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CPJ LAW JOURNAL

Peer Reviewed / Refereed Journal
Volume - XV, Issue No. 2, Jan-2024 ISSN 0976-3562

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CPJ LAW JOURNAL

Volume XV, Issue No. 2 JAN-2024

[Cite as: Volume XV, Issue No. 2, CPJLJ (JAN-2024)]

A Journal of CPJ School of Law

Subscription: Rs. 400

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 XV, Issue No. 2 JAN-2024

Editorial Advisory Board

MESSAGE FROM MANAGEMENT'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 Jan-2024, Volume XV, 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 Jan-2024 (Vol. XV, Issue No. 1) 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. This issue Includes papers from the above to be added at the Contemporary Areas of Research in Legal Insight into Medical Practice, Legal Liability in Contract, Relevance of Prosecution in Murder, Role of Police Investigation, Justice Delivery Using AI, Constitutional Morality, Efficacy of Restorative Justice, Importance of Safe Pesticide Use, International Humanitarian Law, Media Trails in India, Green Collar Crimes, International Legislation, Transformational Leadership, Benefit Act in Delhi NCR, Equality Rights, Competition Law Policy, Technology Protection Measures 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**, **Jan-2024** edition!!

Dr. 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 XV, Issue No. 1, (Jan-2024) 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, Corporate Affairs

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 Jan-2024, Vol. XV, 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 Jan-2024 of CPJ Law Journal.

Dr. Shalini Tyagi
Principal
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
Ex-Chairman
Bar Council of Delhi

CONTENTS

A Critical Legal Insight into Diminishing Ethical Values in Medical Practice*

Dr. Anu Prasannan*

ABSTRACT

Medical Law is a newly emerged branch of law which deals with the relationship between law and medicine. This branch of law thus applies medical knowledge to legal problems and specifies the need for the regulation of medical practice through law. The areas where law and medicine intercept vividly reflect their relationship which is currently undergoing transformation in a greater pace. This transformation in fact can be traced from various instances incident in the practice of the profession. The transforming relationship between law and medicine can be ascertained from the replacement of the regulatory body, the Medical Council of India (MCI) responsible for establishing uniform and high standards of medical education in India with the recent National Medical Commission (NMC). National Medical Commission Act, 2019 has repealed Indian Medical Council Act, 1956 which is one of the major measures in the medical field to curb corruption which reflects that medical field is not free from corruption. Yet another change that is evident is in the diminishing ethical values in the practice of the profession which in fact goes against the sacred Hippocratic Oath. Recently doctors are seen involved in more unethical, immoral and criminal activities which is against the godly image of the doctors themselves. With the positive development of forensic medicine and science, the relevance of medical evidence has also been misused most of the times by giving false medical evidence giving way to increase in cases of medical negligence. Thus, there is rampant corruption in medical field, unethical medical practices, lack of transparency including commercialization of medical education which needs to be addressed to maintain the sanctity of the medical profession.

Keywords: *Medical Law, Declining Ethical Values, Medical Council of India (MCI), National Medical Commission (NMC), Medical Negligence, Corruption.*

INTRODUCTION

Medical law is the branch of law that deals with the prerogatives and responsibilities of medical professionals and the patients. This branch of law thus focuses on the

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application of medical knowledge to legal problems. Medical law has therefore grown to a separate branch of legal discipline. The development of medical law as a distinct and separate branch of law vividly explains that if medicine is practiced without any legal regulation many wrongs would be committed. Analysing the status of medical profession and the relationship of medical professionals with the legal practitioners one can easily understand that medical profession has always been considered as a divine and noble profession from time immemorial. In this regard, the medical practitioners were also clad with serenity and godly image. Their relationship was never strained but always cordial. In recent times their relationship is seen deteriorating with the increase in distrust in medical profession, declining ethical values of medical practitioners, increasing corruption in medical field itself. Howsoever, it is also to be noted that the Hippocratic oath[1] that requires a new physician to swear in the name of healing gods before entering the noble profession and thereby to uphold the ethical standards of medical practice has not been replaced by anybody of principles. The document still remains the coherent code to govern medical ethics and still continues to be relevant and has been brought up-to-date by the World Medical Association.[2] But the irony is that medical practitioners of the present times are seen showing more disrespect to this sacred document and indulging themselves in unethical practices.[3] An attempt is therefore made to analyse and ascertain the diminishing values in medical practice from legal perspective through different instances. In this regard it is pertinent to look into various legislations in the regulation of medical practice.

REGULATION OF MEDICAL PRACTICE THROUGH REGULATORY BODIES

In India there are plethora of legislation and regulatory bodies that regulate the medical practice. Various regulatory bodies are set up for monitoring the standards of medical education, setting up of institutions for the education of medical professional and regulating the conduct of medical practitioners.[4] They are listed as follows:

1 It is an oath made by physicians when they become doctors. It was written by Greek Physician Hippocrates who lived from 460 to 377 B.C. Although there are writings to show that its relevance is lessened by the development of modern medicine it still remains the most famous medical ethics document even in the 21st Century. *See* Emily Woodbury, *The fall of the Hippocratic Oath: Why the Hippocratic Oath should be discarded in favour of a modified version of Pellegrino's Percepts*, Georgetown University Journal of Health Science, 2012 July, Vol.6, No. 2:9-17.

2 Anu Prasannan, *Analysing the transforming role of law in the realms of medicine and medical ethics*, Karnataka State Law University Journal, Vol. VII: 1(2019).

3 A physician charged with alleged ill-conduct may be acquitted or exonerated in criminal or civil court proceedings, yet disciplinary proceedings may be initiated against him with reference to the same conduct on the ground that his conduct was unethical.

4 Medical Education Policy and Medical Education, Available at main.mohfw.gov.in

- The National Medical Commission (NMC) was established as a statutory body under the National Medical Commission Act, 2019 which repealed the Indian Medical Council Act (IMC), 1956.[5]
- The Dental Council of India (DCI) was established as a statutory body under theDentists Act, 1948
- The Pharmacy Council of India (PCI) is a body constituted under Section 3 of the Pharmacy Act, 1948
- The Indian Nursing Council (INC) is an autonomous body under the Govt. of India, Ministry of Health & Family Welfare established under Indian Nursing Council Act, 1947.

