedures such as mediation, counseling and conciliation are gaining major importance in India.

FACTORS BEHIND THE MARITAL DISPUTE

For any society's subsistence and abundance, the institution of marriage and family is a vital factor. The definition of marriage under the Black Laws Dictionary is *" legal status, condition, or relation of one man and one woman united in law for life, or until divorced…"* In the current era, this definition of marriage has also been changed as the nature of marriage has also evolved. In India where the society is multicultural and pluralistic, a dispute relating to marriage becomes more complex. The shift of the nature of marriage from being a pursuit for seeking completeness, happiness, and perfection to the modern marriage that is like a spirit of friendship, support, and mutual efforts is quite visible.The major communities such as Hindus, Christians, Muslims, Parsis, etc have their family laws rooted in their religion and customs that guide their execution of any marriage-related affairs.The concentration provided to marital conflict is comprehensible when we consider its substances for mental. physical and family health. Marital conflict has been linked to the onset of depressive signs. male alcoholism, eating disorders and lots of other elements . Marital conflict can be anything. Couples complain about sources of conflict varying from verbal and physical abuse to personal differentiae and conducts.The legal reformations throughout the world and the socio-economic changes have massively changed this sacred institution as well which especially can be seen in the urban areas. The young generation nowadays is way more exposed to alternative relationships and economic options which in turn becomes a valid ground for them to prompt to break out of any unequal or unsatisfactory relationship. The rate of divorce has also been doubled which is mostly filed by young couples.

The education reform has made this generation conscious of their rights and self-awareness and as a result of that, the characteristics of modern marriages have also changed to a greater extent. Nowadays extramarital affairs, fraud, distrust among family members, a difference of opinion in tribal matters, drug addiction, and intoxication are a few of the major examples of family disputes. Some factors should be discussed also which contribute mostly to any marital dispute, these are as follow,

a. Westernization of social ethos

The influence of western culture has a deep impact on the traditional beliefs and practices of this country. This approach has broadened the cognitive ambit of society and introduced a new set of values. This change has also changed the pattern of marriage and divorce-related issues as well. People nowadays are more aware of their legal rights than the people of the previous generation.

b. Empowerment of Women

The upliftment of women from the stereotype of patriarchal society and their empowerment has significantly improved their position in society. Financial freedom has changed the role and the differentiation of male and female positions in a family. Most women are not bound by any norms or customs that dominate them in a family. The change can be seen in nuclear families situated in urban areas where there is no safety valve to mediate any disputes between the parties. The inevitable stressful and suppressing lifestyle of urban areas has smoothened the roads to marriage-related conflicts.

c. Changing the structure of a family

The changing structure of families due to the influence of the western value system is also changing the pattern of modern families. The Indian traditional societies in many places are dangling between their cultural aspects and the Western model. Along with that, the legislation relating to the rights of women has also contributed to marriage matters.[1] The gender role dynamics in the society due to modernization, individual autonomy, and participation of women in every aspect as per with male counterparts have also changed the marital relations.Apart from the above reasons the disputes can arise from the nature of the parties, psychiatric disorders, depression, cruelty, torture, psychological problems, and insecurity issues. Sometimes conflict leads to violence leading not only to bodily injury but also to damage to the parties mentally.

There are various issues in matrimonial disputes that can arise and often the parties seek the intervention of the court to resolve the matter. Most of them relate to,

- Divorce (Contested or Mutual)
- Judicial separation
- Maintenance, determining the alimony of maintenance
- Determining ownership of moveable and immovable property and succession-related issues
- Determining guardianship or taking the custody of minor child-related issues
- Domestic violence cases

CURRENT STATUS OF THE INDIAN JUDICIARY

The word *Justice* has been inscribed in the preamble by the framers of the constitution. It is one of the most important virtues that the Indian courts strictly adhere to while deciding any matter in front of them. Access to justice is a fundamental right of the citizen of India that has been safeguarded by the courts through various landmark verdicts.This has been mentioned under various international instruments as well. Every person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal has been a mandate under the **Universal Declaration of Human Rights**. A similar provision can be found in the statute of the **International Covenant on Civil and Political Rights, 1966**. The necessity of a comprehensive and adequate legal service program in the country to protect the interest and the rights of people and protect them from injustice becomes the utmost duty of the state. Access to justice also mandates endowing justice within a reasonable period. The State is under obligation to provide free legal aid to the poor and weaker section of the society to ensure justice as a Directive Principle of the State Policy. The Parliament also enacted the **Legal Services Act,1987** to provide nationwide competent and adequate legal service free of cost to the downtrodden section to ensure the legal mandate to justice for all. Through this above-mentioned legislation, The National Legal Services Authority (NALSA) has been erected to improvise and monitor legal aid programs and frame out policies for making legal services available.Despite all the efforts, the massive backlog of pending cases in the courts has not been able to sort out yet. Almost 30 million cases in the courts across the country as been piled up with an addition of 20 million cases each year. That's why Justice V V Rao has opined that it may take almost 320 years to clear it out. Very recently in an interview the Union Law Minister *Kiren Rijiju* also raised the issue of the pendency of cases. He stated nearly 7 lakh cases are still pending in subordinate and district courts for around 20 years in India.As a consequence of this situation, the mandate of speedy trial and speedy disposal of cases is becoming a myth. The ratio between the hearing of the cases and the time consumed for the disposal of the cases indicates there is a serious issue relating to the case management in the procedure in India. As of 1stMay 2023, the list of pending cases in taluk and district courts across the nation is shown in Table no. 1 below.

Table 1

Total Civil Cases	10892923
Total Criminal Cases	32536874
Total Cases	434229797
Total Cases More than 1-year-Old	7302413

Source: National Judicial Data Grid

The main factors behind the pendency of the cases in the courts are that the number of judges has not been sufficient. The ratio between the mounting dispute and the number of judges is quite pathetic. The cumbersome procedures, appeals, revisions,

adjournments, reviews, pending the cases have somehow made the Indian legal system sluggish. Normally the civil case takes almost 5 to 6 years and there are instances where cases have been disposed of after 15 years. There are some unethical practices by the lawyers who on many occasions utilize delaying tactics by violating the sacred ethical principles of justice and making it tremendously time-consuming.The whole judicial system gradually collapsed due to the stress from all the corners. The lower rate of disposal of the cases thus happens for various other factors. It might be the absence of witnesses, Laxity of the public prosecutor, corruption, poor infrastructure in the court, etc. With this delay, justice becomes more and more expensive. As an inevitable result, it is the common people who lose their faith in the judicial system.Another important factor here is, that judges are often made responsible for the administration of legal aid this puts an extra burden on the pre-existing overburdened judicial system. Sometimes the judges lack the potential skill to manage both the roles parallelly. Thus, it has become inevitable to transfer the responsibility of legal aid to a dedicated administrative body or organization. Their work can be scrutinized by a judicial officer also their function can be carried out by expert personnel. This will ease the burden on the lower-level courts.

ROLE OF MEDIATION IN RESOLVING MARITAL DISPUTE

Every relationship has some ups and downs in the path of life. In any religion or creed, marriage is considered an inseparable bond between couples that is supposed to last forever. However as has been discussed above, the present scenario is completely different from the past. Multifarious cases of different nature arise almost every day due to some issue between the couples or their family members. From here the role of mediation comes into play. For any family dispute or matrimonial dispute, the forum of mediation is the best alternative option for the court. This is because there will be a continuance of the relationship in mediation, especially in such cases where a minor is involved. In short, mediation is about getting the parties to talk to one another again.The procedure of mediation not only allows the divorcing couples or the conflicting parties to avoid a huge financial cost but also provides the scope to avoid long rigorous trials. It protects the confidentiality of the parties. Thus this provides greater satisfaction to the parties. In addition to that through this process, the couples also learn to mitigate future conflicts as well. As the parties mutually agree on the outcome of the dispute, there is no loss from either side. If the settlement is successful the parties will be saved from the long-lasting trials and this will also, in turn, reduce the pressure on the courts.

For a successful mediation, three essential requirements are needed in the process. These are as follows,

- A successful mediation is not possible without the willingness to cooperate in the negotiation process.
- The fundamental of mediation is the presumption of the parties of their competence.

- Equality in bargaining or negotiation capacity is important in any mediation process.

There are instances when the reason for the conflict might be a mere misunderstanding that is later resolved through mediation. Nowadays the courts are often sending disputes of such nature to mediation centers. In the case of *K. Srinivas Rao* v. *D.A. Deepa*, the apex court has elaborated on the need for a pre-litigation mediation process in family disputes. The court was also mandated to establish pre-litigation clinics in all mediation centers. The parliament has enacted family laws to preserve the integrity and the sanctity of the marriage. The main objective of mediation is to help the parties themselves.There is no relevant statute for mediation that regulates the procedure yet when this procedure is largely suggested everywhere by the courts. In the absence of any legislation regulating the mediation, the procedure functions as each court prescribe it. The apex court also showed concern relating to the absence of a framework regulating mediation proceedings.In other legislations as well there is scope for reconciliation and counseling to bring the parties into a mutual agreement.The courts are also strictly adhering to these provisions. At present there are two ways a party can access the facilities for the mediation:

a. Private mediation of the parties.

b. Mediation referred through court.

SCOPE OF MEDIATION THROUGH THE NON-GOVERNMENTAL ORGANIZATIONS

The Non-Governmental Organization (hereinafter known as NGO) plays a significant role in various sectors of the social service. These organizations are not directly controlled or directed by the state also they are nonprofit organizations t\which means they don't receive any monthly financial aid from any government department. The government on many occasions collaborates with the NGOs to execute programs. Through their voluntary selfless service to society, they have gained a considerable amount of attention and an NGO can be an instrument of change if they work in resolving marital disputes by providing a platform for mediation.In India, not only there is a scarcity of judges but also there are not enough courts as well to resolve the cases in a reasonable period. Thus a lot of pressure has to be tackled every day by specialty the lower judiciary. Marital disputes are sensitive and require proper counseling and professional guidance. The lower courts often couldn't entertain cases such as professionality due to the lack of time and tremendous pressure of other cases. As a result of this frustration and trauma, many families fall apart permanently. Only if there is a place for mediation between the parties can make the disputed parties come to a mutual agreement by providing the proper counseling and guidance, many families could have been saved from permanently breaking up.There are provisions for the function of Lok adalats and the constitution for the family courts. However, these forums have not proven effective in marital disputes. Plus the lack of properly trained judges in family matters has become a hindrance to this issue. In

addition to that, not all the parties can hire an experienced advocate who is a negotiation expert.

The complete function of mediation involves the following stages- (1). Introduction of the issue, (2). Joint session of the parties, (3). Separate sessions with the mediator (4). Closing of the dispute. Here the mediator plays an important role to resolve the issue. He should have prior knowledge of the problem and acknowledge it along with the raw emotions of the parties.Thus it has been seen that in the lower courts following this becomes almost impossible.Also, in a rural areas, most people are reluctant to seek redress from the court and go to the Kangaroo court instituted by the villagers. The mediation or the agreement or the verdict provided by such a kangaroo court is often immoral or unethical. There are several NGOs that are working in such rural areas that easily could provide not only provide legal aid to the parties but also become a mediation center for any kind of dispute.

There is no provision or legislation for a uniform procedure for mediation. If the NGOs are provided the power and duty to mediate marital dispute issues through an expert mediator then the whole legal system in India will experience a change as this will not only ease the pressure from the courts but also destitute people who are wondering from this courtroom from that room for several years will be able to get justice. If the mediation process fails then the doors of the court are open to the parties, but if the mediation succeeds then the parties will be saved from the long legal procedure and from spending valuable time and hard-earned money.

CONCLUSIVE REMARKS

The mediation process has potential in India and it will surely balance the indifferences in the justice delivery system in society. Conflict is a part of life. Misunderstanding often arises between the family members but that doesn't mean that the bond between them should also be severed for life. The time has come that parliament should frame legislation for resolving the matrimonial disputes through mediation and empower the NGOs to participate in that process. And even if the mediation fails, the unsatisfied parties have the second option to contest their issue in a court of law. This step will not only expand the scope of dispute settlement but also will bring revolutionary changes to the current judicial system.Many countries have adopted and empowered NGOs for providing relief to the parties through mediation. In a country like India where there is a scarcity of courts and judges, this should be implemented as soon as possible. There are some relevant suggestions in this regard that can be taken into consideration. These are :

i. The state should empower the NGOs to provide legally binding awards to the disputing parties after mediation.

ii. The whole process of mediation of marital disputes through an NGO has to be monitored by a judicial officer.

iii. The person who will be the mediator should be an expert in this field.

iv. Detailed guidelines should be framed by the parliament regarding the dispute.

v. The civil cases relating to matrimonial disputes mandatorily should be sent for mediation.

vi. Adequate advertisement of the NGO mediation of marital disputes should be done to make people aware of it.

vii. The government should also frame out policies so that people get this mediation at a minimum without getting caught in any fraudulent scheme.

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Rights of the Persons with Invisible Disabilities

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ABSTRACT

Disability can be a very personal experience, making it very challenging to explain precisely. With or without the use of aids their disability is very real. There are 21 conditions that can qualify a person for disability benefits, the majority of which are obvious impairments.[1]

Many people who are diagnosed with chronic illnesses or AID are not legally disabled, thus they are not eligible for any disability benefits which is incogitable. Its challenging in many fronts like in Education, Employment, Insurance - Health care and so on. And procuring health care benefits becomes even more challenging because of the scarce knowledge on the issue.

INTRODUCTION

A mere listing of rights, even if it is scrupulously written and interpreted is not enough. Whether there is a provision for its enforcement, an avenue for redressal is what is required. Article 32 of the Indian Constitution enshrines that individuals may seek redressal for the violation of their fundamental rights. The word Redress means according to Collins dictionary "If you redress something such as a wrong or a complaint, you do something to correct it or to improve things for the person who has been badly treated"[2] and "If you redress the balance or the imbalance between two things that have become unfair or unequal, you make them fair and equal again."[3] To exercise this fundamental right to Redressal, at the first place,recognition of the problems and lacunas comes first. This article is attempting ***to make the Invisible Disability, Visible!*** so that the Persons with Invisible Disability can also be qualified to avail the benefits and aids provided by the government and to make sure ***Right to Dignity and Right to Redressal*** can beexercised by them.

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1 Not every Disability is visible, available at: https://www.ccyanetwork.org/news/the-invisible-rights-of-persons-with-invisible-disabilities-act-of-india (Last visited on Nov 26, 2022)

2 Collins Dictionary, *available at https://www.collinsdictionary.com/*(last visited on Dec 02, 2022)

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Disability can be a personal experience, making it incredibly challenging to explain precisely. The Rights of Persons with Disabilities Act (RPwD Act) was introduced to be "An Act to give effect to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[4] and for matters connected therewith or incidental thereto." The definition of a "person with disability" adopted by the Government of India is the same as mentioned in the Convention - "a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."[5] India was one of the first countries to ratify the convention. India did it in 2007. But the RPwD Act came into force only in 2016, and it is yet to be implemented by all the states of India.[6]

FACTS ABOUT DISABILITY ACCORDING TO WORLD HEALTH ORGANIZATION

1) An estimated 1.3 billion people – or 1 in 6 people worldwide – experience significant disability.
2) Some persons with disabilities die up to 20 years earlier than those without disabilities.
3) Persons with disabilities have twice the risk of developing conditions such as depression, asthma, diabetes, stroke, obesity, or poor oral health.
4) Inaccessible health facilities are up to 6 times more difficult for persons with disabilities.
5) Persons with disabilities find inaccessible and unaffordable transportation 15 times more difficult than for those without disabilities.
6) Health inequities arise from unfair conditions faced by persons with disabilities, including stigma, discrimination, poverty, exclusion from education and employment, and barriers faced in the health system itself.[7]

UNDERSTANDING INVISIBLE DISABILITY

Invisible disabilities, as the term suggests, are those disabilities which are not visible or are hidden to the human eye. IDA (Invisible Disabilities Association) defines invisible disability to referring symptoms such as debilitating pain, fatigue, dizziness, cognitive dysfunctions, brain injuries, learning differences and mental health disorders, as well as hearing and vision impairments. According to Global Disability Inclusion LLC, 75% of the people with disabilities have an invisible or non-apparent disability.

4 Convention on the Rights of Persons with Disabilities (CRPD), 2022.

5 The Rights of Persons with Disabilities (RPwD) Act, 2016. (No.49 of 2016)

6 The Department of Empowerment of Persons with Disabilities, *available at https://disabilityaffairs.gov.in/content/*(last visited on Dec 03, 2022)

7 Disability, *available at https://www.who.int/news-room/fact-sheets/detail/disability-and-health* (last visited on Dec 03, 2022)

Invisible Disabilities means you cannot see a person's pain or inflictions that make them disabled. With or without the use of aids their disability is very real. If we take a closer look at the notion of "invisible disability" and consider what it might mean to describe a disability as "invisible," we might understand the source of some of the preconceptions and confusions that underlie people's thoughtless views about disability. Engaging in such research may also help us better understand the injustices and indignities that are frequently inflicted upon people with disabilities, as well as help us resolve the theoretical and ethical conundrums that have plagued philosophers, disability studies researchers, and advocates for people with disabilities. It is also worthwhile to investigate the idea of an invisible Disability on its own.[8] Many people have *life-limiting conditions, diseases, or structural or biomechanical defects that are difficult for others to notice. People with Auto Immune Diseases* like Juvenile Rheumatoid Arthritis, Osteo arthritis, Ankylosing Spondylitis, Inflammatory Bowel Disease, Lupus, Psoriasis etc., severe chronic fatigue syndrome (CFS), severe post-traumatic stress disorder (PTSD), severe depression, chronic pain, violent allergies to ordinary household chemicals, and mild traumatic brain injury (MTBI) may all seem "normal" or Invisible to people with whom they interact. *These are not always visible to the onlooker, but can sometimes or always limit daily activities, life limiting conditions, range from mild challenges to severe limitations, and vary from person to person.*

UNKNOWN CHALLENGES AND CHANGING THE NARRATIVES OF INVISIBLE DISABILITIES

The needs of the persons with Invisible disability are similar to the persons with disability, sometimes even more. People with Invisible Disability go through so much that many have not heard about. Most of the Invisible diseases aggravate chronic pain, headaches, nausea, brain fog, awful fatigue that debilities them and keeps them in bed foe days. They are immunocompromised. None of this would be known or seen from looking at them. It is all invisible. And we should remember that just because their disabilities are invisible it does not mean it is not real.

The physical, emotional, and mental limitations of Chronic Illness can actually affect people accessing the care they need. There are many reasons a person living with Chronic conditions will miss their health care appointments. They could be suffering with: - Anxiety that stops them from leaving their homes. ADHD where the block is just too hard to push through Depression, Physical limitations, feeling too unwell, migraines which stops them from moving around, Brain fog and memory issues they simply forget. And the list goes on.

People living with chronic conditions are seen as people who are lazy, hypochondriacs, attention seekers, addicts, work shy, frequent flyers, scroungers, neurotic, depressed. They have been attacked with instant judgement to even to have a sick day. They are being discriminated on daily basis which at times makes them uncomfortable in disclosing their invisible disability to avail any rightful facilities. Hate speech, Name calling or bullying someone with chronic illness should not be tolerated as everyone

8 N. Ann Davis, "Invisible Disability", 116 *University of Chicago Press Journals* 153 (2005)

has the right to life with Dignity. The narrative needs to change. *Awareness and education on this subjectare required.* And *they face double discrimination as their sickness itself is a taboo and goes unrecognised.*

According to the survey conducted by the Chronic Illness Support for All, A Non-Profit Organization dedicated to support those with chronic illness across the UK, People living with the lifelong conditions and disability are 80% more likely to be victims of domestic abuse at the hands of their spouses or children and 30% were subjected to physical abuse. It can be noted that who are vulnerable medically are also more vulnerable to domestic abuse.[9]

It is whether people choose to see others or understand them. If they look closely, they will see the pain in one's bodies, constantly fighting back the disease, grimacing or just how tired is that person. One can see the debilitating fatigue in the way they walk, their faces looking drained and tired, the effort it takes them to do things. It's all there visible if one chooses to look. Even invisible illnesses are not that invisible. Onemustjust choose to look close enough and you will see it.