Thus there are separate regulatory bodies for Allopathy, Ayurveda, Homeopathy, Siddha, Unani.[6] In addition, the Union Cabinet approved the New Education Policy (NEP) 2020 based on Draft National Education Policy, 2019.[7] NEP has designed several proposals to revamp medical education so that the duration, structure, and design of the educational programmes should match the role requirements played by the medical graduates. Regarding assessment of medical students NEP provides that their assessmentshouldbe at regular intervals based on well-defined parameters enabling them to work primarily in primary health care and in secondary hospitals. Further, NEP provides for an integrative approach whereby, all students of allopathic medical education must have a basic understanding of Ayurveda, Yoga and Naturopathy, Unani, Siddha, and Homeopathy (AYUSH), and vice versa. There is also a greater emphasis on preventive healthcare and community medicine in all forms of healthcare education. This has however, aroused criticism from experts because being a policy, implementation of the same depends on further regulation by both Centre and State

5 The Medical Council of India (MCI) was established as a statutory body under the provisions of the Indian Medical Council Act (IMC Act) 1933 which was later replaced by the Indian Medical Council Act (IMC), 1956. The main functions of the Council were:
(i) Maintenance of uniform standards of medical education in the country;
(ii) Prescribing minimum requirements for establishment of medical colleges;
(iii) Recommendation to start new medical colleges/new courses;
(iv) Recognition of medical qualifications;
(v) Maintenance of Indian Medical Register and
(vi) Enforcing ethical conduct for medical professionals.

6 The ministry of AYUSH was formed on 9th November, 2014 to ensure development and propagation of AYUSH systems of healthcare. Earlier it was known as the Department of Indian System of Medicine and Homeopathy (ISM&H) which was created in March 1995 and renamed as Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopthy(AYUSH) in November 2003 which focused attention for development of Education & Research in Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy.

7 The Committee for Draft National Education Policy was chaired by Dr. K. Kasurirangan, former chairman of Indian Space Research Organisation (ISRO) and was submitted to Ministry of Human Resource Development (MHRD)

as education is a concurrent subject.[8] Thus after analysing the regulatory framework it becomes necessary to look into some instances of diminishing values in medical practice.

INSTANCES OF DIMINISHING VALUES IN MEDICAL PRACTICE

Medical ethics, a disciplined study of medical morality has two goals in itself. They are (i) critically appraising the current medical morality and (ii) identifying how it should be improved. Although, a medical practitioner is never allowed to be indulged in ethically impermissible behaviour, the ethics and values adhered in the practice of medicine right from the dawn of civilization has undergone a shocking decline in the present times making the medical practitioners more accountable and answerable in the eyes of general public and the society at large. The practice of medicine has become more unethical resulting in waiving the codes of medical ethics and even the Hippocratic Oath that dates back to the times of ancient Greek wherein, Greeks are considered to be the fathers of medical ethics. The ancient Greek medical ethics has gained importance because of the fact that they were the first written code and their fundamental principles continue to be relevant even in modern medicine. Although some of the principles are not acceptable in the 20th Century, but documents like, Hippocratic Oath has not been replaced by any body of principles. [9] In fact no body of principles has replaced them as coherent code to govern medical ethics. All these ethical principles have been codified by the Indian Medical Council. Medical Council has also laid down regulations for registered medical practitioners on Professional Conduct, Etiquette and Ethicsthe violation of which would make them liable with charges of misconduct.[10] However, in spite of all these initiatives there are growing instances of violation and deviation of medical ethics which are to be identified.

- Corruption is arguably the most serious ethical crisis in medicine today. Theft of public assets for private gain has also become very common. Doctors are hesitating to give their service in government hospitals rather intend to practice in private hospitals for huge salaries and commissions. Asking exorbitant amount for conducting surgery or even for fixing an appointment has also

8 Kishan Shob, *How NEP will Impact India's Medical Education System*? (Aug. 13, 2023, 3.15 P.M) https://www.dailyrounds.org/blog/how-nep-2020-will-impact-indias-medical-education-system/

9 The general principles mentioned in the Hippocratic Oath have been brought up to date by the World Medical Association. The modernized version of the Hippocratic Oath is the Declaration of Geneva adopted by the 3rd General Assembly of World Medical Association at London in October 1949. This was amended in 1968, 1983 and 2006.

10 These regulations called the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 are made by virtue of the powers conferred under Section 20A read with Section 33 (m) of the Medical Council Act, 1956 and with the prior approval of the Central Government. Chapter 1 deals with the code of medical ethics and Chapter 3 deals with the duties of the physician in consultation. *See* No. MCI-211(2)/2001/Registration dated 11th March, 2002. Recently the Regulation of 2002 has been amended in the year 2019. *See* No.MCI-211(2)/2018 (Ethics)/184422.

increased. Absenteeism, that is, not attending work but claiming salary is yet another form of corruption.[11] Informal payments by the patients for better services have become a common practice in medical services.There is also increasing financial relationships of physicians and pharmaceutical companies and laboratories and also increased corruption in the purchase and supply of medicines and lab devices and instruments.

- The illegal practicesare not only confined to patients and practitioners of medicine but can also be extended to admission and study in medical colleges and also to research in medicine. There are increased bribes for getting a seat in medical colleges, bribes to get top ranks in examination, procuring high marks in examination and above all high political influence and favoritism in selection of students to medical colleges. This bribe is also not confined to the students but is extended for appointment of medical teachers as well. In the area of research, clinical trials conducted without prior successful studies on animals and without the approval of review boards for serving the institutional or individual profits
- MCI which was replaced by NMC was criticized for corruption wherein, the parliamentary standing committee titled "the functioning of Medical Council of India" had reported that:

  "corruptionwas there when there was sanctioning of medical colleges, or increasing or decreasing seats. The committee has also been informed that private medical colleges arrange ghost faculty and patients during inspections by MCI and no action is taken for the irregularity."[12]

The IMC Act of 1956 did not even provide any provision for action against corrupt people in the MCI. Finally, NMC has been constituted by an act of Parliament known as National Medical Commission Act, 2019 which came into force on 25.9.2020 by gazette notification dated 24.9.2020. The Board of Governors in supersession of Medical Council of India constituted under Section 3A of the Indian Medical Council Act, 1956 stands dissolved thereafter. NMC thus will have to frame policies to implement the new legislation.

- In the practice of medicine harvesting organs and tissues from terminally ill patients[13] or from patients who does not have the capacity to give consent against the law is common from the side of medical practitioners, hospital

11 Subrata Chattopadhyay, *Corruption in Health Care and Medicine*,Indian Journal of Medical Ethics,2013.

12 Jyotsna Singh,*Parliamentary Panel pulls up MCI over Corruption*, (March 09, 2023, 9.10 P.M), https://www.livemint.com/

13 With the advancement of science and technology we can preserve human organs even in case of irreversible brain damage or brain death. The persons are said to be brain stem dead or beating cadavers and from whom organs can be harvested for therapeutic purposes. Because of these advancement conventional definition of death had to be modified to include brain stem death. However, there is rampant black-marketing of human organs.

administration and even from middle men. There are thus, growing concerns of brain death and organ transplantation. Sub-standard drugs are administered on patients who are not financially sound and use of expired medication and implants which will have life threatening risks on such patients is common. In addition, attempting para-clinical procedures deemed unnecessary for the treatment for monetary gains is with corrupt motive.

- Conducting abortions by unqualified doctors for monetary benefits or qualified medical practitioners ignoring risks to the lives of patients. There are wrongful abortions[14] as a result of negligence or malicious intention for the illegal use of foetus. Unqualified and fake doctors have become a curse in medical practice.Although there is an obligation on medical practitioner to give emergency treatment the medical ethics have declined to such an extent that there is even refusal to give emergency treatment for accident victims.
- Assisted Conception techniques like Artificial Insemination (AI), In-Vitro Fertilization (IVF), Gamate Inter Fallopian Transfer (GIFT), Cryopreservation of gamates, eggs and embryos have increased with the hope of begetting children among childless couple and also preference for male children in spite of laws that prohibit pre-natal diagnostic techniques[15]. There is booming of infertility clinics and sperm banks with commercial purposes to fertility drugs and surrogacy programmes.
- There are also increasing sexual violence on women during the course of treatment by the medical practitioners themselves which clearly reflects as to how the medical practitioners swirl public policy and medical ethics. Sexual harassment in hospitals of women doctors and nurses has also become a common practice in India. In a study conducted by International NGO Population Council, 77 of the 135 women doctors and nurses working in four hospitals in Kolkata admitted sexual harassment.[16]
- Medical negligence which was considered as a crime in the earlier times is now a tort. There are plethora of decisions where the apex court had laid down guidelines regarding the prosecution of doctors for offences of which criminal negligence is an ingredient. In *JacobMathew Case* Supreme Court held that:

14 In north illegal abortions are common and have become a lobby these days. Initially judiciary was very conservative in granting permission for abortion. However, in recent years approach of judiciary has changed in favour of permitting abortion. In addition, the recent amendment in the Medical Termination of Pregnancy Act that is, the Medical Termination of Pregnancy (Amendment) Act, 2021 as per S. 3 (2) enables a woman to terminate her pregnancy not exceeding 24 weeks.

15 See *Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994*.

16 Kounteya Sinha, *Sexual abuse rampant in hospitals: Report*,Times of India, Nov, 5 2006. The report says that over 50 staff did not complain among those interviewed which may be mainly due to fear, loss of reputation etc. Among those complained 45 reported psychological harassment, 41 verbal harassment, 27 unwanted touch and 16 sexual gestures and exhibitionism.

(i) A private complaint may be entertained only when the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ii) Before proceeding against the doctor accused of rashness or negligence, the investigating officer should obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation.

(iii) A doctor accused of rashness or negligence cannot be arrested in a routine manner simply because a charge has been levelled against him.The negligent doctor may be arrested only when it is necessary for furthering the investigation or for collecting evidence or when the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested.

The courts have even moved ahead wherein, courts have directed to compensate unforeseen death or injury in government hospital even if there is no medical negligence.[17]

CONCLUSION

The problem of corruption in healthcare is of multidimensional nature.Medical decisions reached by experts on clinical matters were once regarded as unchallengeable before a court of law and anyone seeking to challenge such a decision often had to face immense struggle. However, more recently the relationship has been changing and courts are willing to accept challenges to the decisions of a doctor. The position can be well ascertained from the decision of Lord Steyn in *Chester v. Afshar*[18] who declared "in medical law paternalism no longer rules." The ethical standards of doctors are seen exceeding the standards prescribed by law exposing oneself to the controversial issues of medical ethics.[19] Fighting corruption requires an overall commitment to integrate anti-corruption perspective into all approaches relating to medical services which include:

(i) more transparency and accountability in all the dealings in order to strengthen the medical sector and services.

(ii) Stringent action should be taken against the delinquent medical professionals without mercy.

17 *Tamil Selvi v. State of Tamil Nadu & Ors.* Writ Petition (MD) No. 2721 of 2017.

18 [2004]UKHL 41

19 Although difficult to define medical ethics, the term is usually interpreted broadly to mean the moral as opposed to legal obligations of a medical practitioner in the practice of his profession. *See* Burton, A. W., *Medical Ethics and the Law*(Sydney: Australian Medical Publishing Co, 1971) p. 13.

(iii) Adequate measures should be adopted to see that medical professionals are properly paid for their services and sufficient allocation of funds to improve the health sector should be prioritized.

(iv) Medicines should be appropriately regulated ensuring that there is no sale, import of sub standard, mis-branded and adulterated drugs in the market

(v) There is a need to have access to whistle blowing mechanisms to report corruption in health sectors.

Though the list is not exhaustive, with adequate caution much changes can be brought to maintain the dignity of the medical profession. Even in the international scenario attempts have been made to prevent corruption through the adoption of the United Nations Convention against Corruption (UNCAC) which was adopted by the UNGA in October 2003 and came into force in 2005 that raised the importance of fighting corruption worldwide. UNDP has also been engaged in anti-corruption work since 2009 with the mandate of 'fighting corruption to improve governance.' This initiative which is supported through UNDP's Global Thematic Programme on Anti-corruption for Development Effectiveness (PACDE) have helped regional, national and local governments to implement anti-corruption initiatives[20]. In the national scenario, with the replacement of IMC with NMC much difference can be expected giving hopes to millions of people who are waiting for the mercy, miracle and godly touch of the medical practitioners….

20 UNDP, *Fighting Corruption in the Health Sector, Methods, Tools and Good Practices*, (NewYork, USA, 2011).

Analyzing Legal Liability in a Standard Formof Contract

*Dr. Manjula Raghav**

ABSTRACT

A business may be required to sign a sizable number of contracts with its clients or customers due to the tremendous growth in the volume and complexity of trade and commerce.A common form for many contracts may be used when someone needs to enter into a lot of contracts because it is practical and easier.Several parties may enter into contracts with the same terms after one party draughts a contract with standardized clauses.At the practical level, it has enormous ramifications for business owners and organizations to become more familiar with contract law's tenets, which can greatly enhance their customers' experiences.The present study will also help the contracting party improve the performance and service of their organization. In the present era, due toincreasing commercial activities, it is pertinent to follow a better trade practice and logical legal framework that can make an industry promising in the market.