The harsh reality of Invisible disability is most of them are ***incurable*** and only controllable, the persons with invisible disability accepting that they are chronically ill and the care takers or parents understanding their requirements are different and unique. And they ***require good health care facilities and medications for life long***, in some cases surgeries or medical procedures. Importantly yearning to do things that their body no longer allows due to limitations and acute pain. Chronic illness can lead to losing friendships and relationships as it could be overwhelming to handle and fight the disease life long could be draining and especially without insurance and medical bills being covered. All this could also lead to giving upon on their career and dreams. Nothing is more shattering than losing everything to a disease which is not even their fault. How are their fundamental rights going to be restored?

The most heart wrenching truth with persons with Auto immune disease or chronic pain is that they wake up everyday in pain, not knowing whether they can function, they require learning the balance between surrendering and fighting. And no one even knows that they are in a battle with themselves. Leaving the house with chronic illness takes double the effort and twice as long to recover. Chronic illness patients go through psychological pain as well in addition to their physical exuding pain. They do not have safe environment to talk about how eventually even those who love them cannot deal with their disease. The family might tend to just disappear, and they are left alone. They do not talk about how their family begin to ignore their symptoms because the truth is too much to handle. It is high time we talk more about this and bring about awareness.

ARE WE EMPATHETIC TOWARDS INVISIBLE DISABILITIES?

If wewitness someone using a wheelchair, wearing a hearing aid, or using an assistive device, we likely are aware the person has a disability. But not all disabilities are

9 Don't Suffer Alone, *available at https://www.cisfauk.org/*(last visited on December 5, 2022)

obvious to the eye. These are known as invisible disabilities. An invisible disability is a physical, mental, or neurological condition that cannot be seen from the outside. But it can impact someone's movements, senses, or activities to a large extent. How empathetic are we towards people with invisible disabilities? Because unfortunately people with invisible disabilities are often accused of faking or imagining their symptoms - the phrases "but you don't look sick" or "you don't look like you have a disability" are said far too often! Conditions such as learning differences, deafness, autism, prosthetics, Traumatic Brain Injury (T.B.I.), mental health disabilities, Usher syndrome, bipolar disorder, diabetes, A.D.D./A.D.H.D., fibromyalgia, Rheumatoid Arthritis, Alzheimer's, anxiety, sleep disorder, Crohn's disease, epilepsy, multiple sclerosis, cystic fibrosis, and many more- Are all Invisible Disabilities.

INVISIBLE DISABILITY IN INDIAN CONTEXT

The Government of India does not recognise the Invisible Disabilities such as Auto Immune Disease or chronic illness etc as conditions that entitle one to disability benefits. Many people who are diagnosed with chronic illnesses or Auto Immune Disease ***are not legally disabled,*** thus they are ***not eligible for any disability benefits*** which is incogitable. Its challenging in many fronts like in Education, Employment, Insurance - Health care and so on.

Over the decade, chronic disease is predicted to affect India more than any other nation in the globe. With over 16% of the population older than 50 as of 2010, and that number expected to rise to 33% by the year 2050,[10] India's population is significantly ageing as a result of the rapid decline in infant mortality rates since the early 1950s as well as improved control of some major infectious diseases.Over individuals (defined as those 50 years of age or older) are anticipated to carry nearly half of the total illness burden in India during the next two decades, primarily as a result of noncommunicable diseases (NCDs)[11]

Apart from the poor execution of the existing Act, there are only ***21 benchmark disabilities that can qualify a person for disability benefits***, the majority of which are obvious impairments.[12] People with these conditions are assessed and granted a disability certificate with a percentage indicating the degree of their impairment. Rights of Persons with Disabilities Rules, 2017 talks about it extensively and notification can be made from time to time.The amount of assistance they can get from the government depends on this percentage. All the disabled person's rights and privileges are outlined in the **RPwD Act.**

10 He W, Muenchrath MN, Kowal P. Geneva, Switzerland: World Health Organization; 2012. Shades of Gray: A Cross Country Study of Health and Well-Being of the Older Populations in SAGE Countries, 2007–2010

11 Chatterji S, Kowal P, Mathers C, et al. The health of aging populations in China and India. Health Af (Millwood) 2008;27(4):1052–1063.

12 Not every Disability is visible, *available at: https://www.ccyanetwork.org/news/the-invisible-rights-of-persons-with-invisible-disabilities-act-of-india*(Last visited on Dec 04, 2022)

The Government of India haspublished the draft on the National Policy for Rare Diseases 2020. The World Health Organisation (WHO) defines a rare disease as an often debilitating, lifelong disease, or disorder with a prevalence of 1 or less, per 1000 population. However different countries have different definitions. In the United States, a rare disease is one with a prevalence of less than 6.4 per 10000, and in Japan, the parameter is 1 per 10000. *India, on the other hand, lacks such a parameter because there aren't enough data, and there isn't a suitable health infrastructure to allow for the collecting of such data.* Government support for the treatment of several treatable illnesses is mentioned in the draught, with a maximum of INR 15 lakh, or about 20000 USD. Due to a shortage of funding, the government does not intend to offer any assistance to people with long-term ailments, but instead suggests creating online contribution systems. India only dedicates 4% of its GDP to health care. *The fact that India has one of the lowest spending on healthcare in the world makes it seem as though a lack of resources is not a sufficient justification for refusing to support persons with chronic and uncommon ailments*.

Will those with Invisible Disabilities, unusual, incurable, chronic illnesses who receive no government assistance be able to contribute to society as successfully as others? Do they not qualify as disabled under the definition the Government of India adopted? *The RPwD act is itself disabled in reality.* It does not adequately represent the myriad conditions that affect the quality of life, social interaction, and academic and career prospects for the millions of people who suffer from them. The reality is that most patients struggle to pay for their care since chronic andor unusual disorders frequently call for expensive medications, and since most patients have either little or no insurance coverage, they must prioritise their survival. Social integration, work, or education, family is not even in the picture.

It is saddening to know that by how slowly healthcare changes are moving along and how little help there is for those who have a variety of chronic ailments that have a significant impact on their quality of life. Are we in the direction to improvise and get better? What chance do we have if in 2023 a superpower-aspiring nation like India claims that it lacks the resources to serve its inhabitants with rare chronic ailments and has a list of disability that only contains 21 conditions? Additionally, the researcher finds that the general public has never taken the issue of healthcare seriously. Election seasons have never seen a problem with it. We are supposed to be blamed. The patient communities themselves lack cohesion. How are they to be fixed? *It shouldn't be that challenging to design a system that assures* ***that everyone has equal and unrestricted access to opportunities, regardless of their health.***

It has been 75 years, we obtained our independence, but persons with chronic illnesses like Auto Immune Disease have not yet been freed from the many chains that hold them down and prevent them from leading free, independent, and meaningful lives.

RIGHTS OF THE PERSONS WITH DISABILITY

Article 55 of the United Nations Charter, 1945 says that with a view to the creation of conditions of stability and well-being which are necessary for the peaceful and

friendly relations among nations based on respect for the principle of equal rights and self-determination of people's, the United Nations shall promote: Higher standard of living, full employment and conditions of economic and social progress and development and so on. The Universal Declaration of Human Rights (UDHR), 1948 serves as the foundational document for the Convention on the Rights of Persons with Disabilities (CRPD) and for all the other human rights conventions. The CRPD contains no new rights but helps to explain how modern nations have agreed to interpret the rights of persons with disabilities.

Article 1 of the UDHR reads:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."[13]

Declaration On the Rights of Disabled Persons 1975, The disabled person shall enjoy all rights contained in this declaration without distinction or discrimination. The disabled persons have inherent rights to respect for their human dignity and irrespective of the origin, nature and seriousness of their disabilities. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible. Disabled persons have the right to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions. Disabled persons shall be protected against all exploitation and treatment of a discriminatory, abusive or degrading nature.[14]

The Convention On The Rights of Persons With Disabilities is an international human rights treaty of the United Nations intended to protect the Rights and dignity of persons with disabilities. It deals with matters such as, general principles on the basis of which the rights of the disabled persons are to be promoted and protected, the obligations that have been undertaken by the State parties to adopt measures. The protocol has been added to the present convention authorizing the Committee on the Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals, who claim to be victims of a violation by a State party of the provisions of the present convention.

Prohibition of Discrimination: In the Indian Constitution, Article 14 guarantees Right to Equality, Article 15 is a manifestation of "Right to Equality" under article 14, as it enshrines a specific dimension of the principles of equality relating to discrimination by state or various grounds. Article 15 of the Indian constitution deals with "prohibition of discrimination" on the grounds of religion, race, caste, sex or place of birth. In Maneka Gandhi v. Union of India, the Supreme Court gave a new dimension to Art. 21. The Court held that the right to live is not merely a physical right but includes within its ambit the right to live with human dignity.[15]

13 Universal Declaration of Human Rights, 1948

14 Rights of Disabled Persons, *available at https://www.legalserviceindia.com/legal/article-98-rights-of-disabled-persons.html*(last visited on Dec 05, 2022)

15 AIR 1978 SC 597; (1978) 1 SCC 248

The Government of India, Ministry of Social Justice and Empowerment, Department of Empowerment of Persons with Disability administers the following three Acts: -

1) The Rights of Persons with Disabilities Act, 2016
2) The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999
3) Rehabilitation Council of India Act, 1992

Nowhere in the above-mentioned provisions the recognition for the persons with Invisible Disabilities are identified or recognized. The legislation with respect to Persons with Disability in India does not have a wide scope as Americans with Disabilities Act (ADA), 1990. The list of medical conditions that can be evaluated for disability benefits seems exhaustive and as inclusive as possible in ADA.

The following are the benefits given to the Persons with Disabilities under the RPwD Act

Disability Certificate: The most fundamental document necessary for a disabled individual to be eligible for certain benefits and concessions. Any person with a disability of more than 40% may receive a disability certificate from the State Medical Boards, which was established under the State governments.[16]

Disability Pension: People who are above 18 years of age, suffering with more than 80% disability and are living below the poverty line are entitled to the disability pension under the Indira Gandhi National Disability Pension Scheme. Various NGOs are dedicated to this because i.e. they help such persons with disabilities to get their disability pension.[17]

Employment: The RPwD act increases the quantum of reservation for people suffering from disabilities from 3% to 4% in government jobs and from 3% to 5% in higher education institutes.[18]

Income Tax Concession: Under sections 80DD and 80U of Income Tax Act, 1961, persons with disabilities are also entitled to certain income tax concessions.

CONCLUSIONS AND SUGGESTIONS

The aim of this study has been to examine the nature and magnitude of the association between chronic morbidities and invisible disabilities, using recently available nationally representative data which is inadequate. Important findings of this article are that pointing out the unfathomable difficulties faced by the persons with Invisible Disability and the burden of persons with invisible disability is almost not addressed in India ***which takes away the right to dignity and right to redressal from them.***

16 The Rights of Persons with Disabilities (RPwD) Act, 2016 (No.49 of 2016), s.58

17 The Rights of Persons with Disabilities (RPwD) Act, 2016 (No.49 of 2016), s.34(3)(g)

18 Right to Reservation in Promotions for PwDs, *available at https://www.drishtiias.com/daily-updates/daily-news-analysis/right-to-reservation-in-promotions-for-pwds*(last visited on Dec 04, 2022)

The UNCRPD and the Government of India both use a dynamic definition of a person with a disability, programmes intended to help the disabled must also be dynamic. There is not a system in place to increase the list of infirmities and Invisible Disabilities. The RPwD act has much smaller range of application when compared to the American Disability Act. Majority of Patients with Auto Immune Disease especially young adults *do not have insurance availability*. Finding and keeping a job is challenging for them. It holds true for education as well. Their illness is viewed as taboo. Their illness has an impact on every aspect of their lives, and for individuals who have ostomies, the issues are exacerbated. According to the criteria for disability evaluation, a person with a missing toe is 10% impaired. A person without a colon or person who is constantly in acute pain is not recognized as legally disabled in any way. How is this even justifiable!

Persons with disabilities are one of the most neglected sections of our nation. This is due to the sheer indifference of the society which subjects such people to disapproval and antipathy. Despite having various International and National legal framework to safeguard the rights of the persons with disabilities, the implementation of those rights has been far reach. To top it off, the provisions does not have wide range of scope to include persons with invisible disability unlike the American Disability Act which has a broad range of application.

The narrative needs to change and change now. People need more awareness and education on this subject. How to be empathetic towards other's needs and difficulties. Especially understanding the Invisible Disability. December 3rd of every year is celebrated as The World Disability Day and The Invisible disabilities week is observed on October 16th – 22nd. Let's make a conscious effort to be more empathetic and kinder to everybody, for we don't know the battles,an individual is going through.

Without the government support their contribution to the society becomes minimal and optimisation of majority Community running around with invisible disabilities are expected to go on with no recognition and basic needs met which makes it a significant issue that needs to be addressed to sensitise and increase inclusiveness in the society. Persons with Invisible disability sometimes go through double the discrimination and no scope for redressal to resolve their suppression for their lifetime. Without the insurance or aid from the government in procuring health care benefits becomes even more challenging because of the scarce knowledge on the issueand the unattainable health care facilities due to unaffordable cost of medications and other medical facilities. Clearly Right to health and Right to Dignity has been violated in an unrestorable manner.

Human beings cannot merely exist without basic rights or amenities. Letting the persons with Invisible disability for life long without supporting their education, employment or health care is allowing them to suffer lifelong without basic rights to live a decent life let alone living a wholesome life with better standard of living as guaranteed by Article 25 (1) of UDHR, which states as "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services,

and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

As a concluding remarks, unless we understand and recognize the Invisible Disability, there is no scope for procuring proper health care. And the Right to redressal can be achieved only by changing the narratives and accepting there is a greater need and assistance is required for the persons with invisible disabilities, no person can be discriminated or left neglected for their basic and fundamental human rights. Hoping for better enactments and polices which are inclusive in nature and meets the bare minimum requirements for the persons with invisible disabilities.

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Rights of Women Workers in Unorganised Sector in India

*Ms. Sukanya Sharma**

A woman is the counterpart of man gifted with equal mental and physical capacities. She has the right to participate in the minutes details of the activities of man. She has the same right of freedom and liberty as he

- Mahatma Gandhi

In the period of ancient India, women were held in high esteem. The position of a woman in the Ancient History was that of a mother (Mata) or goddess (Devi). As per the Manusmriti, women were considered as a precious being who was firstly after birth projected by her father, followed by her brother and after marriage by her husband and finally by, her son. But the status of women keeps on declining with time. Our society is dominated by Muscle power and money power. Men considered themselves superior to women as they usually participate and fought the wars, ran the Business and Industries.

The term 'unorganised' is often used in the Indian context to refer to the vast numbers of women and men engaged in different forms of employment. These forms include home-based work (e.g. Making bangles and beedis), Road Side Vendors (e.g. selling household items), employment in household enterprises as a House-Helper, small units, on the field as agricultural Helpers, labour on construction building sites, domestic helpers, and many other forms of Unorganised or temporary employment. The unorganised sector work is more visible in India in a Physical Mode.

It is found in almost all the industrial segments of the Indian economy, that is, in agriculture, industry, household and the services sectors. But though it has been prevailing in India for a long time in one form or the other, it is only in the 1970s that it drew the attention of the policy-makers and researchers notably from the view point of opportunities for participation in and reaping the benefits of development. In India, the formal sector which received significantly large resources has failed to provide employment to the growing labour force, resulting in the problem of labour force explosion. Under these circumstances the surplus labour force has been forced to generate its own means of income and employment. This new class of petty-

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bourgeois is engaged in a variety of economic activities. In all major aspects of employment including the terms and conditions of employment, job security, earnings, perquisites, social security and retirement benefits, the unorganized labour is found to be in a disadvantageous position (S.K.G. Sundaram, 2000).

Workers India Federation is a CBCI (Catholic Bishop Conference of India) response to unorganised workers of India. Of 460 million of India's workers, 93% are estimated to belong to the unorganised workers.

Some division of labour exists between formal and informal sectors on the basis of gender. It has been suggested that women tend to stay within the informal sector because of the flexibility of working arrangements and diversity of opportunities. The position of women in the unorganised sector has been poor. The ShramShakti Report (II Bhatt Commision1988) has brought out comprehensively the nature of self employment taken up by women in this sector and has offered several suggestions for both men and women workers in this sector. The existing problems of domestic workers have been studied by many researchers, social activists and voluntary organisations at different levels. But they have not succeeded in providing a feasible solution to the problem. Perhaps, lack of a common perspective in this area is the main cause for it. Since the problems of women domestic workers are multifaceted, it should be studied holistically covering economic, legal, social, physical and psychological aspects. To achieve this objective, it is immensely needed to have an integrated approach to understand the issue and it is also important to develop a collective programme to improve their social status and working condition of women in general and women domestic workers in particular.[1]

PROBLEMS FACED BY WOMEN IN UNORGANISED SECTOR

Part-time or full-time, women's jobs are often the least secure."Women still tend to be the last to be hired and the first to be fired."

-Ms. Chinery-Hesse

- **Lack of education**: Illiteracy is the biggest problem because they do not get time to educate themselves. In childhood, they have to start working early which do not allow them to go to school.
- **Insufficient skill & knowledge**: Majority of female do not have proper training and skills aligned to their task. This results in excessive stress and inefficient working.
- **The exploitation of female labor**: the Female worker is more vulnerable to exploitation by the employer. They can be easily threatened with their job for indecent favors. They are also subjected to severe forms of sexual harassment in the workplace.
- **Insecure job**: Absence of strong legislation controlling the unorganised sector makes the job highly insecure in this sector.

1 (http://deshkalindia.com /publisher:Deshkal)

- **The non-sympathetic attitude of employer**: Temporary nature of employment in this sector does not allow the bond between the employee and employer to establish and become strong.
- **Extreme work pressure**: Female is overworked; they work twice as many hours as worked by their male counterpart. In the agriculture sector, the condition is the worst. When measured in terms of the number of tasks performed and the total time spent, it is greater than men as per one study in the Himalayas which found that on a one-hectare farm, a pair of bullocks' works 1064 hours, a man 1212 hours and a woman 3485 hours in a year.
- **Irregular wages payment**: There is a lack of controlled processes in the unorganised sector which results in an untimely payment of wages to the workers. When it comes to payment to female, it is even worst.
- **Wage discrimination**: Female doesn't get similar payment to the male for the same work.

INTERNATIONAL LABOUR ORGANISATION (ILO)

You can tell the condition of a nation by looking at the status of its women.

-Jawaharlal Nehru

When Amartya Sen had taken up the issue of women's welfare, he was accused in India of voicing foreign concern. He was told, Indian women don't think like that about equality. But he argued saying that if they don't think like that they should be given an opportunity to think like that.

The International Labour Organisation says that women represent:

i) 50% of the population
ii) 30% of the labour force
iii) Perform 60% of all working hours
iv) Receive 10% of the world's income
v) Own less than 1% of the world's property

Women's economic participation can be mentioned in the field of production of goods and services accounted in the national income statistics. However, female work participation has always been low at 26% compared to 52% of men. The problem is that women have always been at work; only the definitions of work and work plan have never been defined or realistic to include their contribution to the economy and the society.

- Work Force Participation Rate is the proportion of working population to total population.
- Labour force excludes children below the age of 15 and old people above the age of 60.

- Worker is one gainfully employed or one working for a livelihood- excluding unpaid family workers.

WOMEN DOMESTIC WORKERS IN INDIA

Some immediate interventions can be made at the following levels:

1. The organization of domestic workers is very important. A systematic mobilization is needed to help them in making their own associations and unions so that they can share some solidarity and build their own leadership.
2. There is a need to create public opinion on behalf of domestic workers to grant them the status of workers and dignified working conditions. A proper mutual dialogue may be useful in developing a suitable legislative mechanism.
3. The problems of women domestic workers have still not received adequate attention by researchers, members of voluntary organizations and other social activists as yet. A collaboration, frequent interactions and wider networking with the people and organizations working on the similar issue are required to intensity the movement for improving the overall condition of domestic workers.
4. There is also an urgent need to sensitize the wider society regarding their attitude towards 'Servant-Master' relationship and change it into a respectable 'Employee – Employer' relationship. Therefore it is extremely 53 important to create an environment where the domestic workers may enjoy their rights, duties and interests like other segments of the society.