The concept of contract validity and enforceability is a crucial aspect of business dealings. In order to ensure that contracts are legally binding, it is important to conduct thorough research and analysis. Through doctrinal research, we can gain a deeper understanding of the legal framework surrounding standard forms of contracts and the various factors that can impact their enforceability. Based on this research, we can identify potential issues, like unequal bargain power, irrational terms, unconscionable nature, and mistakenly missing out on reading the terms and conditions, and take proactive measures to mitigate them. Some remedial measures that may be used include ensuring that all parties involved fully understand the stipulations contained within the contract, including clear and concise language in the agreement, and obtaining legal advice from qualified professionals. By taking these steps, contracting parties can increase the likelihood that their agreements will be upheld in court and avoid costly disputes down the line.

Keywords: *Standard form, contract, law, liability,business,trade and commerce etc.*

INTRODUCTION

A business may be required to sign a sizable number of contracts with its clients or customers

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due to the tremendous growth in the volume and complexity of trade and commerce.A common form for many contracts may be used when someone needs to enter into a lot of contracts because it is practical and easier.Several parties may enter into contracts with the same terms after one party draughts a contract with standardized clauses.At the practical level, it has enormous ramifications for business owners and organizations to become more familiar with contract law's tenets, which can greatly enhance their customers' experiences.The present study will also help the contracting party improve the performance and service of their organization. In the present era, due toincreasing commercial activities, it is pertinent to follow a better trade practice and logical legal framework that can make an industry promising in the market.

The concept of contract validity and enforceability is a crucial aspect of business dealings. In order to ensure that contracts are legally binding, it is important to conduct thorough research and analysis. Through doctrinal research, we can gain a deeper understanding of the legal framework surrounding standard forms of contracts and the various factors that can impact their enforceability. Based on this research, we can identify potential issues, like unequal bargain power, irrational terms, unconscionable nature, and mistakenly missing out on reading the terms and conditions, and take proactive measures to mitigate them. Some remedial measures that may be used include ensuring that all parties involved fully understand the stipulations contained within the contract, including clear and concise language in the agreement, and obtaining legal advice from qualified professionals. By taking these steps, contracting parties can increase the likelihood that their agreements will be upheld in court and avoid costly disputes down the line.

Keywords: *Standard form, contract, law, liability, business, trade and commerce etc.*

INTRODUCTION

Due to the tremendous growth in the volume and complexity of trade and commerce, a company may be required to sign a significant number of contracts with its clients or customers. From a practical standpoint and for the benefit of ease, a common form for numerous contracts may be utilized when a person needs to engage into a lot of contracts. A contract with standardized terms could be written by one party,and various parties may sign agreements with the same clauses. These agreements are pre-drafted by one party, and the opposing party is required to sign them without having a chance to request changes. In these types of contracts, one party establishes the terms and conditions, and the other side has no opportunity to discuss the contract's terms[1]. Therefore, there is no room for talks between the parties to the contract. It is a contract that is made between unequal bargaining partners in which only one side draughts the agreement and there is no room for negotiation on the part of the other party regarding the contract's terms and conditions. For instance, an insurance company might create an insurance policy that would serve as the basis for a contract with several covered people. Likewise, the Time Table, which may be viewed as the basis of the contract with thousands of passengers who may be travelling by railway

1 Dr. R.K.Bangia, *Indian Contract Act* 49 (Allahabad Law Agency, Haryana, 15th edn., 2022).

every day, may also contain other terms and conditions that the railway authorities may publish. Similar terms and conditions might be placed on the back of each dry cleaner receipt or each lottery ticket sold by a certain business or organisation. In this situation, the terms and conditions of the contract are not decided by a process of negotiation between the two parties. The contract is typically drafted by one of the parties, and the other party is then encouraged, forced, or perhaps even assumed to have agreed to it. Such agreements are becoming quite common in our day-to-day lives[2].

Relatively little attention has been paid to understand and explore the standard form of contracts. Studies into the standard form of contract shows that there is no specific provision in the Indian Contract Act, 1872 which governs and casts contractual liability on the dominating party into the contract.It is found that standard forms of contracts have not been explored in light of settling legal liability of the party which is in the capacity to dictate. In the paper, an effort is made to fill the gap by exploring the liability clauses binding on the party. It explores that how standard forms of contract are formed and in case, if breached, how the liability will be settled. Hence the following research questions are constituted to be explored: What are the principles and provisions which govern the standard form of contract in India?And is there any contribution of the Supreme Court and High Courts in the dealing with the disputes arise from the standard form of contracts?To investigate into the research questions, doctrinal study has been conducted. For this purpose, primary and secondary data have been used.

EXPLORING THE LIABILITY OF THE PARTY TO THE CONTRACT

The terms and conditions of the contract are pre-drafted by one of the parties in the standard form, and the other is required to sign on the designated spot without the ability to amend the terms. In most cases, the party with the stronger negotiating position draughts the clauses that best serve him and occasionally seeks to exclude or reduce his liabilities, disregarding the interests of the party with the weaker negotiating position. The courts and the legislature have developed specific provisions to protect the interests of the weaker party in light of the unequal bargaining power of the two parties.

There must be a binding contract between the parties in order to constitute a standard form of contract. The terms stated in a document that is merely a receipt and does not establish a contract are not enforceable. By using a case study on this, it can be understood. In **Chapelton v. Barry Urban District Council[3],** to sit on a beach, the plaintiff hired a chair from the defendants. He obtained a ticket from the attendant, paid the required fee, and then selected one chair from the group. He placed the ticket into his pocket without reading anything on it. He suffered bodily injuries as a result of going through the canvas while seated on the chair. The defendant asserted immunity from liability in response to a claim by the plaintiff for damages for bodily

2 Avtar Singh, *Law of Contract and Specific Relief* 71(EBC, Lucknow, 13th edn., 2022)

3 (1940) 1 K.B.532

injuries because of the following clause that was printed on the ticket. The receipt stated that the council would not be responsible for any accident or damage resulting from the rental of seats. It was decided that the defendant could not claim immunity from liability on the grounds of anything printed on this ticket because it was nothing more than a simple receipt.

Misrepresentation is the next important factor in this context that must be taken into account. False portrayal is referred to as misrepresentation. The usual rule in contracts is that the party that was misled may terminate the agreement if the other party was persuaded to enter into the agreement by innocently misrepresenting any substantial fact, particularly one that was within that party's knowledge. It amounts to fraud, though, if it is produced without an honest conviction in its veracity. There must be no misrepresentation for a standard form of contract to be legally binding[4]. A person's acceptance and signature on a document containing specific provisions will not bind them if it is later determined that some of the document's contents were misrepresented. In **Curtis v. Chemical Cleaning and Dyeing Co**[5]. (1951), The defendants could not rely on the provision, the Court ruled, and they were required to pay damages. The court found that there was misrepresentation regarding the contractual provisions that misled the plaintiff as to the scope of the defendant's exemption of liability. The plaintiff in this instance gave the defendants her white satin wedding garment to clean. She was requested to sign a receipt, and the shop assistant told her verbally that she needed to do so because, as stated on the receipt, the defendants disclaimed liability for any harm to the beads and sequins. The plaintiff was not made aware of a provision in the receipt that released the defendants from obligation for any damage to the items they received for cleaning, regardless of how it occurred. The dress was ruined and severely damaged when it was given back to the plaintiff. As a result, the defendants were found to be liable of misrepresentation.

To bind a party with a standard form of contract, there should be a reasonable notice of the contractual terms. Proper communication of the terms of the contract should be done by the party who has pre-drafted the terms of the contract.If the attention of a party to the contract has been drawn to the terms of the contract by sufficient notice, for example, by printing on a ticket, "For information see back" etc. If no sufficient notice is not given to the party about the terms of the contract,there is no binding contract on such terms. In **M/s Prakash Road Lines(P) Ltd. V. H.M.T. Bearing Ltd**[6]**,** according to the court, the simple fact that the goods are being transported at the owner's risk is printed on the lorry receipt does not relieve the transporter of responsibility unless it can be demonstrated that the plaintiff was made aware of this condition. Unless the plaintiff's knowledge and assent about the terms are expressly communicated, the printed words on the truck receipt cannot be regarded as the contract's terms. In this case, the court determined that the carrier was required to deliver the consigned goods at the designated place or else be obligated to compensate

4 Dr. Narendra Kumar, *Contract-1*271 (Allahabad Law Agency, 1st edn., 2023).

5 (1951) 1 K.B. 805

6 AIR 1999 A.P.106

for them.

In a standard form of contract, the party must give notice prior to or at the time of the contract in order for it to bind them. A party to the contract must provide notice of the exemption while the contract is being entered into in order to be exempt from liability.The subsequent notice regarding the exemption from liability will be ineffective if the contract was entered into without the exemption clause. In an English case, **Olley v. Marlborough Court Ltd**., the plaintiff and her husband hired a room in a hotel. When they went to occupy the room, they found a notice displayed which carried the message that the proprietors would not be responsible for any loss of articles. Due to negligence of the hotel staff, their article got stolen from the room. The plaintiff filed a suit to claim compensation for the loss. However, the defendant appliedfor the exemption clause.The defendants were held responsible for the loss because the court determined that the notice in the room was not a part of the contract.

Another mode of protection is to exclude unreasonable terms in the contract. Reasonability is an important element in forming a contract.It is pertinent to note that terms of the contract should be reasonable, not arbitrary.A contract will be void and unenforceable if it is opposed to public policy.It is to be noted that it is not possible to provide a definite definition of public policy. However, an act which is injurious to the interest of society is against public policy. The concept of public policy is of great significance. The principle is simple to understand and implement that partiescannot form a contract which is contrary to public policy as it will be unlawful. According to Chitty, objects that are against public policy may, for convenience, be grouped into the following categories: objects that are unlawful under common law or by legislation; objects that are harmful to good government in the area of domestic or foreign affairs; objects that obstruct the proper operation of the justice system; objects that are offensive to marriage and morality; and objects that are economically against public policy[7].Section 23 of the Indian Contract Act, 1897, deals with legality of object and consideration and carries the concept of public policyalso[8].

In dealing with the concept of public policy, the Supreme Court observed and stated in **State of Rajasthan v. Basant Nahata**[9],"it becomes amply clear that it is not possible to define Public policy with precision at any point of time. It is not for the executive to fill these grey areas as the said power rests with judiciary. Whenever interpretation of the concept "public policy" is required to be considered it is for the judiciary to do so and in doing so even the power of the judiciary is very limited. Even for the said purpose, the part dealing with public policy in Section 23 of the Indian Contract Act is required to be construed in conjunction with other parts thereof"[10].

7 Chitty on Contract, 28the Edn., 838

8 The Indian Contract Act, 1872

9 AIR2005 S.C.3401

10 State of Rajasthan & Ors vs Basant Nahata,*available at*: https://indiankanoon.org/doc/1422834/(Visited on June 01, 2023).

Another example of reasonableness and public policy can be understood through **Central Inland Water Transport Corporation Ltd. V. Brojo Nath**[11]**.** In this instance, a contract of employment stated that the employer might terminate a permanent employee's employment by offering him either three months' salary or notice. According to the aforementioned paragraph, the respondent Brojo Nath and another person's employment was immediately terminated by giving them notice and a cheque for three months' income. According to the Supreme Court, a phrase like this in a service contract between parties with a glaring disparity in negotiating power was completely irrational, went against public policy, and was therefore unenforceable under Section 23 of the Contract Act.

In **Lilly White v. Munuswami**[12],a customer of M/S Lilly White, a dry cleaner and launderer, filed a lawsuit after losing a new saree worth Rs. 220 that had been entrusted to them for cleaning. The defendant proposed to pay only 50% of the price since there was a printed term on the back of the receipt that stated the customer would only be entitled to 50% of the item's market price or value. The plaintiff sought payment for the entire cost of the saree. It was decided that this contract clause was irrational, against public policy, and hence unenforceable. In the same way, in **R.S. Deboo v. Hindlekar**[13]**,** the court ruled that the condition printed on the receipt was invalid because it was irrational and against public policy.

Another protection is provided to the party in unequal bargaining power. In this case, it may happen that the dominating party can insert such exemption clause in the contract that his duty to perform the man contractual obligation is thereby navigated.But the core obligation is not allowed to be navigated by any term of the contract. No exemption clause can allow to permit non-compliance of the basic contractual obligation. For example, one party agrees to deliver goods to other party an says that we ae not liable if they get lost or damaged. As per the contract law, this is not a contract at all. Likewise, if the party is having even non-contractual liability, then the exclusion clause of contractual liability cannot spare the defaulting party from that liability. For example, if the defaulting party is liable for negligence under the tortious liability, he cannot be free from that tortious liability in the name of exclusion from contractual liability.