Sex discrimination in the wage rate is a common feature despite the constitutional provisions of equal work for men and women under the Equal Remuneration Act, 1976. That affects both their economic and social status. The modernization has resulted in erosion of the little power that the women had in society. There is a need for women to create a situation in favour of gender equity in their society and economy. Many women also work in the informal sector, where their labour remained unacknowledged, under-paid and sometimes even unpaid. These sections of women face many problems at their work place and majority of them are deprived of the privileges like maternity leave, pension etc. Employment agencies place the migrant women for domestic work and the conditions of these women's work violate several laws, including Bonded Labour Act, Child Labour Act and Juvenile Justice Act.

The unorganized sector employs a large section of the workforce, especially women, in urban India. There is wide gap between the organized and unorganized sectors, in terms of wages and working conditions, as well as bargaining power. Domestic workers have employment throughout the year, but their wages are exploitatively low.

They are not aware of minimum wage laws for their categories of work. For these workers, it is pertinent to bring in policies relating to conditions of work, holidays, payment of wages, overtime etc. Some mobilization of workers must be attempted in order to organize them and increase their bargaining power capacities. These were physically, mentally or sexually abused.

JOB SEGREGATION

Job segregation remains a vital factor representing wage differences between the genders. In the industrialized nations, 75% of women are utilized in verifiably low-paying, service sector jobs; 15 to 20% work in assembling; and some 5% in agriculture. In a large number of the export processing zones of industrializing nations - where the vast majority of the work is work concentrated, minimal effort producing - 80% of the workforce is female.

In Southeast Asia, women who accessed occupations in export-led manufacturing enterprises are paid altogether not as much as men. For instance, in Singapore, women in non-farming enterprises earned what could be compared to 72% of men's wages in 1993; in Hong Kong it was 63% and in the Republic of Korea, it was 57% that year.

Notwithstanding when women enter generally "male" segments of the work showcase, they acquire not as much as men. In Canada, for instance, female directors are evaluated to win 15 to 20% less than their male partners.

"Universally, the work of women is not as highly valued as that of men," says Mary Chinery-Hesse. She adds that, "the idea that women are only good for certain types of occupations is simply false."

WAGE DISCRIMINATION

Wage discrimination is diminishing in the developed world, yet gradually. What's more, in certain nations there has been next to zero change. For instance, as per The ILO Yearbook of Labour Statistics, in 1992 salaried women in Belgium and the Netherlands earned, individually, 75% and 77% of what guys earned - a similar figure as in 1984. In Germany, female workers (in non-horticultural exercises) in 1984 gathered just 72% of what their male partners earned: by 1993 that figure had edged up to 74%. In France, winning women varied somewhere in the range of 80% and 82% during the period 1984-1993. In the UK, women breadwinners, who brought home 69% of male income in 1985, saw an expansion of just 2% to 71% of male profit.

Wage gains were marginally increasingly pronounced in Australia, ascending from 86% of men's pay rates in 1980 to 90% in 1993, for non-administrative representatives. Sri Lanka, where women's profit is 96% of men's income, is a standout amongst the most adjusted among the nations recorded.

In the United States, the normal time-based compensation of women working all day ascended from 72% of the male comparable to 82% through the course of the decade.

In Denmark, female wage earners lost a rate point, from 84% in 1984 to 83% in 1992, and in Iceland compensation for untalented female laborers dropped from 94% of male profit to 90% amid a similar period. Women laborers likewise lost ground in Japan (from 52% to 51%), Portugal (70% to 68%) and Turkey (97% to 95%).

SURROGACY

To understand surrogacy in the Indian context, one must begin with the fact that, while the Transplantation of Human Organs Act, 1994 banned the sale of human organs, organ loaning— an equally difficult and risky venture-is being promoted through paid surrogacy. This is due to a medical industry that welcomes profitable international ventures like ¯reproductive tourism even when infertility constitutes a small segment of domestic priorities. The incidence of total infertility in India is estimated at 8 to 10 per cent, and for the vast majority of Indian women it is preventable as it is caused by poor health, nutrition, maternity services and high levels of infections. Only about 2 per cent of Indian women suffer from ¯primary infertility which is amenable to ART alone. Moreover, it is further reported that among the cases of women who come for ART treatment, barely one per cent require surrogacy assistance.[2]

Surrogacy is the practice of gestating a child for another couple and could involve any of the various Assisted Reproductive Technologies (ARTs) like IVF (in vitro fertilisation), IUI (intra uterine insemination) etc. Surrogacy has gathered much attention due to the increase in the number of couples opting for surrogacy as well as of the women acting as surrogates. The fertility market is estimated at Rs. 25,000 crores today, with reproductive tourism (surrogacy business) is estimated at around Rs. 900 crores in India and is a growing industry[3]. The past years have seen a 150 per cent rise in surrogacy cases in India. The Gujarat town of Anand, is a hub of surrogate mothers.[4]

India has become the favourite destination for infertile couples from across the globe because of the globally falling birth rates, lower cost, less restrictive laws, lack of regulation of ART clinics and easy availability of surrogate mothers. Surrogacy arrangements are drawn up in a random manner in India and have raised a lot of moral, ethical, legal and health related issues. It can be exploitive for the surrogacy workers (surrogates), especially since most of them are from socioeconomically weaker sections of the society.

Commercial surrogacy, largely an unregulated grey area, has been allowed in India since 2002. In 2005, the Indian Council of Medical Research (ICMR) laid out the guidelines for surrogacy, which made the practice legal, but did not give it a legislative backing. ICMR provided pro-surrogacy guidelines that protected to some extent the surrogate worker and the commissioning parents. It prohibited sex selective surrogacy, required the birth certificate to have only have the commissioning parents' names, required one parent to be the donor of sperm or egg, required a life insurance cover for the surrogate and ensured privacy rights to the mother and donor.

2 Imrana Qadeer and Mary E John, The Business and Ethics of Surrogacy Economic and Political Weekly 10 (January, 2009)

3 http://timesofindia.indiatimes.com/india/Government-to-draft-surrogacy-bill-to-make-parentage-of-children-legal/articleshow/51210264.cms

4 N.B. Sarojini and Aastha Sharma, Guidelines Not Enough, Enact Surrogacy Laws , Hindustan Times, August 8, 2000.

The issues related to surrogacy remained complex and the legal environment in India remained favourable to surrogacy. Even the Law Commission of India has recommended to the Centre that legislation to regulate ART as well as the rights and obligations of parties involved in surrogacy should be enacted. In 2008, the Supreme Court entered the debate of surrogacy by hearing a petition filed by a German couple (Jan Balaz and Susan Anna Lohlad) with regard to grant of Indian citizenship for their surrogate twins, it made pertinent queries. The twins born to an Indian surrogate mother in January 2008 were stateless citizens, having neither German nor Indian citizenship. The German authorities had been consistently refusing visas to Nikolas and Leonard (said twins) on the ground that the state law did not recognise surrogacy as a means to parenthood, but finally agreed to provide the necessary documents after Balaz and his wife went through the inter-country adoption process supervised by Central Adoption Resources Agency. The Indian government, which was refusing to grant the twins Indian citizenship on the ground that they were surrogate children, also played its part in arranging their flight home by agreeing to provide exit permits[5].

The Supreme Court called surrogacy a medical procedure legal in several countries including India. At the same time, it also raised a concern about the absence of a law regulating surrogacy, so that there should not be any threat to the rights of a surrogate, commissioning parents and the child born out of such contract arrangement.

5 Dhananjay Mahapatra, Surrogate Twins to Finally go Home Times of India, May 27, 2010. Anil Malhotra, Business of Babies The Tribune, December 14, 2008.

Collusion by Price Fixing Algorithms: Competition Law Concerns

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ABSTRACTS

Artificial Intelligence has stepped into most of the human lifestyle spheres, such as shopping, movie suggestions and development of business strategies to name a few. But the use of Artificial Intelligence has also posed several issues depending on domain area of its use. Today online shopping spaces are seen to have inherent transparency and are dynamic in pricing goods and commodities they offer for sale. Very often than not, it has been observed that the prices of goods and commodities available at the online shopping platforms are fixed by algorithms and not humans. Algorithms have been used for price fixing because of their ability to store immense amount of data inclusive of consumer preference, products demand and real time prices of competitors among various others. Apart from promising advantages of employing algorithms in price fixing they even pose real time competition law issues. The paramount issue which the paper looks at is of tacit collusion caused by interaction of algorithms and no human interaction involved. It has been observed that algorithms can also be designed to mimic competitors or market leader's price without human communication taking place to that effect.

It is pertinent to note, that the competition law in India does not criminalize unilateral price fixing but collusive price fixing is penalized. An endeavor is made to analyze the scope of competition law regime to ascertain if its scope is extending to tackle collusion caused by use of pricing algorithms.

Key Words: *Artificial Intelligence, Competition Law, Collusion.*

INTRODUCTION

Humans have witnessed significant trade and market space changes with the advancements in internet and related technology. Buyers can now experience home comfort while shopping their desired goods as compared to the traditional brick and

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mortar model, in online shopping.[1] These online shopping spaces like Amazon.com, Flipkart.com, etc are seen to have inherent transparency and are dynamic in pricing goods and commodities they offer for sale. Very often than not, it has been observed that the prices of goods and commodities available at the above-mentioned platforms are fixed by algorithms and not humans.[2] Algorithms have been used for price fixing because of their ability to store immense amount of data about, consumer preference, products demand and real time prices of competitors among various others.[3]Apart from promising advantages of employing algorithms in price fixing they even pose real time competition law issues.[4] These issues include firstly the penalization of tacit collusion among competitors where algorithms are capable to communicate with each other without human intervention being involved, which results in collusive outcomes.[5] It has been seen that algorithms can also be designed to mimic competitors or market leader's price without human communication taking place to that effect.

It is pertinent to note, that the existing competition legal framework in India does not criminalize unilateral price fixing and has not sufficiently evolved to cover the algorithmic collusion.[6] This paper adopts a doctrinal research methodology to explain the concept of algorithms and their use in goods and commodity price fixing in online shopping platforms. A special emphasis on Amazon.com price fixing algorithm will be placed to explain the above said assertion. An endeavor to analyze the present Indian competition law regime to ascertain if it sufficiently covers the algorithmic collusion. In case the answer to question is negative, then the paper will make suggestions on the basis oflegislative framework and economic analysis, which can be adapted to prevent the adverse outcomes of algorithmic collusion on competition in the market. This paper is therefore exploratory in nature and hence descriptive.

ALGORITHMS AND COLLUSION: UNDERSTANDING

In order to appreciate the concept of algorithmic collusion it is important to understand the two concepts that is algorithm and collusion individually.

Algorithms: Algorithms as defined in oxford dictionary to mean "*A process or set of rules to be followed in calculations or other problem-solving operations, specially by a computer.*"[7] From the said definition it can be inferred that algorithm refers to a process in

1 Mark R Patterson "Antitrust, Consumer Protection, and the New Information Platforms" 31 *Fordhan University School of Law*97 (2017)

2 Mihailis E Diamantis"The Extended Corporate Mind: When Corporations Use AI to Break the Law" 98*North Carolina Law Review*893 (2020)

3 Peter Seele, Claus Dierksmeier, Reto Hofstetter and Mario D. Schultz, "Mapping the Ethicality of Algorithmic Pricing: A Review of Dynamic and Personalized Pricing" 170 Journal of Business Ethics 697 (2019)

4 *Ibid*

5 *Supra* note 1

6 The Competition Act, 2002 (12 of 2003)

7 Bundeskartellamt and Autorité de la concurrence, "Algorithm and Competition" 3 (November, 2019)

which rules need to be followed in a sequential order, to be precise in exact order that the programmer has set for the software to perform a given task. In other words, it can be said that algorithms apply logic in giving an output on given set of inputs. Advanced algorithms form part of Artificial Intelligence machines. Artificial Intelligence is referred to machine ability to mimic human intelligence in making informed decisions.

Artificial Intelligence has various domain areas such as machine learning and deep learning.[8] Machine learning is the algorithm which refers to the ability of a machine to learn from the data and experience available independently without human intervention being involved in it.[9] Samuel said that, "machine learning gives computers the ability to learn without being explicitly programmed."[10] On the other hand deep learning is a subset of machine learning. This function enables computers to learn by making use of complex software's which are designed to replicate or mimic human neurons activity by creating artificial neural network.

Collusion: Collusion is defined as a form of agreement or co-ordination among competing firms with an objective of earning profits higher than non-cooperative equilibrium, which results in deadweight loss.[11] In other words collusion is a strategy which competing firms use to maximize their profit earnings which might harm the consumers. For making collusive equilibrium sustainable competing firms need to ensure three things, first everyone needs to agree to a common policy, second adherence to the common policy should be monitored and third enforcement mechanisms should be in place to control deviations.

Economists differentiate between two types of collusion, first explicit collusion and second tacit collusion. Both forms of collusion are anti-competitive conducts by market players.[12] The former relates to competing forms forming an explicit agreement by directly interacting with each other and agree on an optimal level of price.[13] The latter differs from explicit collusion, as it does not require any explicit agreement

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8 Awishkar Ghimire1, Surendrabikram Thapa, Avinash Kumar Jha, Surabhi Adhikari and Ankit Kumar Accelarting Business Growth with Big Data and Artificial Intelligence, Proceedings of the Fourth International Conference on I-SMAC (IoT in Social, Mobile, Analytics and Cloud) (I-SMAC) Palladam India Novermber, 2020, available at <https://ieeexplore.ieee.org/document/9243318> (20th August, 2021)

9 Maria Paola Bonacina, *Automated Reasoning for Explainable Artificial Intelligence,* Conference: First Workshop on Automated Reasoning: Challenges, Applications, Directions, Exemplary Achievements (ARCADE), Satellite of the Twenty-Sixth International Conference on Automated Deduction, Gothenburg, Sweden November 8 2017, available at<https://www.researchgate.net/publication/318216210_Automated_Reasoning_for_Explainable_Artificial_Intelligence> (15th August, 2021)

10 Ibid

11 Salil K Mehra "Antitrust and the Robo-Seller: Competition in the Time of Algorithms"100 *Minnesota Law Review* 204(2016)

12 Saul Levmore and Frank Fagant"The End of Bargaining in The Digital Age" 103*Cornell Law Review*1469 (2018)

13 Ai Deng, "What Do We Know About Algorithmic Tacit Collusion" 33 *Antitrust* 1 (2019)

and competitors are able to maintain the agreement by recognizing their mutual interdependence.[14] Here each competitor decides his own profit maximizing independently. This type of arrangement is usually seen in transparent markets where competing firms take advantage from collective market power without having explicit interaction with each other.

There are two approaches to understand collusion, economic and legal.[15] Economic approach considers collusion as a market output whereas legal approach places its focus on means to achieve such collusive outcomes. Hence its can be argued that competition law does not prohibit such collusions rather prohibits anti-competitive agreements. In other words, it can be said that if collusion is a result of anti-competitive practices then suit for law infringement can be established.

After understanding the concepts individually, the question arises how they intersect with each other? Or what is the role of algorithms in collusion? The answer to the question is that algorithms can be used to fix the prices for goods and commodities available on online platforms. The algorithm can be programmed to fix the prices either lower or higher than the competitor. This task can be performed by simple algorithm, but on the other hand a complex algorithm is programmed to make price decisions relying on factors such as reviews from customers, number of clicks on the product or number of competitors in the market, to name a few.[16]Based on the above explanation it can be asserted that complex algorithms are possess the ability to solve more complex problems related to price fixing.

First algorithm designed to perform the function of price fixing was programmed on the basis of principle of "win-continue and lose-reverse".[17] In simple terms it denotes that a firm using algorithm to fix prices will measure profits after changing prices in a specific format be it upward or downward direction and continues to move in the same direction as long as profits keep increasing. As soon as losses are incurred then move in the opposite direction. A simple algorithm would be able to perform the task based on this principle as long as it does not require specific consumer data to perform this function.

Algorithms for price fixing can be developed in two ways[18], either the firm involved in selling the product itself develops for its use or buy from a technology developing firm. In the latter category the firm may develop the algorithm for generic purpose as compared to catering the needs of a specific good or service. Studies say that in 1990's and beyond that e-bay used to conduct online auctions or manually fix the prices. By the end of 2015 all the big online shopping platforms such as Amazon

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14 Michael O Wise "Antitrust's Newest New Learning Returns the Law to its Roots: Chaos and Adaptation as New Metaphors for Competition Policy" 40 *Antitrust Bull* 713 (1995)

15 Ibid

16 Daryl Lim "Predictive Analytics" 51 *Loyola University Chicago Law Journal* 161(2019)

17 Michal S Gal "Algorithmic Challenges to Autonomous Choice"25 *Michigan Technology Law Review* 59 (2018)

18 *Supra* note 11

started to use automated price fixing algorithmic software. Researchers suggest that it will not be possible for sellers deploying manual pricing mechanism to compete with the firms using pricing algorithms. Advancement in M is considered to be the major reason for increase in use of pricing algorithm. Big data is considered to poses traits of volume, velocity and speed.[19] Volume refers to quantum of data, velocity refers to the speed at which data can be gathered and speed is the changes that occur in data. One of the reasons for increase in penetration of pricing algorithms is the immense amount of data that the algorithms can store and process as compared to human brains.

This trend of using pricing algorithm has several benefits to the sellers but at the same time also pose potential issues. First among these issues these pricing algorithms do not assure that the prices of products will reduce ultimately benefiting the consumers. Second it raises competition law issues as it facilitates tacit collusion.

PRICING ALGORITHMS AND COLLUSION: ALGORITHMS FACILITATING COLLUSION

Competition authorities around the globe fear that the price determination algorithms might learn to collude. Collusion as explained above refers to a practice employed by competitors to maximize profit earning by agreeing to adhere to common policies.[20] These activities are done secretly and means employed are illegal. Clarke[21] states that collusion requires two steps to be followed, "*first there should be an agreement based on prevailing market state amongst competitors and second evolution of coordinated market strategy based on these homogenised beliefs*."

Economic literature reflects that tacit collusion is profoundly observed in oligopolistic industries, which havetransparent markets and they deal in homogenous products.[22] The transaction cost in coming to an agreement will not be prohibitive if there are less market players and at the same time monitoring cost to determine deviants will also be less.

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19 Nathan Newman "Search, Antitrust, and the Economics of the Control of User Data" 30*Yale Journal on Regulation*401 (2014)

20 Katrin Bukhali, "Price Discrimination with Inequity Averse Consumers: A reinforcement Learning Approach" Hohenheim Discussion Papers in Business, Economics and Social Science - Discussion Paper 2, University of Hohenheim 2020, available at < https://wiso.uni-hohenheim.de/papers> (21st August, 2021)

21 Richard N. Clarke "Collusion and the incentives for information sharing"14 The Bell Journal of Economics 383 (1983)

22 Matthias Hettich, Algorithmic Pricing and Tacit Collusion Cooperation in Multi-Agent Deep Reinforcement Learning, available at <https://www.google.com/search?q=Algorithmic+Pricing+and+Tacit+Collusion+Cooperation+in+Multi-Agent+Deep+Reinforcement+Learning&client=firefox-b-d&channel=nrow5&ei=zZ1BYdPkO6O_3LUPmaaaoA4&oq=Algorithmic+Pricing+and+Tacit+Collusion+Cooperation+in+Multi-Agent+Deep+Reinforcement+Learning&gs_lcp= Cgdnd3Mtd2l6EANKBAhBGABQwYZRWMGGUWCkjVFoAXAAeACAAa8BiAGvAZIBAzAuMZgBAKABAaABArABAMABAQ&sclient=gws-wiz&ved=0ahUKEwiT_6DRt4DzAhWjH7cAHRmTBuQQ4dUDCA0&uact=5> (8th August, 2021)

If we look at the types of collusion (explicit and tacit) from legal perspective,[23] despite of the fact that outcome (anti-competitive) of both is same but these collusions allow firms to earn large competitive profits. Explicit collusion is illegal in most of the jurisdictions as it involves explicit agreement, whereas tacit collusion is not illegal and it is beyond the scope of competition law because tacit collusion does not contravene competition law provisions.

Instance of the ill effects of using pricing algorithm has been seen in a case where price of a book gradually increased to $23 million per copy, sold atAmazon.com.[24] The two sellers who offered the book for sale were using simple price determination algorithm, which factored the price of the book with the sale prize of other competitors. The first selleralgorithm fixed the price for the book at 1.2 times the price at which the second seller was offering the same book.The second seller's algorithm fixed the price of the book 0.99 times the price of first seller. Because of the said programming of the algorithm employed in price determination the price of the book kept on increasing till the time it reached $23 million per copy, until one of the sellers had reset the price in line with usual market standards. Recently in July, 2019 consumers bought products on Amazon.com at very cheap price, the reason was algorithmic malfunctioning.

Algorithms employed in price determination on online shopping platforms include the following types:

1. Monitoring algorithm:[25] By making use of this algorithm a market player is able to keep track of the activities of his competitor and plan his future course of action accordingly. When we talk about online market place, the algorithms are not employed only for the purpose of price fixation rather are also used for the purpose of implementing past collusive agreements between the market players. In 2016 UK competition regulatory authority witnessed the use of a monitoring algorithm by two sellers in implementing their price fixing collusion agreement while selling goods (sports and entertainment posters) on Amazon.com. Monitoring algorithm enabled them to put in place their goods for sale on Amazon at the same price, the consumers had to buy the product at same prize the only difference would be of the seller from whom the purchase is made. This resulted in no competition between the sellers, which is not acceptable by the antitrust law as the agreement between the sellers is anti-competitive in nature.

23 Hariharan Venkateshwaran, "Anti-Competitive Nature of Pricing Algorithms" 7 *International Journal of Legal Developments and Allied Issues* 1 (2021)

24 Le Chen, Alan Misloveand Christo Wilson, An empirical analysis of algorithmic pricing on amazon marketplaceProceedings of the 25th International Conference on World Wide Web April 2016, available at < https://dl.acm.org/doi/10.1145/2872427.2883089> (18th August, 2021)

25 Ariel Ezrachi and Maurice E Stucke"Artificial Intelligence & Collusion: When Computers Inhibit Competition" 2017 *University of Illinois Law Review* 1775 (2017)

2. Hub and Spokes Model:[26] In hub (pricing software) and spokes (two or more competitors) model two or more competitors use the same pricing software algorithm. This situation usually arises when pricing software is developed by a third technology partner and employed by various sellers for price determination of their products. Use of same pricing algorithm results in the algorithm determining same price for good and commodities offered for sale by different seller, this ultimately results collusive prices. Though express human intervention is not involved in this scenario but information exchange and sharing takes place between the algorithms enabling the price determination.[27] Pricing algorithm developing partners set a share of revenue in the products to be sold, this acts as an incentive for the technology partners to develop algorithms which are able to set prices for the products at high competitive level, in order to increase their personal profits. Sellers on dominant online market platforms such as Amazon. Com use such algorithms to set prices for homogenous products. Complicated tacit collusion occurs in application of hub and spoke model as there lies a possibility of the fact that competitors are unaware of all the horizontal and vertical agreements in place. Hub and spoke model can pose major competition issue with respect to collusion in case many competitors in the market dealing in homogenous goods are using the same pricing algorithm, as in such scenario consumers will not have much scope to move from one seller to other.
3. Signalling Algorithm or Predictable Agent:[28] These algorithms make use of extensive input data sets for making pricing decisions. These data sets include information such as customer review or the product or service, price of the raw materials used in manufacturing process, demand for the product in the relevant market, etc. in such scenarios the probability of tacit collusion is high, as the algorithm will signal the price intention to competitors, this results in facilitating collusive outcomes. As there is no express agreement between the competitors for price fixing, it raises a debatable issue with respect to the algorithms signaling price fixation to competitors being an anti-competitive practice. An entity signals increase in price of his goods under the impression that the competitors will also increase the price of their goods, and in case the competitors do not respond to the signal by increasing the price, the entity initiating the signal loses the customer base, as the customers will prefer low price goods of the same quality and characteristics. But this signals not

26 Joseph Harrington and Patrick T. Harker "How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies" (2018) available at <SSRN: https://ssrn.com/abstract=3238244> (12th August, 2021)

27 Ashwin Ittoo and Nicolas Petit "Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective", in L'intelligenceartificielle et le droit, Hervé JACQUEMIN and Alexandre DE STREEL (eds), Bruxelles: Larcier, 241-256 (2020)

28 Michal Gal and Niva Elkin-Koren"Algorithmic Consumers"30 *Harvard Journal of Law and Technology* 309 (2017)

receiving intended outcomes, will not be a scenario if algorithms are involved in initiating these pricing signals. Delay in response to the signal probability is eliminated because algorithms can process and store data within fraction of seconds. These signals are initiated usually when the buyer activities are minimal, ultimately minimizing the risks associated to the signals.

Oligopolistic markets are favorable for signaling algorithms as there exist transparency, for example online markets where competitor's price can be ascertained easily. Whether signaling practices are anti-competitive or not is a debatable issue.

4. Machine and Deep Learning Algorithms: Machine learning algorithms are designed on self-learning capability basis. These algorithms learn by observing their environment or surrounding activities. An example of machine learning algorithm can be Alpha Go, designed to play the age-old Japanese game Go. This algorithm was not designed on how to play rather only the output that is to win. It has competed with various human players and have defeated world champion KeJie. Machine learning algorithms can cause tacit collusion as the algorithm can be programmed to set prices which results in optimum profits for the seller. The machine learning algorithm will predict the competitor's behavior which can either be a human or another algorithm and based on the said prediction set price. Herein algorithms over a period of time after operating in the market may learn that collusive practices earn higher profits which might be a problematic situation, as no human intervention is involved in this practice. Here the user of the algorithm does not have knowledge about the steps involved or procedure used by the algorithm in price fixing, which makes it even more difficult for the competition authorities to determine the sellers involved in collusion as the sellers are themselves unaware about these practices that the prize fixing algorithm uses. In this case the seller is aware of only the input and the output. The steps involved or the procedure used to result in collusive practices are hidden in the black box and that data is unknown which makes it even more difficult to determine if collusion has actually occurred or not. The machine algorithm works on the basis of the goals that it has to achieve that is earning high profits for the seller.

After understanding the various types of algorithms used in price fixing and the probability of collusion occurring by use of them, it becomes important to understand if the Indian competition law is in place to tackle situations of collusion occurring due to the use of pricing algorithms.

SCOPE OF EXISTING INDIAN LEGAL FRAMEWORK: ALGORITHMIC COLLUSION

India Competition Act, 2002 governs the competition law. It is largely framed on the basis of antitrust principles in place in European Union (EU) and United States of America (USA). Section 3[29] of the said legislation largely based on section 101 of the

29 The Competition Act, 2002 (12 of 2003)

Treaty on the functioning of the European Union in place at EU deals with anticompetitive agreements which prohibits horizontal price fixing agreements. Clause 3 of Section 3 expressly presumes that price fixation agreements cause significant adverse effects on the competition. Agreements as defined under the legislation have a very wide scope, as it includes arrangements, understandings and action in concert. It has been held by the Supreme Court that if price of commodities or services is found to be same on account of communication or information sharing between the competitors the said act will amount to be anti-competitive.

The question thus arises if the competition law covers under its ambit the above discussed algorithmic collusive price fixing issue. If yes, what is the remedy available and if not, what are the probable solutions that can be adapted by the competition commission to address this growing algorithmic collusive price practice, as collusion is per se anti-competitive. The author seeks to address the above two questions in this section.

Monitoring algorithms or Hub and Spoke model, is covered under the ambit of the present competition law regime which declared collusive pricing algorithms to be anti-competitive. Whereas signaling and machine learning algorithms may fall under the collusive practices which are not presently covered by the competition law in place.

In 'Monitoring' and/or 'Hub and Spokes Model' algorithms, the algorithm facilitates implementation of collusive agreement already existent between the competitor parties, and which has been categorized to be anti-competitive. Hence it can be rightly asserted in the above cases that thecompetition law legislative framework is in place to deal with tacit collusive practices. Example of the same can be "Uber"[30], the drivers of Uber enable Uber to fix price for their service.There is no express agreement between the drivers with respect to the price of service offered rather they have consented to a third-party algorithm to do this task for them. In other words it is Uber's algorithm which fixes price for all the driversand in addition the drivers have also agreed that they will not charge a price apart from the algorithms fixed one. This tacit collusion issue directly falls under the ambit of present competition law regime, and the competition commission in India held that this practice undertaken by Uber is not illegal for the reason that[31] "*In case of Cab Aggregators model, the estimation of fare through App is done by the algorithm on the basis of large data sets, popularly referred to as 'big data'. Such algorithm seemingly takes into account personalized information of riders along with other factors e.g. time of the day, traffic situation, special conditions/events, festival, weekday/weekend which all determine the demand-supply situation etc. Resultantly, the algorithmically determined pricing for each rider and each trip tends to be different owing to the interplay of large data sets.....In the case of ride-sourcing and ride-sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does*

30 Hubert Bekisz, "When Does Algorithmic Pricing Result In an Intra-Platform Anticompetitive Agreement or Concerted Practice? The Case of Uber In the Framework of EU Competition Law" *12 Jconcertedournal of European Competiton Law & Practice* 217 (2021)

not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission finds no substance in the first allegation raised by the Informant."

This decision is erred one, as the commission reasoned that there is not express agreement between the drivers with respect to price fixing per se, rather the drivers have tacitly outsourced this decision on Uber's algorithm (hub). This action falls within the scope of agreement as defined in Competition Act. Hence it can rightly be asserted that competition law is equipped to deal with tacit collusions occurring due to the use of algorithms in price fixing. There lies sufficient scope with the competition commission to declare this Hub and Spokes model tacit collusion illegal.

Another issue at hand is with respect to the Signaling and Machine learning algorithm. Unlike India the European Union and Unites States of America also do not make a mention of unilateral parallel behavior in their competition law regime. If a competitor increases the prices of the commodities observing the decision made by market leader constitutes to be a decision made independently and is therefore not categorized as anti-competitive. The major issue to be addressed here in Signaling and Machine learning is with respect to affixing liability as there does not exist any co-ordination among the competitors. In the latter case another concern is that the design of algorithm is so complex that it becomes nearly impossible to determine if the algorithmbeing used has colluded with the algorithm used by other market competitors. Moreover, machine learning algorithms are designed in such a manner that they learn themselves. This self-learning capability enables the algorithm to reach to a conclusion that collusive interaction leads to optimum prices resulting in profit maximization, which is the aim determined for algorithm to achieve. Human algorithm users are unaware of the illegal collusive price fixing strategy has been undertaken by the algorithm to achieve the set goal. Hence the competition law at place in India is not equipped to deal with the said signaling and machine learning collusive activities liability affixing.

POSSIBLE SOLUTIONS

The possible solution to the issues discussed above can be as follows:

1. Applying the doctrine of conspiracy: This doctrine has been developed by USA Antitrust body. Schwartz[32] mentions that, "*firms which persistently follow parallel business policies will be treated as if they had agreed upon those policies, at least where there is some evidence that they consciously faced the policy issue as a common problem.*" More broad interpretation to the term agreement can be a possible solution to determine the collusive practice being in place. As it is not viable to make actual communication to be a prerequisite for collusion to occur through agreement being in place, especially in cases where algorithms

31 Sameer Agrawal v. Competition Commission of India and Ors. Supreme Court 29th May, 2020

32 Louis B. Schwartz, "New Approaches to the Control of Oligopoly" 2 *Journal on Reprints Antitrust Law & Economics* 335 (1970)

have been used to perform the function of price fixing. Kaplow[33] argued that it will be appropriate to look at the end collusive result as opposed to the manner which lead to collusion.

2. Another possible solution to the problem can be monitoring the working of algorithms used in price fixing.[34] Though controlling the features of an algorithm might an impact on its effective performance. In applying this solution, which features of the algorithm result in collusive outcomes has to be determined and then controlled. This solution may not be a viable one when we consider machine learning algorithms, first, determining the feature which leads to collusive outcomes may be difficult to locate because machine learning is a self-learning algorithm. Second, these feature controlling mechanisms may have an adverse effect on the machine learning, learning mechanism.

Economists suggest that the algorithms ability to respond the price change in the market depends on the vast data sets based on which it works in a short span of time.[35] Based on this observation it has been suggested that a policy be put in place to regulate the number of times an algorithm responds to the price change. This policy may have adverse effects as it will reduce the signaling algorithms effectiveness and in turn also impact the seller's ability to respond to market change.

3. Prohibit the features to be incorporated in an algorithm which lead to collusive outcomes.
4. Companies deploying an algorithm for price determination must use the algorithm first in an artificial market. This method will enable them to predict the outcome of that algorithm's use, in other words if it's use is resulting in collusion or not. This practice will enable the market players/ competitors to avoid the problem of black box to an extent, as the procedure employed in price fixing may not be ascertainable but the outcome can be predicted.

Liability affixation in cases of collusion is another issue which needs to be addressed. Liability can wither be fixed on the human who has employed the algorithm,[36] or on the algorithm itself, or commission can take an approach of non-criminalizing any entity. The third approach is not feasible and should not be adapted as that will not resolve the problem of collusion in the market. Second option of fixing the liability on the algorithm is not again a viable option as imprisonment to an algorithm cannot

33 Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law* Harvard Law and Economics Discussion Paper No. 691 (2015) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873430> (28th August, 2021)

34 Francisco Beneke and Mark-Oliver Mackenrodt, "Remedies for Algorithmic Tacit Collusion" 9 *Journal of Antitrust Enforcement* 152 (2021)

35 J ZhannaMalekos Smith, 'Finding Humanity in the Great Power Competition for Artificial Intelligence' (2019) 103 Judicature 84

36 Niccolo Colombo "Virtual Competition: Human Liability Vis-a-Vis Artificial Intelligence's Anticompetitive Behaviours" 2*European Competition & Regulation Law Review* 11(2018)

be executed and fine cannot be recovered.[37] Hence fixing liability on the human employing algorithm is appropriate as that will ensure that every business entity deploys an algorithm wisely to perform price fixing function.

The concept of collective dominance[38] as recognized in the EU should also be applicable in Indian jurisdiction, as it will equip the authorities to curtail tacit collusion in oligopolistic transparent market. This proposal is strongly proposed by the author as collective dominance concept has proven to be successful at EU in curtailing tacit collusion.Here two business enterprises are collectively held dominant as tacit collusion resulted in supra-competitive prices.

CONCLUSION

Over the past decade, the number of salespeople using pricing Artificial Intelligence software to determine prices has increased significantly. This use of technology is not covered in the scope of competition law in India.[39]Online selling market includeshigh transparency and intelligent robots, have resulted in collusive practices in some cases. The complex software's based on unsupervised machine learning algorithms keep tab of prizes fixed by competitor market players and react immediately to change price. The price change is done by processing hugedata sets in short span of time. These technologically advanced artificial intelligent machine learning algorithms can get better with experience (as they learn from their surrounding and experience) can enter into collusive practices without human intervention involved, this can take place with or without human knowledge.

Monitoring algorithms and hub & spoke models are expressly dealt by competition law framework, as the role of algorithms in both of theseprogramming techniques confined only to implement an underlying anti-competitive agreement. But, the real challenge is posed by the use of signaling and machine learning algorithms, where no human interaction is involved before the "concerted action"[40] caused by the interaction of two competitors'algorithms is in place. Unlike human market competitors the algorithms do not enter into tacit collusion agreement, the tacit collusion facilitated by the use of pricing algorithms is not covered in the scope of competition law.

The first key question is how to define "agreement" and "concerted action" to let algorithmic tacit collusion fall within the scope of competition law. It is recommended to abolish the concept of human interaction/communication as an essential prerequisite for the behavior that amounts to "agreement" or "concerted action". Second issue is identification of the collusion by algorithms is another hurdle in fixation of liability.

37 Michael R Siebecker "Making Corporations More Humane through Artificial Intelligence" 45 *Journal of Corporate Law* 95 (2019)

38 Václav Šmejkal"Cartels by Robots: Current Antitrust Law in Search of an Answer" 4 *Intereulaweast* 1 (2017)

39 AnikBhaduri, "Tackling Collusion in the Digital Marketplace: Is the Competition Act Enough?" 41 *European Competition Law Review* 1 (2020)

40 Supra note 30

In order to resolve this issue making software code compulsory, adopting the concept of collective dominance, binding guidelines requiring algorithms to be tested before actually deploying them, etc. can prove to be a viable solution. Third issue is, fixation of liability is another issue that needs to be recognized here. For the second issue recognized it is recommended to impose liability on the party using the algorithm. In other word the liability for collusion will be fixed on the market player who has used the algorithm which indulged in the collusive practice.

There is an urgent need to improve the infrastructure and hire experts in this field from the competition authorities to control the collusion caused by use of pricing algorithms. A complete ban on the use of price fixing algorithm is not a socially efficient solution because the outsourcing of price-setting by humans to intelligent software's has resulted in significant efficiency gains on both the demand and supply sides. An efficient legislation that is able to tackle tacit collusions caused by use of advanced algorithms is needed, as here the role of human competitors is limited to the use of algorithms and there is no active participation in price-setting agreement. Amendment to the existing legislation (to include price fixing algorithm's collusion) will equip competition authorities to resolve the issue of anti-competitiveness of the software users in the market.

International Human Rights and the Victims Protection under Indian Constitution: An *Invitro* Study

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ABSTRACT

Human rights are defined as the rights which every human being is entitled to enjoy and to have protected. The struggle for the recognition of human rights and the struggle against political, economic, social and cultural oppression, against injustice and inequalities, have been integral part of the history of all human societies. The origin of the contemporary conception of human rights can be traced to the period of renaissance in the Twentieth century remains the witness of two world wars. In the year 1948, the Universal Declaration of Human Rights was proclaimed, and has been followed by other declarations. India is one of the signatory countries. It has inculcated these principles in the constitution under Part III and IV. Thus, in this invitro study, indebt information relating to international laws on human rights has been discussed with reference to Constitution of India.

Keywords: *Constitution of India, Universal Declaration on Human Rights, Charter of Human Rights, Rights against Exploitation, Right to Education, Right to Equality, Right to Life and Personal Liberty.*

I. INTRODUCTION

Human rights are generally defined as the rights which every human being is entitled to enjoy and to have protected. Every civilization, societies and cultures have in the past developed some conception of rights and principles that should be respected and some of these rights and principles have been considered universal in nature. The struggle for the recognition of human rights and the struggle against political, economic, social and cultural oppression, against injustice and inequalities, have been

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integral part of the history of all human societies. The conception of the rights which every individual enjoys as being a member of the human species has evolved through history in the process of these struggles.

The origin of the contemporary conception of human rights can be traced to the period of renaissance. But the historical development of human rights begins from the period of twentieth century. Twentieth century remains the witness of two world wars. After the World War-II, almost all the nations of the globe united together and framed the Charter of the United Nations which began with the following words: "WE THE PEOPLE OF THE UNITED NATIONS DETRERMINED to save the succeeding generations from the scourge of war…..and to encourage social development and a dignified for larger freedom…"

In 1948, the Universal Declaration of Human Rights was proclaimed wherein, an elaborate list of human rights anticipated as 'a universal standard of achievement for the people and nations' is the contemporary statement on human rights which are intended to be universally applicable. The Universal Declaration has been followed by other declarations which present in an elaborate form the human rights principles in respect of specific issues and aspects. There have also been many conventions and covenants which are elaborate statements of specific rights relating to specific aspects. These conventions and covenants are also special in the sense that countries that are signatories to them have explicitly agreed to follow them.

India is also one of the signatory countries. It has tried to include these principles in the Constitution itself under Part III as fundamental right such as Right against Exploitation, Right to Life and Personal liberty, Right to Equality etc. and under Part -IV of the Constitution, directions have been issued to the State Governments to make such laws which protects the rights of victims like, Child victims, elderly victims etc. judiciary in India is playing its vital role for the protection of rights of victims. In this article role of education in Human rights is also discussed because without education human rights cannot be protected at all. Education is also one of the fundamental rights enshrined in Article 21-A of Part-III of the Constitution of India. Whereby, children up to the age of 14 years are having fundamental right to get education.