In **Morris v. C.W. Martin and Sons Ltd**[14]., The case at hand centres around a fur garment that resulted in legal action against the defendants. Despite their attempts to claim exemption from liability based on an agreement between the plaintiff and the furrier, the defendants were ultimately held responsible. This case highlights the importance of considering third-party liability in legal matters, as even agreements between two parties may not absolve one from responsibility towards others. It serves as a reminder to individuals and businesses alike to carefully consider potential consequences and liabilities when entering into agreements or engaging in actions

11 AIR1986 S.C.1571

12 AIR1966 Mad 13

13 AIR1995 Bom. 68

14 (1965) ALL E.R. 725

that may impact others. Ultimately, this case underscores the need for accountability and responsibility in all legal matters, particularly those involving third parties. The defendants were held liable for the theft of the plaintiff's fur garment due to the agreement between them.

DISCUSSION

As per the above discussion, it is clear that there is no special regulation in India that deals with or controls the common form of contracts. However, there are broad rules of contract law that apply to all kinds of contracts, including the standard form of contracts. According to section 2(h) of the Act of 1872, such transactions are legal and enforceable.Additionally, it meets all the following requirements for a legal contract as outlined in section 10; an agreement between the two parties.Agreement should be between the parties who are competent to contract. There should be a lawful consideration and lawful object. There should be free consent when parties enter into a contract. An agreement should not be declared void by law. It is also important to note that agreements should not be ambiguous and uncertain. If so, the agreement would be void.

It is discovered that while the Indian Contract Act, 1872 acknowledges the existence of basic forms of contracts, it does not define them specifically. Any contract that contains a particular level of injustice, unconscionability, or is against public policy is void, according to Section 23 of the Act. The clause is applicable to conventional forms of contracts as well, and any clause determined to be unconscionable or against public policy in one of these contracts may be declared void.

On the basis of equityalso, the court can deny to enforce the contract if the court finds it against the principles of equity, justice and good conscience. Moreover,the weaker party has right to avoid the contract if there is an element of fraud, misrepresentation, undue influence etc. The party has right to rescind the contract if such element was forced onto him.

The Law Commission of India has recommended adding a new Chapter 1V- "A" consisting of Section 67 A to the Indian Contract Act in its 103rd Report on Unfair Terms in Contract.This recommendation states that the court may refuse to enforce the contract or the portion of it that it deems to be unconscionable if it determines, based on the terms of the contract or evidence presented by the parties, that the contract or any portion of it is unconscionable.This clause states that a contract is considered unfair if it shields one party from being held accountable for a willful breach of the agreement or the results of negligence[15].

Customers now have the option to report unfair business practices thanks to the Consumer Protection Act of 2019, which also works to promote fair competition in the market for consumer services. The modern world has experienced limitless industrial

15 One Hundred and Ninety Ninth Report (199th Report) on Unfair (Procedural and Substantive) Terms in Contract, August, 2006,*available at*:http://lawcommissionofindia.nic.in/reports/rep199.pdf (Visited on June 01, 2023)

development, transforming the entire planet into a global village market under the aegis of liberalization, the free market, and open trade.State regulation and protection of consumer interests in harmony with competing interests and goals of industry and manufacturers have been made necessary by the rising revolution in human expectations, hopes, and desires towards consumerism. Thus, consumer jurisprudence is the body of law pertaining to the market place that reconciles, adjusts, and balances the divergent interests of the pre-dominant groups of sellers and consumers on the matrix of business morality and the welfare of the consumers by safeguarding them from abuses, impurities, and misrepresentation of consumer goods. [16].

The Consumer Protection Act, 2019, aims to safeguard the interests of consumers and establishes authorities for the prompt and efficient administration and resolution of consumer disputes as well as for matters related to or incidental to those disputes. It ensures the following six consumer rights under the Act;right to safety, right to be informed, right to choose, right to be heard, right to seek redressal and right to consumer awareness[17].It includes procedures for compensating the consumer for any loss or harm sustained as a result of negligence. The Act also contains provisions for punitive damages in the event of any product or service flaws, as well as for the cessation of unfair trade practices and restrictive trade practices and a promise not to repeat them[18].

CONCLUSION

Contract law is limited to upholding voluntarily agreed-upon civil obligations.It does not, however, include all civil obligations. There are numerous civil obligations that are outside the purview of contracts, such as those that are mandated by law or established by the acceptance of a trust, and whose violation may give rise to legal action under the tort law or under another statute. However, a standard form of contract binds the parties and adheres to the general principles of the Indian Contract Act, 1872. Additionally, if the dominant party to the contract behaves improperly or in violation of the rules of contract law, that party is responsible. In the event that the other party to the contract suffers a loss, that party is obligated to make restitution. The Indian Contract Act and the Consumer Protection Act, 2019 ensure fair trade practices in India. While contract law provides general principles,which are mandatory to be followed by the parties while forming a contract and casts an obligation in case of any loss caused to the party to the contract, the Consumer Protection Act aims to protect the interests of consumers. These laws play a significant role in ensuring that businesses operate ethically and transparently. By providing legal recourse to both parties in a transaction, they help create a level playing field for all stakeholders

16 S.N. Dhayani, *Fundamentals of Jurisprudence (The Indian Approach)* 426 (Central Law Agency, Allahabad, 3rd edn., 2007).

17 FAQs on Consumer Protection Act 2019, *available at:*https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/FAQ.pdf

18 Fairnessin Contracts: A Consumer Law Perspective, *available at:*https://ceerapub.nls.ac.in/fairness-in-contracts-a-consumer-law-perspective/(Visited on June 01,2023)

involved. This, in turn, fosters trust and confidence among consumers and businesses alike, leading to a healthy and sustainable economy. Overall, these laws are essential for promoting fair trade practices and protecting the interests of all parties involved in a transaction.

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Defending Women Who Kill: The (IR) Relevance of Prosecution in a Murder Trial

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I. INTRODUCTION

"Strictly speaking, 'women' cannot be said to exist"

– *Julia Kristeva*[1]

The obvious relegation of women as the *'Other'* in the social hierarchy has always raised a doubt about them being autonomous individuals, capable of being practical and rational.[2] When the *'Other'* disturbs the masculine-feminine gender binary by doing something which is against the acceptable female behaviour, they are constructed as 'evil' or 'non-women'.[3] In all likelihood, the disproportionate amount of public gaze on women who commit crimes of violent nature is inextricably linked to cultural perceptions of an 'ideal woman' who would never violate the ideals of feminity by killing someone.[4] Every time a woman commits murder, it makes us dig deeper into the crime and question -"*Why did she do it?*"- since we have been culturally motivated to believe that only something 'deviant' or 'pathological' must have forced her to so.[5] The 'ideal woman' construct reflects patriarchal gender expectations that categorise women to be gentle, passive, nurturing and particularly susceptible to mental instability

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1 Mahua Roy, *Women's Movement in the West*, in WOMEN'S STUDIES: VARIOUS ASPECTS 63 (Basabi Chakraborty ed.,2014).