II. MEANING OF HUMAN RIGHTS

Human rights are defined as the rights which every human being is entitled to enjoy and to have protected. Section 2 (d) of the Protection of Human Rights Act, 1993 defines "Human Rights" as a right anticipated to provide liberty, equality and a dignified life of the person guaranteed under the Constitution or enshrined in the International Covenants and enforceable by courts in India.[1]

1 https://indiankanoon.org, visited on 4th Feb'2022, see also https://www.indiacode.nic.in

Whereas, the Vienna Declaration[2] in which all representatives of 171 countries and hundreds of non-governmental organizations participated, unambiguously affirmed that "All human rights are common, indivisible, and interdependent and interconnected in nature." Human rights are further defined as rights provide to every human being, irrespective of race, gender, citizenship, ethnicity, language, religion or any other category. Human right further includes the right to liberty, expression, work, education, freedom from slavery, torture and many more. Everyone is entitled to these rights, without any discrimination.[3]

According to Marriam Webster Dictionary, Human rights are (rights which provide freedom from unlawful imprisonment, torture, and execution) regarded as belonging fundamentally to every individual. Thus, all are saying the same words and are universally accepted.

III. HUMAN RIGHTS AND VICTIM PROTECTION

"Victim" is defined as a person who, has suffered any harm or injury including physical or mental or any kind of torture or suppression individually or collectively that are in violation of criminal laws operative within member states, including any other laws prescribing criminal abuse of power.[4]

This definition covers many categories of harm sustained by people as a consequence of criminal conduct, ranging from physical and psychological injury to financial or other forms of damage to their rights, irrespective of whether the injury or damage concerned was the result of positive conduct or failure to act.

This declaration requires member nations to adopt measures that provide universal recognition and respect for the victims of felony and abuse of power. If any discrimination is made on the basis of race, sex, age, language, religion, nationality etc. it means the human rights of a person is being violated. Hence, it becomes the duty of every state to protect the rights of victims.

Criminologists classified victims into child victims, young victims, elderly victims, women victims, mentally ill victims, immigrants' victims etc. Young, elderly and women are more susceptible to victimization *per se* because of things such as physical vulnerability. Henceforth, Governments are making laws for the protection of human rights of these vulnerable groups of society. Basically, two issues are there, namely:

2 *Vienna Declaration*, 1993 or the world conference on Human Rights in Vienna on 25th June 1993 reaffirms the solemn commitment of all states to fulfill their obligations to promote universal respect for and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedom is beyond question. In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purpose of the United Nations. Human Rights and fundamental freedoms are the birth right of all human beings, their protection and promotion is the first responsibility of Governments.

3 www.un.org, visited on 4th Feb'2022.

4 Para 1, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1985

1) Protection and redress of victim of crime, and
2) Protection and redress of victim of Human Rights Violation

As far as first issue is concerned, conventional crime is committed by people in their private capacity against national penal law, and Governments are not, in principle, responsible for the illegal conduct involved. Whereas, acts committed human rights violations, are committed by organs or persons in the name of or on behalf of the state, for example by Governments, prosecutors, police officers and other law enforcement officials. However, in some specific cases, Government may also, be responsible for the acts of private individuals. These acts may constitute violations of fundamental rights and freedoms of persons under international human rights law and or under any other domestic laws.

It is pertinent here to note that the impact on victim of crime is not necessarily limited to physical injury and loss of property, but may also include "loss of time in obtaining financial redress and replacing damaged goods."[5] Hence, under this paper laws that exists globally for the protection of victim is being analysed.

IV. INTERNATIONAL LAWS AND PROTECTION OF VICTIMS

The violation of human rights is a universal phenomenon. Numerous types of torture, abuse, cruelty, and offences against marginalized and vulnerable sections of the society *i.e.* religious minority, caste minority, women, children, elderly people, LGBT etc. are very common. Several international laws such as Universal Declaration of Human Rights,[6] International Covenant on Economic, Social and Cultural Rights,[7] International Covenant on Civil and Political Rights,[8] International Convention on the Elimination of All Forms of Racial Discrimination,[9] Convention on Elimination of All Forms of Discrimination Against Women,[10] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[11] Convention on the Rights of Child,[12] etc. are there for the protection of the rights of victims. There is widespread acceptance of the importance of human rights in the international structure. However, there is a confusion prevailing as to its precise nature and as to the protection of these rights. The paper discusses some of them as under:

(1) Civil and Political Rights viz-a-viz Economic, Social and Cultural Rights: The UDHR, i.e. Magna Carta of human Rights did not categorise the different kinds of

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5 UN doc.A /CONF.144/20, annex, Guide for Practitioners, P.3, Para 5.

6 Universal Declaration of Human Rights, 1948.

7 International Covenant on Economic, Social and Cultural Rights, 1976.

8 International Covenant on Civil and Political Rights, 1976

9 International Covenant on All Forms of Racial Discrimination, 1969

10 Convention on Elimination of All Forms of Discrimination Against Woman, 1979

11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987

12 Convention on the Right of Child, 1990

human rights but in general it has been classified as (1) Civil and Political Rights (2) Economic, Social and Cultural Rights.

Civil Rights or liberties are those rights which are related to the protection of the right to life and personal liberty. They are essential for a person so that he may live a dignified life. Political rights may be referred to those rights which allow a person to participate in the Government of a State. Thus, right to vote, right to be elected at genuine periodic elections, right to take part in public affairs etc. are instances of political rights. The nature of civil and political rights may be different but they are inter-related and inter-woven and therefore, it does not appeal logical to differentiate them. Therefore, a covenant was formulated namely, International Covenant on Civil and Political rights.[13]

Economic, Social and Cultural Rights are related to guarantee of minimum necessities of the life to human beings. In the absence of these rights the existence of human beings is likely to be endangered. Right to adequate food, clothing, housing, adequate standard of living, right to work, right to social security, right to physical and mental health, right to education are included in this category of rights. Hence, these rights are covered under the International Covenant on Economic, Social and Cultural Rights.

These rights are sometimes called positive rights and require active intervention, not abstentions on the part of States. These are based fundamentally on the concept of social equality. Although these two sets of rights have been recognized by the UN into two separate Covenants, but there is a close relationship between them. It has been rightly realized by the developing countries that Civil and Political Rights can have no meaning unless they are accompanied by social, economic and cultural rights. Thus, both the categories of rights are equally important and one right cannot be realized upon full extent until the full realization of another right.[14]

In Vienna Conference of 1993 again it was emphasized that there is no difference between the two sets of rights by stating that: "All human rights are universal in nature and cannot be separated. The international community must promote fair and just treatment of every individual universally in a fair and equal manner, on the same footing, and with the same emphasis."[15]

Hence, it appears to be true as all the rights derive from the intrinsic dignity of the individual and are essential for his free and holistic development.

13 H.O. Aggarwal, *International Law and Human Rights*, 768 (2019)

14 International Human Rights Conference, held in 1968; *Supra* Note 17 at 769.

15 The 2005 World Summit Outcome also stated the same and affirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.

(2) International Convention on the Elimination of All Forms of Racial Discrimination: The UDHR has recognized two basic covenants i.e. International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Although they were binding on the States but none of them was particular about human rights. A number of conventions has been adopted under the auspices of United Nations to prevent the commission of certain inhuman acts such as slavery, forced labour, genocide, torture etc. because their commission is against the dignity and worth of human persons. Keeping into mind all these in the year 1969, the UN General assembly proclaimed the Declaration on the Elimination of All Forms of Racial Discrimination. Further, Article 2 of UDHR also provides the same that the rights and freedoms provided in the Declaration shall be available to all the persons irrespective of race, colour, sex and religion.

Hence, the Declaration of 1969[16] affirmed the fundamental equality of all persons and states that any discrimination on the basis of nationality, religion, ethnicity, place of birth, caste, colour , sex or any other field of public life is considered as 'racial discrimination'[17]. The Convention further clarifies that if any distinction, exclusion, restriction or preferences are made by the State party between citizens and non-citizens, the provisions of the convention should not apply on it.[18]

This Convention under Article 2 further puts some obligation on the State parties that they should not sponsor, defend or support racial discrimination by any person or organization and they should undertake not to any act or practice of racial discrimination against person or group of persons or institutions, further they should also ensure that all authorities, institutions either local or national, shall act in conformity with this obligation.

This Article further states that the State parties shall undertake to guarantee equality before law in enjoyment of human rights and shall take appropriate measures to review and recommend various governmental, national and local policies which have the effect of creating or perpetuating racial discrimination.

(3) Convention on Elimination of All Forms of Discrimination Against Women (CEDAW): The advancement of women has always been a focus of the work of the United Nations since its formation.[19] But due to constraints imposed by the society women and girls face multitude of problems relating to discrimination. Although these constraints are not imposed by law still, they are the victims and their fundamental rights of equality has been violated. At international platform, in the year 1979 a Convention on Elimination of All Forms of Discrimination against Women was adopted by the General Assembly. The Preamble to the CEDAW explains that, despite the

16 The Declaration on Elimination of All Forms of Racial Discrimination, 1969.

17 Article 1 of The Declaration on Elimination of All Forms of Racial Discrimination, 1969

18 *Supra* Note 17 at 849.

19 Article 1 of the UN Charter proclaims that one of the purposes of the UN is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedom for the people without distinction as to race, sex, language or religion.

existence of other instruments, women still do not have equal rights with men. Discrimination against women continues to exist in every society be in the field of Education, Employment, health care facilities, marriage and family resolution etc. Moreover, the Convention do not provide for individual complaint system.

Although in order to fulfil this deficiency in the year 1999, the UN General Assembly adopted the Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women which would enable women victims to report the abuses to the committee on the Elimination of Discrimination against Women against State Parties to the Protocol. Then the Committee will prepare the report and recommendations are transmitted to the parties concerned. After that, within the period of six months, the State parties has to send the written statement to the committee, including remedial steps taken.

(4) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:[20] Article 2 of this Convention imposes obligation on the State parties to take effective, legislative, administrative, judicial or other measures to prevent acts of torture. The prohibition against torture shall be absolute and shall be upheld also in state of war and in other exceptional circumstances. It further provides that proper inquiry should be initiated against the suspected person of the said offence of torture and each state party shall ensure to victims of torture an enforceable right to fair and adequate compensation.[21]

(5) Convention on Rights of Child: UDHR has stipulated under Para 2 of the article 25 that childhood is entitled to special care and assistance. The Covenant on Civil and Political Rights[22] and Covenant on Economic, Social and Cultural Rights[23] made provisions for the care of child. In number of other international documents, it was stated that family environment should be given to every child for his psychological growth as well. It is also required for happiness, love and understanding.

The Convention on Right of Child was adopted in the year 1989[24] with the objective for the protection of children's civil, political, economic, social and cultural rights, later on three Optional Protocols to the Convention on the Rights of the Child have been adopted namely, Optional Protocol on the Involvement of Children in Armed Forces,[25] Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography[26] and Optional Protocol on the Rights of Child on a Communication Procedure.[27]

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20 Adopted by General Assembly on 10th December' 1984.

21 Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

22 Article 23 & 24 of International Covenant on Civil and Political Rights, 1976

23 Article 10 of International Covenant on Economic, Social and Cultural Rights, 1976

24 It was further ratified on December 11' 1992.

25 Adopted in May 25' 2000. India ratified the Protocol on November 30' 2005.

26 Adopted in Jan 18. 2002. India ratified the Protocol on August 16, 2005.

27 Adopted in December 19' 1911 but it came into force on April 14, 2014.

V. INDIAN CONSTITUTION ON UNHRD OBLIGATIONS

The Universal Declaration on Human rights had a great impact on the Framers of the constitution. Many provisions in the Indian constitutions were influenced by the Universal Declaration. The Preamble, Provisions of Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) bears a close relationship with the Universal Declaration. The Framers of the constitution had a staunch belief for the conservation of human rights, therefore they had decided to frame the constitution in such a way that the rights of the citizens, as well as, aliens should be preserved and equal and adequate opportunities for development should be given to all. The provisions of the Indian Constitution that are similar to the Declaration are as follow:

Table 1.1[29]

Rights	Universal Declaration	Indian Constitution
Equality before Law	Article 7	Article 14
Prohibition of Discrimination	Article 7	Article 15 (1)
Equality of Opportunity	Article 21(2)	Article 16 (1)
Freedom of Speech and Expression	Article 19	Article 19 (1) (a)
Freedom of Peaceful assembly	Article 20 (1)	Article 19 (1) (b)
Right to form association or Unions	Article 23 (4)	Article 19 (1) (c)
Freedom of Movement within the border	Article 13 (1)	Article 19 (1) (d)
Protection in respect of conviction for offences	Article 11 (2)	Article 20 (1)
Protection of life and personal liberty	Article 9	Article 21
Protection of Slavery and forced labour	Article 4	Article 23
Freedom of conscience and religion	Article 18	Article 25 (1)
Remedy for enforcement of Rights	Article 830	Article 32

The above table shows that how Indian constitution provisions are influenced by the Universal Declaration on human rights while providing a model for human rights provisions in India. In a landmark judgment of *Keshvananda Bharti* v. *State of Kerela*[30] the Supreme Court stated; ''The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of Human Rights'' when India adopted its constitution.

VI. LEGISLATIVE PROVISION FOR THE PROTECTION OF THE VULNERABLE SECTIONS OF THE SOCIETY

(a) National Commission for Schedule Caste (Article 338): For the protection of the interest of the Schedule Caste, Indian constitution provides a constitutional body under article 338 which investigates and monitors all the matters relating to the

28 Universal Declaration on Human Rights.

29 See H.O Agarwal, 'International Law and Human Rights' Twenty first Edition, p.789.

30 AIR 1973 Supreme Court 1461 at 1510.

safeguard of the SC's.[31] It inquires into the complaints with respect to the deprivation of the rights of the Schedule Caste's. It also suggests various socio-economic plans for the welfare and development of the SC's. The commission consists of a chairperson, a vice chairperson and three other members. The commission provides a sense of security to the weaker section of the society and has been working efficiently for the protection of their rights

(b) National Commission for Schedule Tribes (Article 338 A): Schedule Tribes are the indigenous people living in the country but could not have benefitted from any government schemes for a long period of time. They have their different culture and wanted to remain undisturbed form the outside society. The protection of those people remained a priority for the Indian constitution framers. Earlier there was a single commission for the SC's and ST's. But with the 89th Constitutional Amendment Act of 2003 a separate National Commission for Schedule Tribes was established. It came into existence in 2004 under Article 338-A of the Constitution. In the year 1999 a separate ministry of Tribal affairs was formed to keenly look into the welfare and socio-economic development of the ST's.

VII. ROLE OF JUDICIARY FOR THE PROTECTION OF HUMAN RIGHTS OF VICTIMS

It is not easy to sum up the role of Judiciary regarding victim protection from Constitution to Criminal Justice System in India. Therefore, an attempt has been made to discuss the important aspects of victim protection.

(a) Hard Labour by Prisoners: The Kerala High Court *In the Matter of: Prison Reforms Enhancement of Wages of Prisoners*[32] has declared that the prisoners are entitled to payment of reasonable wages for the work taken from them. But the question that has been taken into consideration: can prisoners be made to do hard labour against their will? Is it hit by Article 23 of the Constitution? The Supreme Court in *State of Gujarat* v. *Hon'ble High Court of Gujarat*,[33] ruled that a prisoners sentenced to Rigorous Imprisonment can be made to do so. But even then, they should not be exploited and being paid equitable wages for his work. The Hon'ble Court has directed each State Government to appoint a wage-fixing body to determine the quantum and a committee for the enforcement of them should also been constituted.

(b) Victims of Sexual Abuse: The Judiciary in India is doing its best to protect not only the women victims of sexual abuse but they are also protecting the human rights of prostitutes and even their children.[34] The Immoral Traffic (Prevention) Act, 1956 has been enacted by the legislature with the aim to supress the evils of prostitution in women and girls and achieving a public purpose, viz. to rescue the women and

31 Article 338 is contained in Part XVI of Indian Constitution entitled as "Special Provisions Relating to Certain Classes".

32 AIR 1983 Ker. 261.

33 AIR 1998 SC 3168.

34 *Gaurav Jain* v. *Union of India,* AIR 1997 SC 3021.

girls fallen forcefully to stamp out the evils of prostitution and to provide them an opportunity so that they could become decent members of the society.

The Apex Court has also taken the offences committed with women at work place seriously. In *Vishaka* v. *State of Rajasthan*,[35] *Appareal Export Promotion Council* v. *A.K.Chopra*[36], the Hon'ble Court has observed that : " Sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated."

Rape is yet another heinous crime which has been held to be violation of a person's fundamental right to life guaranteed under Article 21. The Supreme Court in *Narender Kumar* v. *State (NCT of Delhi)*,[37] and in *Bodhisattwa Gautam* v. *Subhra Chakraborty*,[38] has observed that: "Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is, therefore, the most hated crime. It is a crime against human rights and is violative of the victim's most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21."

(c) Under-Trial Victims and Victims under the Custody of Police: These two categories of people are also prone to human rights violations. Judiciary is trying its best to protect the rights of under-trial victims and victims under the custody of police. Krishna Iyer, J. in *Prem Shankar* v. *Delhi Administration*[39] has asserted that insurance against escape does not compulsorily require handcuffing. The similar view was also laid down in *Citizens for Democracy Through its President* v. *State of Assam*,[40] by the Supreme Court and it was directed that handcuffs or other fetters shall not be forced on a prisoner convicted or under-trial while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another jail or to court or vice-versa. The Apex Court in number of landmark cases[41] protected the human rights of victims under the Police custody and decides that custodial torture violates the basic rights of citizens and if there is some material on record to reveal the police atrocities, the court must take stern action against the erring police officials in accordance with law.

(d) Right to Medical Care: Supreme Court is also taking attention of people who has been devoid of the basic right of medical care facility because it is not only the fundamental right of people to have it but it is the duty enumerated in Part IV of

35 AIR 1997 SC 3011; See also *Medha Kotwal Lele* v. *Union of India*, AIR 2013 SC 93 (101)

36 AIR 1999 SC 625.

37 (2021) 7 SCC 171 (179).

38 AIR 1996 SC 922.

39 AIR 1980 SC 1535.

40 AIR 1996 SC 2193.

41 *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746; *Raghubir Singh* v. *State of Haryana*, AIR 1980 SC 1087; *Shakila Andul Gafar Khan* v. *Vasant Raghunath Dhoble*, (2003) 7 SCC 749; *Prithipal Singh* v. *State of Punjab*, (2012) 1 SCC 10 (25)

the Constitution to provide best medical facility to every individual without any discrimination on the ground of class, gender, sex, colour etc. A Bench comprising of Dr. D.Y. Chandrachud, L.Nageswara Rao and S. Ravindra Bhatti. JJ. of Hon'ble Supreme Court in *Re: Distribution of Essential Supplies and Services During Pandemic,*[42] observed that during second wave of COVID-19 Pandemic- differing standards for admission in different hospitals across nation leads to chaos and uncertainties. Hence, directions were issued to C. Govt. to frame policy in this regard, in exercise of its statutory powers under Disaster Management Act, 2005, which would be followed nationally. It was also directed by Hon'ble Court that buffer emergency stock of oxygen should be created so that if supply chain is disrupted in any hospitals, buffer or emergency stocks can be used to avoid loss of human lives.

Directions were further issued regarding vaccination to 18-44 Years age group that available stock of vaccine is not adequate to deal with requirements and C. Government must take responsibility of providing guidance to every State on quantities to be supplied to each State, vaccine being allocated, period of delivery and number of people who can be covered for vaccination. Another direction include that the C. Govt. is free to choose any available course of action that it deems fit to tackle the issue of vaccine requirements-which may involve negotiations with domestic and foreign producers of vaccines. Other than that, directions were issued by the Apex Court that Medical, Nursing and Pharmacy students graduated in 2020 and 2021, would be available to augment workforce in health sector. Armed Forces, Para Military Forces can be used for purpose of vaccination. C. govt can also be directed to prosecute those people who are indulging in black marketing of drugs and medicines. The welfare of public health care professionals during COVID-19 pandemic should be considered seriously by the Central and State Govt.

Other than that, offences committed against children, Health of Labour, Environment Protection, Care Homes living condition improvement, Issues related with Slum Dwellers etc. are some of the other avenues where the Judiciary is trying to protect the human rights of victims.

VIII. CONCLUSION AND SUGGESTIONS

In the era of globalization where actions of one county directly affect the world, there are various contemporary global threats to Human Rights like Terrorism, Environment effects, Privacy, Sexual abuses, Cyber threats etc. These new challenges need new international and national laws to tackle them in a swift manner. Special attention is required for the weaker section of society. As with the advent of technology and the strike of Covid-19 where all the daily chores are performed with the help of technology, cyber threats in online payment, breach of privacy, sexual exploitations etc are the new challenges. There is a dire need to educate the masses so that they may be aware of their rights and duties. Education is the way to empower the masses and preserve their rights. Along with the education of rights and duties the

42 AIR 2021 SC 2356: AIR Online 2021 SC 242.

education of modern technologies uses should also be made a compulsory subject in the school curriculum. Not only a single country can solve these challenges but collective efforts are required. Although there are various national and international laws covering major issues of human rights protection and Judiciary is playing a vital role in providing justice to the people. But sometimes the judicial process took a way longer time to provide justice to the people. As former British prime minister William E. Gladstone has rightly said "Justice Delay is Justice Denied" we should make the judicial process a little more expedited. Fast track courts to listen to the cases related to human rights violations can possibly play a leading role.

Changing Dimensions of Dowry Laws in India and its Neighbouring Countries

R. Prerna Sharma* & Dr. Ankita Sharma**

ABSTRACT

India is the second most populated country in the world with approximately 138 crores of people and almost half of them are women, so the development of the nation is directly connected with the growth of women. However, in India women are often deprived of their basic rights and this raises a question of gender bias as well as the presence of a patriarchal system in the 21st century. Discrimination may be considered one of the factors plaguing the path of women's rights. Dowry is one such repercussion of gender discrimination and also dowry is an internal part of marriage in various cultures in India. Dowry itself leads to domestic violence, female foeticide, and child marriage, and the reason for the lack of female education. This paper will attempt to grapple with the different challenges faced by women in India and the neighbouring countries in the area of dowry cases like dowry violence with women, abetment to suicide, dowry death or dowry murder, etc. The aim of the paper is to study the changing dimensions of law in the sphere of dowry cases as the Dowry Prohibition Act, 1961 has not been adequately put into operation in India. The paper also aims to suggest strategies to empower women uniformly in Indian society.

Keywords: *Dowry in India, Dowry Death, Bride Price, Streedhan, Dower (Mahr).*

INTRODUCTION

Dowry is an ancient practice that likely originated in the Middle East and spread to India, the Mediterranean, and parts of Africa. It is believed to have originated in the Middle East during the time of the Pharaohs. It is believed that the practice of dowry was introduced to India by the Aryans. India is the second-largest populated country after China in Southeast Asia.

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Dowry means assets given by the family or by the father of a girl at the marriage or before/ after marriage, in other words, we can describe it as a consideration for marriage by the bride's family. Dowry is part of social-cultural customs in society. Indian society has different linguistic, and regional beliefs, and different customs. Almost half of the nation's population are women but yet women are deprived of their basic human rights or fundamental rights in society. The development of any nation also depends on women's growth. Discrimination may be considered one of the factors plaguing the path of women's fundamental rights. Dowry is one such repercussion of gender discrimination and also dowry is an internal part of marriage in various cultures in India. Dowry's practice does not only lead to various issues that are connected with the perspective of socioeconomic but also with the legal perspective. Dowry practices create more hurdles in the development of women's empowerment. The northern parts of India have high rates of dowry cases and dowry deaths as compared to the southern parts of India. States like U.P, M.P, Rajasthan, and Odisha are considered to be having more cases of dowry practice and dowry death. Although this evil custom is being practiced in both parts of the country i.e., North India and South India. Whereas in North India dowry includes a car, the sum of money, a bed, utensils, or other materialist thing but in southern parts of the country, dowry means gold – how much gold is given by the parents of the bride during the marriage. However, dowry practice is not only limited to the Hindu community but this custom is also being followed by the Muslim community and Christian communities. The demand for dowry amounts depends on the status of the bridegroom. Kerala has the highest literacy rate in India and very less dowry cases. After marriage, if women want to escape from the abusive marital bond, then divorce is the only way out but in Indian culture - divorce is not a healthy practice for women in India. Due to the high literacy rate, women are more educated in Kerela and also much more aware of their rights. High Immigration to foreign nations can often be seen in Punjab and Kerela due to which people in these two states have good wealth and high family status. However, this high family status leads to high demand for dowry by the groom's family. The amount of dowry is connected with different factors such as the education of the bridegroom, his employment status; government or private employee, own house, and other assets are considered. Even in some cases when the boy is not well established or well settled then also dowry plays an important part because of the presence of a patriarchal mindset in the society. This leads to Gender discrimination and results in women's disempowerment as well as domestic violence. Dowry laws have had a significant impact in many countries around the world. In some countries, dowry laws have been used to combat the practice of dowry, while in other countries, they have been used to protect women's rights and discourage the practice of dowry. In India, dowry laws were enacted in 1961, with the intention of preventing the practice of dowry. The law was designed to punish those who accept or demand dowry and those who give or receive it. These laws have had some success in curbing the practice of dowry, although it is still practiced in some parts of the country. In Bangladesh, dowry laws were enacted in 1980, with the intention of protecting women's rights and discouraging the practice

of dowry. The laws have been moderately successful in curbing the practice of dowry, although it is still practiced in some parts of the country.

In Pakistan, dowry laws were enacted in 1961, with the intention of discouraging the practice of dowry. The laws have been moderately successful in curbing the practice of dowry, although it is still practiced in some parts of the country. In Nepal, dowry laws were enacted in 2006, with the intention of protecting women's rights and discouraging the practice of dowry. The laws have been moderately successful in curbing the practice of dowry, although it is still practiced.

Dowry is not a common practice in China. The Chinese government has actively discouraged the practice of dowry since the 1950s, and it is now illegal in the country. Chinese families traditionally gave gifts to the bride's family as a symbol of appreciation, but the gifts would not be of significant value.

Dowry is not a customary practice in Sri Lanka. Although dowry is still practiced in some parts of the country, it is not as widespread as it is in other parts of South Asia. However, in some rural areas, it is still common for families to give gifts to the bride or groom's family as part of the marriage negotiations. These gifts can include money, jewelry, clothing, and other items. In some cases, the bride's family may also be expected to provide a dowry to the groom's family. In this research paper, the doctrinal methodology has been adopted.

DEFINITIONS; DOWRY, DOWER, BRIDES PRICE, AND STREEDHAN

These four terms - Dowry, Dower (Meher), Brides Price, and Streedhan sounds similar but has different meanings as per different religion and cultures.

Dowry is an asset given by the family or by the father of a girl at the marriage or before/ after marriage, in other words, we can describe it as a consideration for marriage by the bride's family. The term Streedhan is very often misinterpreted as dowry but both have different meanings. Streedhan means property of women and on which women have absolute ownership. It is given by the bridal family members to the bride – voluntarily as a token of love to establish her property not to the bridegroom or to his family. Other terms may sound similar to dowries such as dower (Meher) and Bride price. Dower (Meher) is an amount of money / assert in terms of a token of love as well as respect provided by the husband at the time of dissolution of marriage[1]. Bride prices are altogether a flip-side concept of the dowery. In Bangladesh, bride price (pawn) was the concept that was originally followed by the people but later this tradition got replaced with a dowry which is also known as Joutukh or Joutuk.

The custom of dowry is present in different countries across the globe and it has different names according to their culture and languages. The practice of dowry custom can be seen across the globe and it is known by various names in different

1 Rakesh Kumar Singh, *Law of dower (Mahr) in India,* JOURNAL OF ISLAMIC LAW AND CULTURE, (November 24, 2010), Law of dower (Mahr) in India: Journal of Islamic Law and Culture: Vol 12, No 1 (tandfonline.com)

cultures – "in Hindi (*Dahej*), Tamil (*Varadhachanai*), Urdu and Arabic (*Jahez*), Bengali (*Joutuk*), Mandarin (*Jiazhuang*), Turkish (*Ceyiz*), French (*Dot*), and Nepali (*Daijo*) and African countries, it is known as *Idana.*"[2]

DOWRY PRACTICE IN THE 21ST CENTURY IN INDIA

Dowry is the sum of consideration paid by the father or guardian or family member of the bride during the marriage or even after the marriage. Dowry's definition is not limited to goods, property – movable/ immovable, cash, and material things given during or before marriage or demands after the marriage. Dowry custom is being practiced in India for many centuries. India has various religions and different cultures and payments are made at the time of various ceremonies such as childbirth, and baby shower (Godh Bharai).[3] These ceremonies do not fall under the ambit of dowry.[4]

The origin of dowry had a different purpose altogether which has changed with time. In ancient times dowry was considered a stepping stone for the newly wedded couple to begin their new life easily; household things such as furniture, bedding, utensils, clothes, and other basic things were given to the couple to establish their house or to begin their married life.

But with time, the motive of the custom disappeared and got converted into demands for marriage. The importance of dowry has been converted into evil because of the materialistic approach of society. A dowry is traditionally seen as a gift from the bride's family to the groom's family, meant to ensure the financial security of the bride in the new home, it encourages the groom's family to take responsibility for the bride and protect her interests and that dowry money can be also be used by the bride's family to avoid economic hardship in the event of her husband's death or disability. However, in recent times, dowry has become a source of extortion. Families of the groom have started to demand excessive dowry amounts, which are often unaffordable for the bride's family. Dowry not only created economic pressure on the bride's family but also encouraged a materialistic approach to marriage and a sense of entitlement in the groom and in some cases, it leads to domestic violence against the bride. This has led to the abuse and exploitation of young brides, as well as the neglect of female children due to the perceived burden they bring. As a result, dowry has become an evil in many societies, which is why it has been discouraged by governments and social organizations.

However, there are various conflicting remarks were given by the different authors about the presence of the practice of dowry in ancient and medieval cultures so it's not possible to produce any consistent fact.[5]

2 Rajeev Kumar, Dowry System: Unequalizing Gender Equality, 1-12, (Springer, Cham. 2019).

3 State of Andhra. Pradesh Vs. Raj Gopal Asawa and Anr, (*2004) 4 SCC 470.*

4 Satvir Singh& Ors. Vs. State of Punjab (2001) 8 SCC 633.

5 JACK GOODY, STANLEY JEYARAJA TAMBIAH, BRIDEWEALTH AND DOWRY, (Cambridge University Press, Cambridge 1973)

CRIMES RELATED TO DOWRY PRACTICE IN INDIA

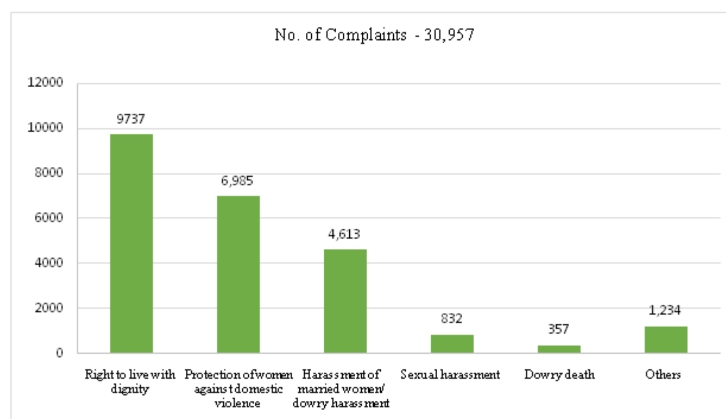
The definition of the dowry has changed with time previously it was considered a voluntary gift but nowadays it is considered a demand/ forceful demand. When these forceful demands of the groom were not met, subsequently dowry-related crimes and violence began to come to light. It is not possible to rely on the database available because most of the data of the hospital have a common cause of death: kitchen fire-related accidents, self-immolation, and domestic violence. "In almost all the cases the age group of the women is between 15 and 34 years. In most cases, the main reason behind the deaths is directly connected to the dowry demand because, after the death of the wife, men had an option of remarriage and fetching dowry again from the new bride's family". Female homicide is also part of the dowry practice in society and unequal sex ratio in any country across the globe results in gender bias. Initially, it was considered that dowry issues are arising because of the lack of awareness of rights and law. However, with modernization, even educated people are following this practice in the name of voluntary gifts. Dowry practice as a custom is still pervasive in the country but with new insights.

Database of Crime against Women in India

The rise in dowry-related cases can be attributed to several factors. One of the major reasons is the traditional belief that dowry is necessary for marriage in India. This has led to an increase in demands for dowry and the prevalence of dowry-related harassment and violence. In addition, gender discrimination and the patriarchal structure of society are also contributing to the increase in dowry-related cases.

Nature-wise number of cases registered during 2022 is 30, 957 in India.

(Statistical Overview of Received Complaints, 2022)

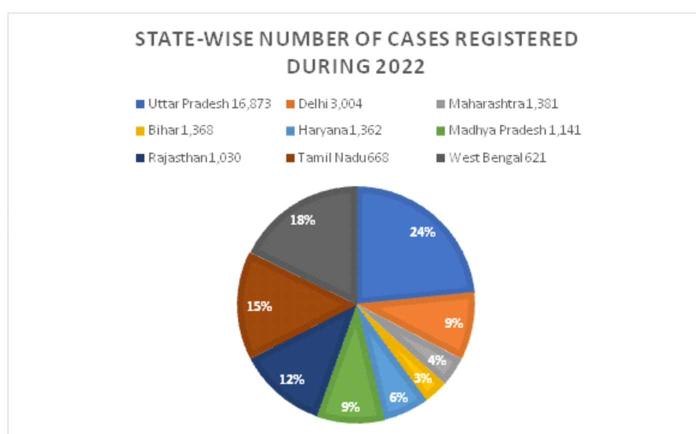


Source: National Commission for Women, Statistical Overview of Received Complaints

Nearly 30,957 complaints of crimes committed against women were received by the National Commission for Women – National Commission for Women (NCW) in 2022, the highest since 2014, with over half of them from Uttar Pradesh (U.P), India. Out of 30,957 complaints, a maximum of 9737 were related to the right to live with dignity taking into account - emotional abuse of women, followed by 6,985 cases of domestic violence, 4,613 cases of harassment of married women/ dowry harassment, 832 cases of dowry death and others women related offences according to official data of National Commission for Women (NCW).[6]

The overall number of complaints received in 2020 was around 23,722, but in 2021, 31,000 reports were received, and in later 2022, 30,957 complaints were received. The number of reports of crimes against women increased by 30% in 2021 compared to 2020, while there was only a very minor decline in 2022.[7]

State-wise number of crimes against women



Source: National Commission for Women, Statistical Overview of Received Complaints

The most populated state of Uttar Pradesh has recorded the highest number of complaints of crimes against women at 16,873, followed by 3,004 complaints in Delhi, 1,382 complaints in Maharashtra, 1,368 complaints in Bihar, 1,141 complaints in Madhya Pradesh, 1,030 complaints in Rajasthan, 668 complaints in Tamil Nadu and 621 complaints from West Bengal. at 1,456 complaints.

INITIATIVE; BY THE GOVERNMENT TO CURB THE MENACE OF DOWRY IN INDIA

The Indian government has launched various schemes, policies, and programs. The

6 National Commission For Women, Statistical Overview Of Received Complaints, https://ncwapps.nic.in/frmComp_Stat_Overview.aspx, (last visited Apr. 20, 2023)

7 *Nearly 31,000 complaints of crime against women received in 2021, over half from UP: NCW*, THE ECONOMIC TIMES, January 01, 2022https://economictimes.indiatimes.com/news/india/nearly-31000-complaints-of-crimes-against-women-received-in-2021-over-half-from-up-ncw/articleshow/88630127.cms

main motive behind these policies is to save the girl child, to protect the gild child, and to provide the rights that she deserved in society.

The Government of India has taken several initiatives to curb the menace of Dowry in the country.

- Amendments to the Dowry Prohibition Act: The Dowry Prohibition Act of 1961 was amended in 1984 and 1986 to provide harsher punishments for those who give, take or demand dowry.
- Introduction of the Anti-Dowry Act: The Government of India also introduced the Anti-Dowry Act in 1983, which criminalizes the demand of dowry and any harassment related to it.
- Creation of specialized police units: The Government has also created dedicated police units to investigate and prosecute cases of dowry.
- Education and Awareness: The Government has also launched several awareness campaigns to educate people about the ill effects of dowry and to create a social stigma against it.
- Strict enforcement of existing laws: The Government has also been enforcing the existing laws against dowry more strictly and has made it easier for victims to report cases of dowry.
- Encouraging alternative gift giving: The Government has also encouraged the practice of giving alternative gifts to the bride and groom instead of dowry.
- Introduction of the Dowry Prohibition (Amendment) Bill 2018: The Government recently introduced the Dowry Prohibition (Amendment) Bill 2018, which seeks to enhance the punishment for those demanding and giving dowry.
- Setting up of Anti-Dowry Cells: The Government has also set up Anti-Dowry Cells in each district to provide counselling and legal help to those affected by dowry.
- Setting up of Anti-Dowry Helplines: The Government has also set up helplines in each district to provide legal and other help to those affected by dowry.

The various grassroots initiatives introduced by the government are: -

1. *Beti Bachao Beti Padhao*, (Save the Girl Child, Educate the Girl Child);

   Purpose – To remove the gender inequality ratio problem in various states of India.

2. Pradhan Mantri Ujjwala Yojana

   Purpose – To provide gas connection to the BPL households of women with a special focus on rural areas of the nation and the main motto behind this initiative was the health of women.

3. Mahila- E- Haat

   Purpose – To encourage women entrepreneurs across the nation and to create online platforms for women. This program will not only eliminate the

dependency of women on men in society but also make women more aware of their basic rights.

There are few states in India that do not have dowry practice or dowry as a custom. Northeast parts of the country have set an example of dowry-free communities. There are four states such as Goa, Mizoram, Nagaland, and Sikkim that reported zero cases of dowry death in 2014. Similarly, there are also other states like H.P, J&K, Manipur, and Arunachal Pradesh that reported very less cases of dowry in India.

LEGISLATURES TO COMBAT THE MENACE OF DOWRY AND DOMESTIC VIOLENCE IN INDIA

To eradicate the dowry practice in India, the government has enacted many laws such as the Dowry Prohibition Act, of 1961. Under the Indian Penal Code, Section 498 A was added to cover the offences like domestic violence and cruelty against women. The Dowry Prohibition Act applies to all the citizens of India irrespective of their caste. The original text of the dowry prohibition act failed to address the issue of dowry demand and was widely judged to be ineffective. As a result, the dowry prohibition act underwent subsequent amendments such as voluntarily giving presents/ gifts to the bride and groom at the time of marriage are allowed, creating a penalty for demanding dowry, etc. In addition to this Protection of women from Domestic Violence Act was also enacted in 2005 to provide an extra layer of protection.

DOWRY PRACTICES IN NEIGHBOURING COUNTRIES OF INDIA

According to the IMF, a total of 152 countries are considered developing countries and which includes the whole of central and south America, the whole of Africa, and almost all Asian countries. Developing countries are those nations whose standard of living is below average in terms of economic or industrial development. The neighbouring countries of India also come under the sphere of developing countries such as Bhutan, Nepal, Pakistan, Bangladesh, Sri-Lanka, and China.