2 CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 59 (1987).

3 S. L. MALLICOAT & C. E. IRELAND, WOMEN AND CRIME: THE ESSENTIALS280 (2014).

4 LIZZIE SEAL, WOMEN, MURDER AND FEMINITY 9 (2010).

5 LAURIE NALEPA & RICHARD PFEFFERMAN, THE MURDER MYSTIQUE: FEMALE KILLERS AND POPULARCULTURE 1 (2013).

owing to their biological structure.[6] As a result, the experiences of female offenders who commit crime have been reduced to a cursory glance and the same has resulted into discriminatory treatment of these women who trouble the gender binary by transgressing its boundaries.

In the criminal justice system, the role of prosecution is to see that "*justice is done*" by convicting those who have violated the laws and to make sure that only the guilty are tried and punished, which makes it obligatory for the prosecutor to turn over any evidence in his hands that might benefit the defendant at trial.[7] However, the prosecution somehow fails to live up to its traditional expectation especially in cases of homicide by women. The reason might be intricately linked with the preconceived notion that women do not engage in violent crimes, and if they do, then something must be surely wrong with them, and their actions should be viewed strictly; a view not based on the circumstances in which such act was committed. The feminist scholars have categorically highlighted that the formulation or actual application of criminal law discriminates against women defendants and often reinforces sexist stereotypes about appropriate female and male behaviour.[8] In order to defend such women who kill and to '*render them harmless*', the accused women's lawyers have to more often than not redefine the cause of their action in terms of 'psychiatric problems' even though the women themselves see their action as a measure of self-preservation. It is a fact that the existing defences under the Penal Law in India may condone violent acts after seeing a psychological imbalance on the part of the woman as excusing or mitigating circumstance, but it also reinforces the age-old belief that women who commit violent crimes are 'abnormal' or 'mentally ill'. This is where the prosecution should step in and give a proper direction to the trial by drawing a relation between previous victimization and the offence committed by her, if there is some evidence available.

The whole case of a woman who kills lies in the hands of prosecutionthat not only assumes responsibility in the investigative process but also has the authority to reduce the seriousness of a charge since the existing laws, which fail to confront social and economic factors vital to any explanation of why women commit crimes, effectively remove women from the purview of the general legal defences. Owing to the inability on the part of the prosecution to bring justice in the real sense, few common law

6 ANNE WORRALL, OFFENDING WOMEN: FEMALE LAWBREAKERS AND THE CRIMINAL JUSTICE SYSTEM 80(2002).

7 NATIONAL ACADEMY OF SCIENCES, WHAT'S CHANGING IN PROSECUTION? REPORT OF A WORKSHOP 7-9 (PhilipHeyman& Carol Petrie eds., 2001)

8 *See* Ved Kumari, *Gender Analysis of Indian Penal Code* in ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 139-160 (Amita Dhanda& Archana Parashar eds., 1999); Shreyas Gupta, *Right to Kill: The Case of the Battered Women*, 3(2) NIRMA UNIVERSITY LAW JOURNAL 59 (2014); Keerthana Medarametla, *Battered Women: The Gendered Notion of Defences Available*, 13 SOCIO-LEGAL REVIEW 108 (2017); Aman Deep Borthakur, *The Case for Inclusion of Battered Woman Defence in Indian Law*, 11 NUJS L. REV. 1(2018); Aishwarya Deb, *Rethinking Insanity Defence in the Light of Kumari Chandra versus State of Rajasthan: Are Female Murderers Abnormal?*, 61(3) JILI 350 (2019).

countries have made way for "non-party intervenors" who aid the officers of the Court to put forth the real picture behind the homicidal acts committed by women who are often victims of violence.[9] Against this background, the authorsin this Article examine the changing nature of prosecution vis-à-vis the treatment of female murderers by the criminal justice system in India.This Article does not engage in a discussion pertaining to statutory powers of the prosecutor or their appointment procedures; rather, the main objective of this Article is to critique the role of the prosecution in establishing the guilt of female offenders who kill in exceptional circumstances, with the help of reported judicial decisions of the Hon'ble Apex Court and the Hon'ble High Courts in India. The authors also advance an argument for situating the concept of "non-party intervenors" within the Indian Criminal Justice system, thereby providing the opportunity to supplant the role of prosecutors and aid in providing justice to female offenders who kill in exceptional circumstances.

II. ROLE OF THE PROSECUTION VIS-A-VIS JUDICIAL DISCOURSE IN INDIA

As per the general convention, prosecutors are often associated with the drama of trial, but they are empowered to perform a multitude of tasks that determine both specific case outcomes and system-wide responses to the problems of criminal justice.[10] Prosecutors provide the link between police investigation and courtroom adjudication, with the power to impact every decision along the way. Collectively, their discretionary judgments constitute a critical form of public policy that determines the fate of countless individuals.[11]We have tried to critique the role played by the prosecution in homicidal cases involving female offenders by illustrating few reported decisions of the Appellate Courts in India. It will be pertinent to add that the critique is not a comprehensive one owing to the fact that there are very few reported decisions on homicides committed by women who kill in exceptional circumstances. It is also noteworthy that the official statistics relating to crimes in India show that females arrested on the charge of murder amount to only 7.4 % of the total number of alleged offenders.[12] Scholars contend that the persistent low-ratio of women committing violent crimes like homicide is one of the primary reasons behind the interpretation of criminal law from a male perspective, which takes into account the experiences of men to set a standard for theevaluation of all human behaviour.[13] No matter how gender-neutral criminal law appears theoretically, the actual application of the law is premised upon assumptions

9 John Koch, *Making Room: New Directions in Third Party Intervention*, 48 UT FAC. L. REV.151(1990).

10 Laurene Soubise & Alice Woodley, *Prosecutors and Justice: Insights from Comparative Analysis*, 42 FORDHAM INT'L L.J. 587 (2018).