S. No	Nation	Presence of Dowry
1.	Bhutan	This country has no culture of dowry custom. Almost 49% of the population in Bhutan are women and they enjoy their freedom. Domestic violence is treated with utmost severity by law.
2.	Nepal	Dowry was illegalized in 1976 under the Social Practice Reforms Act (2033). But this evil continued due to the poor enforcement of the law. "According to the data provided by Nepal Police, as many as 141 cases of dowry-related violence were reported within the last four years. A total of 58, 32, 32, and 19 cases were reported in the fiscal year 2017/78, 2018/19, 2019/20, and 2020/2021, respectively (the number of the fiscal year 2020/21 includes data as of mid-March)"[8]

8 Anushka Nepal, *Dowry related violence could escalate during the pandemic,* WOREC (May 19, 2021), https://www.worecnepal.org/content/239/2021-05-19

3.	Pakistan	Dowry practice still exists in Pakistan. The rights of women are exploited in the name of dowry.[9] Although the nation has also taken various initiatives such as the Dowry and Bridal Gifts (Restriction) Act 1976 to limit the value of dowry gifts. and bridal gifts are given to the bride and her in-laws cannot exceed the value of Rs5,000.[10] Despite these laws, the highest number of dowry deaths is recorded.
4.	Bangladesh	Bride price (pawn) was the concept that was initially followed in Bangladesh but later this tradition got replaced with a dowry (Joutukh or Joutuk). According to the reports of Mahila Parishad- nearly 5616 cases of domestic violence have been reported in 2012 out of which 558 cases are of dowry murders. Dowry Prohibition Act 1980 bans dowry practice with a maximum penalty of 5 years imprisonment and safeguards from physical abuse. As per the statistical records, nearly 138 girls are tortured for dowry demand out of which 45 women were killed for dowry[11].
5.	Sri Lanka	Dowry is a very frequent practice in Sri- Lanka. Dowry is also called Dewedda in Sri Lanka. The Sri Lankan context indicated that with time there is a transformation in dowry which leads to the compulsion for the girl's family to provide gifts to the groom's in all communities. Dowry still prevails in Sinhala and Tamil communities and legal requirements in the Muslim community. It has socio-legal legitimacy in Sri Lanka.[12]
6.	China	"In a Chinese wedding tradition, Pin Jin, meaning the bride's price, is a practice in which the groom's family offers the bride's family an amount of money as a symbol of respect. This is usually given during the Chinese betrothal ceremony. Stemming from the Chinese belief that when a daughter is married, she leaves the family while the in-laws receive her into theirs, Pin Jin symbolizes the bride's 'value' to the groom's family. A dowry is given to create goodwill between the in-laws".[13]

MISUSE OF DOWRY LAWS IN VARIOUS COUNTRIES

Misuse of dowry laws is also a serious problem in many countries, including India, Pakistan, Bangladesh, and other countries in South Asia. In these countries, women are often falsely accused of demanding dowry from their husbands or in-laws in order to extort money from them. This often leads to false imprisonment, physical abuse, and even death. The laws were put in place to protect married women from harassment and abuse by their husbands or in-laws. However, the laws have been misused by some women to take revenge against their husbands and in-laws. This

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9 Shazia Gulzar, Muhammad Nauman, Farzan Yahya, Shagafat Ali, Mariam Yaqoob, *Dowry System inPakistan,* Asian Economic And Financial Review. 784-794 (2021)

10 Aminah Mohsin, *Dowry: A trade in which the essence of marriage is lost,* THE EXPRESS TRIBUNE, April 02, 2022, https://tribune.com.pk/story/2350647/dowry-a-trade-in-which-the-essence-of-marriage-is-lost

11 THE DAILY STAR, https://www.thedailystar.net/city/news/empower-women-prevent-violence-mahila-parishad-2070713, (last visited Jan. 6, 2023).

12 M.P.S. Kaushani Pathirana, *A Proposal for a Dowry Prohibition Law in Sri Lanka: An Assessment in the light of Indian Dowry Prohibition Act No. 28 of 1961,* Annual Research Symposium 2012 University of Colombo.157-159.pdf (cmb.ac.lk)

13 Rachel Yeo, *Dowry: Traditional Wedding Dowry Prices for Different races,* SEEDLY, September 21, 2019, Dowry: Traditional Wedding Dowry Prices for Different Races in Singapore (seedly.sg)

misuse has made it difficult for many innocent people to find justice in the court of law. In some cases, the accused are forced to pay a hefty fine or face jail time. This is done in order to extort money, threaten or harass innocent people, or take revenge. The laws have failed to protect innocent people, as they are often misused by the accuser to target a particular family or individual.

In other cases, the accused are simply thrown out of their homes and denied any support from their families. In India, the misuse of dowry laws is so rampant that the government has recently enacted strict laws to curb them but still it is a ongoing problem.

In Pakistan, the misuse of dowry laws is a major problem as well. The Pakistani government has introduced a number of measures to combat this issue, such as the Dowry and Bridal Gifts (Restriction) Act 1976, which makes it illegal to accept or demand dowry. In Bangladesh, the misuse of dowry laws is also a problem. The country has recently enacted the Dowry Prohibitive Act, which makes it illegal for anyone to take or give a dowry. The act also makes it illegal to advertise or promote dowry in any form.

From 2001 to 2012, National Crime Records Bureau (NCRB) provided data on false dowry cases in India.[14] This data focused on the Fake dowry cases, regardless of whether the claims are based on facts or law. It is important to point out that despite the preliminary investigation resulting in some hints that the case may be genuine, the number of fake dowry cases in India is steadily increasing every year as more acquittals and discharges are recorded.

In a false dowry case, there is no direct legal answer to the question of what the punishment is. In spite of this, Section 211 of the Indian Penal Code, 1860, provides for punishment if a person falsely implicates another person in a crime with the intention to cause injury, and in such a case, the punishment is imprisonment for up to seven years or a fine. "Also, the Section 177 of the same Code lays punishment for furnishing false information to a public servant, which in this false dowry case is the concerned police officer through whom the complaint was registered - imprisonment of up to 6 months or fine or both. Such cases need to be proceeded with and proved by the wrongly implicated persons in the court of law".[15]

The Indian government has taken several steps to address this misuse and these include strengthening the punishments for the misuse of dowry laws, creating awareness about the misuse of these laws, and making it easier for the victims to file complaints. In addition, the government has also set up helplines and counselling services to assist victims of dowry-related abuse. It is important to note, however, that many women's groups and activist groups have justified the existence of these exploitations as being common to all types of laws, and that there is also a smaller proportion of

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14 National Crime Records Bureau, https://ncrb.gov.in/en/crime-in-india-table-contents, (last visited Mar. 16, 2023).

15 Ridhi Khurana,Vidhikarya, *Fake Dowry Cases in India,* VIDHIKARYA, September 15, 2022, www.vidhikarya.com/legal-blog/fight-against-fake-dowry-cases-in-india

false cases than true ones. There is still a rise in the abuse of anti-dowry laws, and that they are taking a toll on women.

Despite these efforts, the problem of misuse of dowry laws continues to exist in India. This is due to a lack of awareness, weak enforcement of the laws, and the prevalence of social and cultural norms that encourage the practice of dowry. In order to tackle this problem, the Indian government needs to take serious steps to ensure that the laws are enforced and that those who misuse them are held accountable.

CONCLUSION

Even in the 21st century, the Indian society has a patriarchal mindset, and dowry is not considered an evil practice and crime but is considered a custom in society. The causes of dowry typically stem from cultural expectations and traditional gender roles. These expectations often dictate that the bride's family must give the groom a dowry to demonstrate the bride's worth and to prove that the bride's family is financially capable of providing for the groom. Additionally, in some cultures, dowry is seen as a form of payment for the groom's family to accept the bride. Dowry is also used to secure the groom's commitment to the marriage and to ensure that the bride is provided for in the event of widowhood. Furthermore, in some cultures, dowry is a sign of status and is used by the bride's family to demonstrate their wealth. According to the World Health Organization, dowry-related violence is a problem in many countries around the world, including India, Bangladesh, Pakistan, Nepal, Sri Lanka, and parts of Africa. However, there is currently no reliable data available that tracks the number of countries that have abolished or restricted the use of dowry systems. While the practice of dowry is illegal in many countries, it is still widely practiced in many cultures. In countries like the United States, dowry is not a common practice, but is still practiced in some cultural and religious communities. The promotion of this custom leads to various factors such as the disempowerment of women, a patriarchal society, the financial dependency of women on men, etc. The glorification of the dowry system leads to son preference in society which promotes female feticide which directly results in an unequal sex ratio as well as gender inequality. Historically, dowries have been seen as a form of social security, as they often provided financial stability to the bride and her family in the event of the husband's death or abandonment. In some cultures, dowries are still seen as a sign of a family's wealth and status. In others, it is considered an outdated and even oppressive tradition. In many modern societies, dowries are no longer legally required or expected. Although the Indian Constitution guarantees gender equality and many other laws such as dowry prohibition laws, domestic violence laws, and Section 498 A of the Indian Penal Code 1860 – are enacted to protect women but are ineffective to reduce crime. Many steps taken by the government have been quite effective in curbing the problem of dowry in many states of India. There are many organizations and NGOs dedicated to ending dowry and advocating for gender equality. Government should raise awareness about the harm and dangers of dowry and also educate the people in schools, colleges/universities, and in various communities about the legal and social implications of dowry and the negative impacts it has on society. Reporting dowry

cases should be easy for the victims as well as for the people who are evidencing the situation of the victim. However, there is still a long way to go before the problem can be completely eradicated. For this to happen, there needs to be a change in the mindset of people regarding dowry. People need to be made aware of the fact that dowry is illegal and unacceptable. Furthermore, society needs to be more accepting of women, and their rights to equality and autonomy must be recognized. Dowry Practice is a socio-legal issue that cannot be eliminated only by the laws but requires strict and ruthless enforcement of such laws. Dowry is not pride but a shameful practice that is still continued in society not only in India but all across different countries. Equal status of women with men, social awareness, awareness of the rights of women, and women empowerment is the antidote to overcoming this evil practice in India as well as other different nations.

Viability of the Institution of the Governor of the States and the President, under the Indian Constitution: A Comparative Analysis

Mr. Shivam Gupta, Dr. K.B. Asthana** & Dr. Kishori Lal****

ABSTRACT

The right and duties of the President of India and the Governor of the State can be distinguished from the various provisions of the Constitution of India as well as with the support of the apex court decisions. The election, removal, impeachment procedure of the President and the Governor is also enshrined in the Constitution of India. Theirright and dutiesare also elaborately explained in the Constitution.[1]

As we know that there are two kinds of democratic system in the world. First one is the Presidential form of government in which the President is vested with the entire power of the executive, legislative, administrative etc. whereas the other form of government is the Parliamentary form of government in which the Prime Minister is vested with all these powers.

The position of the Governor in the State can be enumerated as that the Governors are the representatives of the President and they discharge their duties on behalf of the President of India as per the various provisions enshrined in the Constitution.

The comparison between theGovernor of the State and the President of India has also stated in the Constitution.The powers of these dignitaries are almost all same, but the President holds more power than the Governors of the State. The Governors of the state are appointed and removed by the President of India, it means they can hold their office during the pleasure of the President of India. It also termed as "Doctrine of pleasure".

In this paper we will carry out the comparative study of the role of the Governor in the State and the President in India which includes the differences in various types of powers vested in

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1 See The Constitution of India 1950.

them, like financial powers, executive powers, legislative powers, discretionary powers, judicial powers, emergency powers, military powers etc.

Keywords: *The Governor, the President, State Legislature, Central Legislature, the Constitution, Article.*

INTRODUCTION

Every citizen of India is aware that there is one President in the nation, who is vested with huge legislative, executive and judiciary powers. On the other hand the Governor of the State is also vested with huge power unlikely the President of India but his power are lessor than the powers of the President of the India.

As we know that there is a provision enshrined in the Constitution of India that there shall be President of India[2] and similar way in the State there shall be a Governor,[3] who will be appointed by the President for the smooth functioning of the democratic system.

Comparative Study between President of India and Governors in the State

(i) Legislative Powers:-

(a) The President:-

(i) The President has the authority to call both houses of parliament into session or prorogue them, as well as dissolve the Lok Sabha.[4]

(ii) The joint session of both houses may be called by the President.[5]

(iii) After every general election the President addresses the Parliament during the commencement of its first session.[6]

(iv) The President appoints the Speaker/Deputy Speaker in LokSabha and the Chairman/Deputy Chairman in Rajya Sabha.[7]

(v) In Rajya Sabha, the President nominates the 12 members of different streams.[8]

(vi) In Lok Sabha, the President nominates the 02 members of Anglo-Indian community.[9]

(vii) The power to promulgate the Ordinance is vested in the President.[10]

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2 See the Article 52 of the Constitution of India, 1950.

3 See the Article 153 of the Constitution of India, 1950.

4 See the Article 85(2) of the Constitution of India, 1950.

5 See the Article 108 of the Constitution of India, 1950.

6 See the Article 87(1) of the Constitution of India, 1950.

7 See the Article 89 and 93 of the Constitution of India, 1950.

8 See the Article 80 of the Constitution of India, 1950.

9 See the Article 331 of the Constitution of India, 1950.

10 See the Article 123 of the Constitution of India, 1950.

(viii) Comptroller General of India, Finance Commission, Union Public Service Commission etc. submits their report to the President.[11]

(ix) On the question of disqualification of an MP, the President seeks advice from the Election Commission of India.[12]

(x) The Certain types of bills are also recommended/ permitted by the President of India.

(b) The Governor:-

(i) The Governor issues the Ordinance for the State.[13]

(ii) The Governor can dissolve the State Legislative Assembly.[14]

(iii) The Governor address the first session of the State Legislature every year.[15]

(iv) In the absence of the Speaker and the Deputy Speaker, the Governor appoint a person to preside the session.[16]

(v) The Governor appoints the 1/6 of the total member of State Legislative Council in the fields of (i) Literature, (ii) Science, (iii) Art, (iv) Cooperative Movement, (v) Social Science.[17]

(vi) As the President appoints 02 Anglo-Indian in LokSabha, the Governor appoints 01 Anglo-Indian in State Legislative Assembly.[18]

(vii) The Governor can consult to the Election Commission for the matter of disqualification of MLA/MLC.

(ii) Executive Powers:-

(a) The President:-

(i) Every executive decision made by the Indian government must be made in the name of the president.[19]

(ii) The President appoints the following personnel;

(aa) Attorney General of India[20]

(ab) Comptroller General of India[21]

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11 See the Article 151, 281 and 323 of the Constitution of India, 1950.

12 See the Article 103 of the Constitution of India, 1950.

13 See the Article 213 of the Constitution of India, 1950.

14 See the Article 174 of the Constitution of India, 1950.

15 See the Article 176 of the Constitution of India, 1950.

16 See the Article 180 of the Constitution of India, 1950.

17 See the Article 171 of the Constitution of India, 1950.

18 See the Article 331 and 333 of the Constitution of India, 1950.

19 See the Article 77 of the Constitution of India, 1950.

20 See the Article 76(1) of the Constitution of India, 1950.

21 See the Article 148 of the Constitution of India, 1950.

(ac) Chief Election Commissioner of India and other Election Commissioners[22]

(ad) the Governors in the State[23]

(ae) Finance Commission of India and its members[24]

(iii) The President also appoints;

(aa) Inter State Council[25]

(ab) Administrators of Union Territories[26]

(ac) National Commission of Scheduled Caste[27]

(ad) National Commission of Scheduled Tribes[28]

(ae) National Commission of Other Backward Classes[29]

(b) The Governor:-

(i) Every State Government decision must be made in the name of the Governor[30].

(ii) The Governor appoints the Chief Minister and other ministers in the State.

(iii) In the following States the Governor also appoints the Tribal Welfare Minister;[31]

(aa) Chhattisgarh

(ab) Jharkhand

(ac) Madhya Pradesh

(ad) Odisha

(iv) The appointment and fixation of remuneration of Advocate General of State is also done by the Governor[32].

(v) The Governor appoints the following persons namely;

(aa) State Election Commissioner[33]

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22 See the Article 324 of the Constitution of India, 1950.
23 See the Article 155 of the Constitution of India, 1950.
24 See the Article 280 of the Constitution of India, 1950.
25 See the Article 263 of the Constitution of India, 1950.
26 See the Article 239 of the Constitution of India, 1950.
27 See the Article 338 of the Constitution of India, 1950.
28 See the Article 338A of the Constitution of India, 1950.
29 See the Article 338B of the Constitution of India, 1950.
30 See the Article 166 of the Constitution of India, 1950.
31 See the Article 164 of the Constitution of India, 1950.
32 See the Article 165 of the Constitution of India, 1950.
33 See the Article 243K of the Constitution of India, 1950.

(ab) Chairman and members of State Public Service Commission[34]

(ac) Vice Chancellors in the State Universities

(vi) The Governor seeks report from the State Government.[35]

(vii) The Governor recommends the Constitutional emergency in the State to the President.[36]

(viii) During the President Rule the Governor enjoys the extensive executive power.

(iii) Judicial Powers:-

(a) The President:-

(i) The appointment of the Chief Justice of India and other judges in Supreme Court and High Courts is to be done by the President.[37]

(ii) The President can take advice from the Supreme Court, however it never remains binding on him.[38]

(iii) The President has the right to pardon the punishment awarded to any person. In which he can pardon, commutation, remission, respite or reprieve the punishment awarded.[39]

(b) The Governor:-

(i) The Governor has the right to pardon the punishment awarded to any person. In which he can pardon, remission, respite or reprieve the punishment awarded or suspend, remit or commute the sentence awarded.[40]

(ii) The President seeks opinion of the Governor on appointment of Judges in High Court.[41]

(iii) The Governor consults with the state High Court before making any appointments, postings and promotions of the district judges.[42]

(iv) The Governor consults with the state High Court and state public service commission before appointing any person to the judicial services.

(iv) Emergency Powers:-

34 See the Article 316 of the Constitution of India, 1950.

35 See the Article 167 of the Constitution of India, 1950.

36 See the Article 356 of the Constitution of India, 1950.

37 See the Article 124 & 217 of the Constitution of India, 1950.

38 See the Article 143 of the Constitution of India, 1950

39 See the Article 72 of the Constitution of India, 1950.

40 See the Article 161 of the Constitution of India, 1950.

41 See the Article 217 of the Constitution of India, 1950.

42 See the Article 233 of the Constitution of India, 1950.

(a) The President:-

(i) The President has the power to declare the National Emergency.[43]

(ii) The President has the power to declare the President Rule.[44]

(iii) The President has the power to declare the Financial Emergency.[45]

(b) The Governor:-

There are no such powers vested in the Governor.

(v) Military Powers:-

(a) The President:-

(i) The Supreme Commander of defense forces in India is the President.[46]

(ii) He also appoints the Chief of the Army, Chief of the Air Force and Chief of the Navy[47].

(b) The Governor:-

There are no such powers vested in the Governor.

(vi) Financial Powers:-

(a) The President:-

(i) Before presenting the Money Bill in the house, the consent of the President is must.[48]

(ii) The President constitutes the Finance Commission in every five years.[49]

(iii) The control over the Contingency Fund of India is vested in the President.[50]

(b) The Governor:-

(i) The Governor constitutes the State Finance Commission in every five years.[51]

(ii) The control over the Contingency Fund of State is vested in the Governor.[52]

(iii) Before presenting the Money Bill in the State Legislature, the consent of the Governor is must.[53]

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43 See the Article 352 of the Constitution of India, 1950.

44 See the Article 356 & 365 of the Constitution of India, 1950.

45 See the Article 360 of the Constitution of India, 1950.

46 See the Article 53 of the Constitution of India, 1950.

47 ibid.

48 See the Article 110 of the Constitution of India, 1950.

49 See the Article 280 of the Constitution of India, 1950.

50 See the Article 267(1) of the Constitution of India, 1950.

51 See the Article 243-I of the Constitution of India, 1950.

52 See the Article 267(2) of the Constitution of India, 1950.

53 See the Article 200 of the Constitution of India, 1950.

(vii) Discretionary Powers:-

(a) The President:-

A bill after passing by both the houses and before becoming an act, it has to be present before the President. The President has the Veto Power over the bill.The President can reject the bill, return the bill or withhold his assent to the bill.[54]

(b) The Governor:-

Same as the President, the Governor has a Veto Power over the bill. He can give assent to the bill, return the bill, withhold his assent to the bill or reserve the bill for the consideration of the President.[55]

ROLE OF THE PRESIDENT AND THE GOVERNOR UNDER THE CONSTITUTION OF INDIA:-

The role and power of the President and the Governor is same as the role and power of the Crown under the British Parliamentary System. The Supreme Court has clarify it in its several verdicts, *PuMyllaiHlychho* v. *State of Mizoram*,[56] *Ram JawayaKapur* v. *State of Punjab*,[57] *A. Sanjeevi Naidu* v. *State of Madras*,[58] *U.N.R. Rao* v. *Indira Gandhi*.[59]

The President is the integral part of the Parliament whereas the Governor is the integral part of the State Legislature. It is confirmed by the Constitution of India which states that "There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and House of the People.[60]

Whereas the Constitution also states that the Governor constitutes an integral part of the State Legislature and is also vested with the legislative power to promulgate Ordinances while the Houses of the legislature are not in session.[61]

The office of the President of India and the office of the Governor in state is an independent constitutional office and these offices are not under control of the Government of India.

Though the Governor is appointed by the President, which indicates that effect and substance of the Government of India exists, but this does not make him employee of Government of India. The Supreme Court of India has stated in Hargovind Pant

54 See the Article 111 of the Constitution of India, 1950.

55 See the Article 200 of the Constitution of India, 1950.

56 AIR 2005 SC 1537 (Para15).

57 AIR 1955 SC 549.

58 AIR 1970 SC 1102.

59 AIR 1971 SC 1002.

60 See the Article 79 of the Constitution of India, 1950.

61 See the Article 168 of the Constitution of India, 1950.

v. Dr. RaghukulTilak and others[62] that there can be no doubt that the office of the Governor is not an employment under the Government of India.

Same in the case of President also, neither the office of the President is controlled by the Government of India nor the President is an employee of the Government of India.

Where the views of the Union Government and the State Government are in conflict, the President and the Governor is to act in an impartial and neutral manner. The Supreme Court of India has stated in BP Singhal v. Union[63] of India that their peculiar position arises from the fact that the Indian Constitution is quasi-federal in character.

It is expected of the President and the Governor to demonstrate their loyalty to the Constitution rather than any particular political party. It is envisaged that the President/ Governor will be nominated by competent administrators and notable figures with maturity and experience. In the case of BP Singhal v. Union of India,[64] the apex court has enshrined its verdict that the President/Governor should show their loyalty to the Constitution and not to any political party and required to preserve, protect and defend the Constitution.

The President's powers under Article 74 and the Governor's powers under Article 163 of the Constitution are distinct. Between the roles of President and Governor, there are certain qualitative differences.According to Article 74 of the Constitution, the President has no discretionary powers, but according to Article 163(2) of the Constitution, the Governor has some discretionary powers.The President has to exercise all his functions in consonance with the advice tendered to him by the Union Council of Ministers with the Prime Minister as the head. The President has not been granted any discretionary authority under Article 74 that would allow him to carry out his duties at his own discretion.The President can, at most, ask the Council of Ministers to reevaluate the counsel given to him. And after reconsideration also the opinion of the Council of Ministers remain the same then the President has no option but to act in consonance with the opinion of the Council of Ministers. Whereas, even though Article 163 similarly provides that the Governor in State is to exercise his functions with aid and advice given by the Council of Ministers with the Chief Minister in State but Article 163(2) provides the discretionary power to the Governor. The authority granted to the President and the Governor clearly differs from one another.*(i) NabamRebia&Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly & Others*[65] *(ii) State of Gujarat & Others v. Mr. Justice (retired) R.A. Mehta & Others*[66] *and (iii) Samsher Singh v. State of Punjab.*[67]

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62 AIR 1979 SC 1109.

63 (2010) 6 SCC 331.

64 Ibid.

65 *(2016) 8 SCC.*

66 *AIR 2013 SC 693.*

67 *AIR 1974 SC 2192.*

EXECUTIVE POWER OF CENTRE VERSES EXECUTIVE POWER OF STATE

(i) States are responsible for Centre through many provisions of the Constitution of India

There are many provisions in the Constitution of India which puts restrictions on states and also gives power to the centre for exercising its executive power. *Firstly,* via articles 255 & 256, it is the duty of the State that it should exercise its executive power in such a way that it should not hinder or obstruct the exercise of the Centre's power whereas the State should ensures compliance with the laws passed by the Parliament. *Secondly,* the Centre has some controlling power, via Article 365 of the Constitution to control on the State for effective implementation of Article 255 & 256. Article 365 empowers the Centre for the situation that if a state has failed to comply with the directions given by the Union Government in the exercise of its executive power, the President shall be duty bound to hold that situation, which has arisen in the State, if it is contrary to the provision of the Constitution. Furthermore the President can also impose President's Rule on the State under the provision of Article 356. The power of Article-356 is the discretionary power of the President, which can be exercised during any emergency.

(ii) Responsibility of Centre for States under the various provisions of the Constitution of India

It is the duty and responsibility of the Centre to protect the States against any external aggression and the internal disturbance. The same has been enshrined in the Article-355. Over a period of time this Article has taken a different shape.

(iii) Distribution of executive powers

The distribution of executive power is done through the following way in the Constitution. The constitution has the three lists namely:-

- Union list
- State list
- Concurrent list

The Union list is the list of matters on which only Union government has legislative powers. Other than that the Union government can also make the law on matters conferred on it by any treaty or agreement.

The State list is list of matters on which only the State government has the legislative powers.

The Concurrent list is the list of matters on which generally the State government has the legislative powers until the established constitutional provision or a parliamentary law specifically confers this power to the Centre government.

(iv) Mutual delegation of administrative functions

Although there is a rigid division of legislative powers between the Centre government and the State government, in the Constitution of India, but to maintain the smooth flow of work coordination between the Centre and the State, it is mandatory to delegate the executive power in two methods which are as follows;

(a) Delegation by agreement

It is the inherent power of the President that he can, with the consent of the state government, entrust any of the executive function of the centre to state. Similarly, the State government with the consent of the Central Government can entrust any of the executive function of a state to centre. The Centre and the State both can have this mutual delegation of administrative functions; and it can be either conditional or unconditional.

(b) Delegation by law

The Union government has the power to make law in the Parliament and the law passed by the Parliament is equally applicable to all State, unless any contrary to it mentioned in it. The prior consent of State government is not necessary to Union government before passing such laws. But contrary to it the State government does not have the same power to make any law which is also applicable on the Union government.

(vii) Other provisions of the Constitution for Coordination between the Centre and the State governments

There are few other provisions of the Constitutions for coordination between the Centre and the State governments:

- The Parliament has the power to appoint an authority to look after the interstate freedom of trade, commerce and intercourse.
- The Governor in the State appoints the Chairman and the member of the State public service commission. Whereas they can be removed from their posts by the President only.
- On the request of the States the Parliament has right to make law to establish a joint public service commission for two or more States. If State request the same can be done by UPSC also.
- The Governor in State is appointed by the President and hold his office during the pleasure of the President. He also act as an agent of the Union government. He sends the periodical reports of administrative affairs of the State to the President.
- The governor appoints the state election commissioner whereas he can be removed only by the President.

(viii) Other Constitutional bodies for the cooperation of the Centre and the State

There are few other constitutional bodies for the cooperation of the Centre and the State like;

- Planning Commission {now replaced by NITI Aayog}
- National Integration Council, Zonal Councils
- North-Eastern Council
- University Grants Commission
- GST council etc.
- Few other conferences take place frequently which are listed below;
- Governor's conference {presided by President},
- Chief Minister's conference {presided by PM},
- Chief Secretarie's conference {presided by Cabinet Secretary} etc.

CONCLUSION

The ambit of immunity is fairly broad.No court can order the President or the Governor to use a power or fulfill a duty, and no court can issue a writ regarding the President's or the Governor's official acts or omissions.They are not subject to any order, writ, or mandate from a court. No court can compel them to show cause or defend their action. In the case of official acts, an absolute immunity from the process of the court is given to the President and the Governor.

The immunity extends to acts or omissions which may be incidental to, as well as to any act 'purporting to be done by the President or the Governor, in the exercise and performance of the powers and duties of their offices. The words "purporting to be done" are of very wide scope. Even though the act is outside, or in contravention of the Constitution, the President and the Governor is protected so long as the act is professed to be done in pursuance of the Constitution.[68]

When any official act of the President or the Governor is challenged on the ground of maladies, the immunity extends to them and they cannot be called upon personally to defend themselves against such an allegation. Nevertheless, the validity of the act can be questioned and the Government has to defend it.[69]

One of the trickiest issues in a federal government is balancing the administrative responsibilities between the Union and the States. In order to prevent conflicts between the states and the Union as much as possible, the Indian Constitution's framers incorporated specific clauses. But the union government holds a better position in the administrative realm compared to the legislative realm because its executive authority covers more topics.

68 See *Biman Chandra Bose* v. *Dr. H.C. Mukherjee*, AIR 1952 Cal 799, 56 CWN 651.

69 See the Article 361 of the Constitution of India, 1950.

A Comprehensive Study of Software Patents in Contemporary Times

Mr. Dhruv & Dr. Rajender Kumar Mittal***

ABSTRACT

The purpose of this article is to "dynamically analyze the nature and scope of software patents. The article examines whether pure software patents are permissible and the necessity of patent protection for software-related inventions". It examines the development of software patents worldwide and the Indian legal system for computer-related inventions (CRIs). Finally, the author makes sound arguments both in favor of and against software patents.

Keywords: *Patent, Inventions, India, Software, Computer.*

I. INTRODUCTION

"Every aspect of human life in the 21st century is heavily influenced by technology, allowing us to significantly expand our horizons to levels previously thought unimaginable. There have been innovations and inventions throughout human evolution that have fundamentally altered human life. A digital, knowledge-based economy has emerged as a result of the explosion of information technology."

The entire process of "entering, storing, retrieving, transmitting, and managing data through the use of computers and other networks, hardware, software, electronics, and telecommunications" is referred to as "Information Technology."[1]

"One of the most significant innovations in technology of the 21st century was the growth of software as a field of innovation. Software is the programming code or instructions that the system's hardware stores and executes."The massive development of computer-related inventions has resulted from the exponential growth of information technology and rapid advancements in computer software. These developments have fundamentally altered how societies function.

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1. "Guidelines for the Examination of Computer Related Inventions, 2017".

"Software research and commercial interest are reviving as a result of technological advancements like access to big data, advancements in machine learning, and improvements in computing hardware. The growth of software products and services is largely to blame for the ICT industry's exponential rise in value and importance. Protecting this valuable new form of intellectual property has become crucial to the health of ongoing innovation as a whole has developed around software development, implementation, and distribution."

II. THE NEED FOR PATENT PROTECTION OF SOFTWARE-RELATED INVENTIONS

"Software has become so important in today's information age because it is a general-purpose technology that is useful in almost every aspect of human life. It has found its way into our day-to-day lives as well as the software industry as a whole. They are highly prized assets with high strategic and economic worth. Algorithms' capacity to optimize and automate tasks that are becoming increasingly complex has resulted in a rise in productivity in some traditional industries and a significant shift in others.[2]"

Software is used to implement inventions like "mobile phones, medical imaging technology, aircraft navigation systems, car safety features" like "ABS, and Blu-ray technology". Additionally, the functionality and effectiveness of household appliances like "vacuum cleaners, refrigerators, and washing machines" are enhanced by the presence of software. In addition to the software industry, numerous other industries, including healthcare, government/public sector services, and defense, now require data processing-based inventions.

"As a result, there is a pressing need for laws that control how these software-related inventions can be protected under patents. This is because the software's functionality and high economic value cannot be adequately protected by the Copyright protection that is typically provided. The result is that the software's functionality or the code can be copied without actually copying the code, resulting in a significant financial loss for the person who developed it."

III. ARE PURE SOFTWARE PATENTS PERMISSIBLE UNDER PATENT LAW?

"First and foremost, it is crucial to note that pure software does not qualify for patent protection in India or the majority of other nations. According to Section 3(k) of the Act, pure software patents fall outside the purview of the Patents Act of 1970. It stipulates that computer programs as such, mathematical or business strategies, and algorithms are not subject to patentability."

As a result, software that is admixture of few algo is not covered by a patent. In light of these circumstances, "it is essential to comprehend the scope of patent protection for computer-related inventions (CRIs) whose primary component is software. A

2. Ibid.

CRI can be granted a patent by the Indian Patent Office (IPO) if it meets the requirements outlined in the published guidelines and the Patents Act of 1970".

- **Computer-Related-Inventions**

The following are all included in the definition of a computer-related invention: *"Inventions which involve the use of computers, computer networks or other programmable apparatus and include such inventions having one or more features of which are realized wholly or partially by means of a computer programme or programmes"*.[3]

Therefore, the software that is embedded in those tangible computer-readable media can also be designated as a CRI, in addition to the tangible goods or hardware. The definition of what constitutes an invention related to computers varies by nation. It should be noted that the "definition of "other programmable apparatus" has been expanded to include a variety of smart devices".

The scope of intellectual property protection for computer software is associated with the uncertainty and confusion surrounding computer-related inventions. The European Union uses the term "Computer-implemented-invention," which is defined as "an invention whose implementation involves the use of a computer, computer network, or other programmable apparatus with features realised wholly or partly by means of a computer program, in contrast to nations such as the United States, India, Japan, and others".

The definitions of the aforementioned terms demonstrate their similarity. However, the level of standards used in these different jurisdictions is what sets them apart. In comparison to CRI/CII, the term "software" has a more ambiguous definition.

"More or less, it very well may be presumed that product related creations are considered as CRIs/CIIs by the patent workplaces across the globe basically due the constant advancements in the field of programming improvement. As a result, CRIs cover software, mobile applications, smartphone apps, and the most recent technological innovations like the Internet of Things, blockchain technology, and artificial intelligence. These inventions can be patented to safeguard their innovative nature."

IV. THE SCOPE OF PATENT PROTECTION FOR SOFTWARE-RELATED INVENTIONS

The question of whether computer/software-related inventions could be granted patents persisted for a considerable amount of time. based on **"**Article 27**"** According to **"**Article 1 of the TRIPS Agreement**" which states that"***inventions in any technology field can be granted patents as long as they are novel, involve an inventive process, and have the potential for industrial application. Computer software was not specifically excluded from patentability, so the phrase "all fields of technology" broadened the scope of its patentability*.**"**

"Inventions related to computers are better protected by patents than by copyright or trade secrets. It can safeguard the software-implemented invention's idea or functionality. Realizing that software inventions **are not entitled to be given the**

3. Ibid.

protection of the patentability is critical. They are granted for "computer-related inventions that are new, involve an inventive technical contribution to the prior art, and have a technical character.""

"Due to the claims made by the patentee, patents clearly define the software's precise boundaries. CRIs, like other inventions, must be novel, not obvious, and applicable to industry. Software is significantly more complicated than any other conventional technology, which contributes to the issue. Software products, in contrast to other products, contain numerous inventions. In addition, the software industry frequently circumvents the application of the patent regime because, in contrast to the conventional industry, which produces a new product over a considerable amount of time, it changes its generation much more rapidly."

V. THE DEVELOPMENT OF SOFTWARE-RELATED PATENTS

The "United States" has led the way in patent protection for "CR inventions, particularly software-related patents", according to jurisprudence, which was then observed and duly followed by the EU. A patent application of British origin was submitted in 1962 regarding "effective memory management for the simplex algorithm that could be implemented solely through software. One of the earliest software patents, the patent was granted on August 17, 1966".

The "**USPTO"** has since then granted many patents which may be referred to as software patents.[4] In "***Gottschalk v. Benson"***[5], "A process patent should not be granted if it would "wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself," according to a ruling by the United States Supreme Court".

In 1981, nearly a decade later, the Supreme Court made the following ruling:

"A claim for grant of a patent cannot be ruled out simply because it uses a mathematical formula, computer program, or digital computer."

A claim can be into the ambit of the patentability if it qualifies:

"A mathematical formula and implements or applies the formula in a structure or process which, is performing a function which the patent laws were designed to protect".[6]

With more land decisions, "the patentability of software was well established by the 1990s and in 1996 the "USPTO" issued the "**Final Computer Related Examination Guidelines"**[7] which clarified that "a practical application of a computer-related invention is statutory subject matter."

The status in concern with "the patentability of software inventions was settled in the USA through the SC decision in ***Alice Corporation Pty. Ltd. v. CLS Bank***

4. Sandeep Singh Bhandari, *Patenting of Software: Trends in US & UK* (August 16, 2009).
5. Gottschalk v Benson, 409 U.S. 63 (1972)
6. Diamond v. Diehr, 450 U.S. 175 (1981)
7. Examination Guidelines for Computer-Related Inventions, 1996, USPTP

Internationa"l[8], "where a patent claim for a computer-implemented scheme for mitigating a "settlement risk" was rejected by the court". It was held that "the inclusion of the generic computer in a claim cannot transform a patent-ineligible abstract idea into a patent-eligible invention. The method does not improve the functioning of the computer itself, nor does it affect any improvement in the technology".

"As for India, the law relating to CR inventions is very new and ambiguous, as a result of which there is great uncertainty as to what extent these inventions are likely to be protected. A computer programme by itself is not patentable in India. However, if it is in conjunction with novel hardware, then it could be eligible for a patent.[9] The evolution of the law relating to CRIs depicts India's complex approach to IP rights."

From a share of "36% in 2011-12, the share of Patent applications for CR Inventions filed in India has increased to 40 % in 2015-16, which clearly shows the increasing significance of patenting of CR Inventions".

"The position regarding the scope of software-related inventions in India was somewhat settled by the Delhi HC in December 2019 in the case of "***Ferid Allani v Union of India & Ors."***[10]. The writ was filed against the rejection of a patent application for a "method and device for accessing information sources and services on the web." The court went into the jurisprudence of Section 3(k) of the Act and held that "the words 'per se' were incorporated with the intention to ensure that genuine inventions which are based on computer programs are granted patents".

It laid down that "an invention which demonstrates a technical effect or a technical contribution is patent-eligible even though it may be based on a computer program, and ordered the patent office to reconsider the application. It termed such rejection as retrograde considering the fact that many technological computer innovations such as artificial intelligence, blockchain and other computer programs are inventions 'based' on computer programs and not just computer programs per se".

VI. ARGUMENTS AGAINST SOFTWARE PATENTS

"The expansion of the software industry will be significantly impacted by the granting of software patents. It is impossible to definitively state whether they are beneficial or detrimental. On either side of the spectrum, there are persuasive arguments. To provide patent protection without stifling innovation in such a situation, it is necessary to strike a delicate balance between the competing interests."

"Patent protection stifles innovation in the software industry by creating a minefield for programmers, in contrast to other inventions, which promote innovation. This is one argument against the patentability of software-related inventions. In addition, software innovations are incremental, and the rapid technological advancements in

8. 573 U.S. 208 (2014)
9. "Dave, Raj &Sriniwas, G. & Singh, Manisha & Ro, Myungjin& Davey, Neil. (2018). Recent Changes in Software Patenting in India, and Comparison with the US–Intellectual Property Magazine".
10 "MANU/DE/4323/2019"

the software industry are primarily attributable to the open exchange of information between programmers in the past."

Because the **mentioned subjected industry is taken over** by the market, **the concerned company which does not want to** develop novel products will eventually run out of customers. **We can say that when the patent mechanism is not present**, this will maintain the **said industry's** status as an innovative sector. The software industry's technological dynamism suggests that current software technology will rapidly become obsolete, making the 20-year protection concept seem counterintuitive.

"It could also result in excessive monopolies on interface standards, which would be exacerbated by network effects, which is another negative effect. Success in the software industry is achieved by "doing it right," as opposed to "doing it first" or "differently." A product's uniqueness and utility stem from its improved application of existing concepts. As a result, the best way to implement or market a invention may not always come from the inventor, and granting patents may have a direct impact on the software industry's business philosophy."

"In addition, the expansion of open-source software, which has been dubbed "the most innovative development of the past decades," could be seriously threatened by the grant of patents. Because it allowed developers to build on each other's work and share the source code, the open-source software mechanism is largely to blame for the current level of software development. However, software patents would significantly hinder open-source innovation."

VII. ARGUMENTS IN FAVOUR

Additionally, expanding software invention patentability is supported by strong arguments. According to one point of view, market to innovate more in order to remain relevant in a technological environment that is rapidly changing.

"It is important to think of software-related invention patents as a reward for the researcher's time, money, and efforts. During the exclusive rights period, businesses would be able to recover their R&D expenses, allowing them to continue investing in research. Another argument in favor of patents is that protecting intellectual property would open up opportunities for small and medium-sized businesses on the global market. If not, it would be extremely challenging for them to establish a foothold in the software industry. Software piracy, which costs software companies a lot of money each year, will be reduced with the help of the robust patenting system."

VIII. CONCLUSION

In conclusion, it is abundantly clear that "one of the most significant technological advancements of the 21st century is the invention of software. Due to the fact that software is a technology that can be used for any purpose, their significance cannot be restricted to any one industry. Software inventions will undoubtedly expand at an exponential rate as society moves toward an IT-based model. Because of this, a clear and unambiguous patent system for computer-related inventions is essential. The FeridAllani decision and the 2017 guidelines for CRI examination have helped to clarify and stabilize the scope of patentability".

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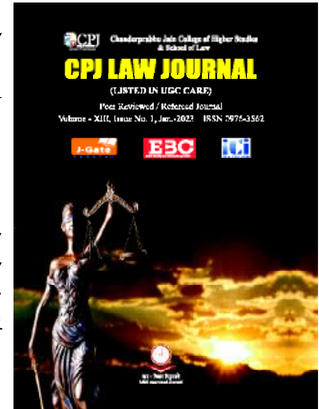

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