11 *Id.*

12 National Crime Records Bureau, *Crime in India 2019- Volume III* (Table 19A.1: Age Group and Gender-wise Persons Arrested under IPC Crime), https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%203.pdf

13 MALLICOAT, *supra* note 3, at 287.

and sexist stereotypes about gender and therefore, discriminates against female killers.[14] The mind of the stakeholders of the criminal justice system, including the prosecutors, are preconditioned to believe that 'ideal women' are passive and as such, they often give overwhelming reaction to violent women.[15] In contrast to male violence and masculinity, female violence doesn't fit conveniently into their ideas of the femininity.[16] The Court-room discussion surrounding cases of violent women, seems to be less about justice or the act in question than about what it is to be a woman—motherly, feminine, wifely, ladylike, and so forth.[17] More often than not, when confronted with a woman's violent act, the prosecution begins to question why she acted violently, while it also speculates endlessly about the definition of femininity.Obviously, the endless speculation about femininity is not only an attempt to define women, but also to define the relationship between masculinity and femininity. The prosecutors often deem violence so antithetical to femininity that when a woman murders someone it doesn't make sense within their symbolic system.[18] Their reaction to the female murderer is hysterical because instead of trying to analyse her case or action, they end up asking, "*What does this woman want?*". For instance, the cases in which mothers murder their own children are most difficult to comprehend because they so strongly go against the "idea" of a mother. When a mother murders her child, the first question that might come in the mind of the prosecutor is~ "*Why is she the way she is?*" It is obvious for any person to suggest that a man who commits violence—and even murder—always acts within a certain masculine ethos, but women, do not know what to do in violent situations because violence lies beyond their ken. In such circumstances, the prosecutors' judgement is clouded by their preconceived notion of womanhood, and they inevitably end up neglecting the best evidence which might aid the case of the accused woman.

In this regard, reference may be made to the case of *Amutha v. State*[19], wherein the Madras High Court granted anticipatory bail to a woman who had pushed her daughters into the well and jumped herself too but unfortunately survived. In the instant case, the evidence on record clearly revealed that the accused was a victim of domestic violence, but the prosecution failed to bring into light the circumstances under which the act was committed. However, the Hon'ble Court, recognising Battered Woman

14 Donald Nicolson, *Criminal Law and Feminism* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 17 (DonaldNicolson & Lois Bibbings eds., 2000).

15 NGAIRE NAFFINE, FEMALE CRIME: THE CONSTRUCTION OF WOMEN IN CRIMINOLOGY 124(2016).

16 B. MORRISSEY, WHEN WOMEN KILL: QUESTIONS OF AGENCY AND SUBJECTIVITY 10 (2003).

17 *Id.,* at 36.

18 Soubise, *supra* note 10, at 590.

19 2014 (2) MWN (Cr) 605.

Syndrome as accepted in *R v. Ahluwalia*[20], held that the continuous provocative conduct of the husband for years and the triggering action on the night of the incident, made her lose self-control and take a decision to kill herself and her daughters in order to put an end to the violence. The Court also referred to Nallathangal's Syndrome conceptualised by the Court in *Suyambukkani v. State of Tamil Nadu*[21] as the factual circumstances in the present case were quite similar to the one in that case. Similarly, in the case of *Mst. Shanti Devi v. State*,[22] the accused woman had cut the neck of her child with a razor. On being charged with murder, the accused pleaded insanity. It will be pertinent to mention that the investigation was clear with respect to the fact that the accused had a history of mental illness, but evidence was brought on record by the lawyer of the accused in order to prove the defence of insanity, not the prosecution. On having found that prior to the occurrence of the homicidal act, the accused was admitted to mental hospital and was suffering from Maniac Depressive Psychosis, the Court held that she was entitled to benefit of Section 84 of the Indian Penal Code, 1860 and acquitted her. The afore-mentioned cases reveal that the prosecution's lack of understanding of feminity, and cycle of violence often create an impact on performance of their duty. In a similar case of *Sumitra Shriram v. State of Maharashtra*[23], the accused mother was alleged to have committed the crime of killing her two minor children by throwing them into the well and attempting to kill third child and end her own life by taking the child in her arms and jumping herself in the well. During the course of investigation it was found out that the accused was suffering from illness and the offence committed by her was a consequence of unsoundness of mind. The prosecution was able to secure conviction of the accused in the Trial Court by highlighting certain ocular and circumstantial evidence to show that the accused was present at the crime scene and was solely responsible for the homicidal act. However, the Hon'ble High Court acquitted the accused woman by opining that the conduct of the accused clearly indicated that she did not have the requisite *mens rea* to commit the offence. It is quite evident from the discussion that the prosecutors often do not pay attention in determining *mens rea* which is a pre-requisite to establish a criminal act. The evidence, coated with the pre-conceived notion that violent women are 'bad', often leads to injustice for those women who kill in self-preservation.

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20 [1992] 4 All ER 889. In the instant case,the question of cumulative provocation was addressed to removethe veil and to allow the law to look beyond the events, which immediately preceded thekilling so that they can be viewed in the context of years of escalating violence and abuse andgradual erosion of self-control. Also, there was ample evidence at the trial to support thatfrom the very outset of marriage the woman had been subjected to abuse at the hands of herhusband. It was accepted that a small delay between the provocation and the resultant killing,often termed as 'cooling time', would not inevitably obliterate the defence.

21 1989 LW (Cri) 86.

22 AIR 1968 Del 177.

23 2000 (2) Mh.L.J. 149.

The criminal justice system in India is designed in a manner to ensure that the decision makers will discover the truth and achieve justice through a contest between the prosecution and defence. Being a part of the adversarial process, the prosecutors only put forth the evidence and arguments that support a conviction and desired sentence. Although some States in India have instituted guidelines regarding the role of prosecutors in criminal trials, many do not have such written guidelines or instead keep them confidential.[24] Despite relying upon law enforcement agents for trial evidence, prosecutors infrequently partake in investigations and are seldom responsible for any lacunae in the evidence that are brought on record.[25] Since the prosecution relies completely on the police authorities to provide them with evidence to prosecute cases, they are often hesitant to challenge police investigations in particular cases or police practices in general.[26] Under the traditional view, the prosecutors are not supposed to hold back evidence since it would mean failing to meet the burden of proof to convict the accused. The nature of the adversarial adjudication system is also largely responsible for the professional culture of many prosecution offices that take a more passive view of their duty to see that justice is done.[27] A strong, affirmative view of the prosecutor's role, even within adversarial adjudication, insists upon a responsibility to assure that accused persons are charged only for the precise offenses of which they are guilty and receive only the sentences their guilt merits.[28] Prosecutors can fulfil that responsibility only by investigating possible defences as well as gathering incriminating evidence. As a part of the adversarial process, the duty of the prosecutor is to produce evidence and the Court is to determine the guilt from the evidence that is produced by both the parties and evaluated under the criminal standard of proof. However, the prosecutors, more often than not, assume an affirmative duty to assess the guilt and punishment of the accused and showcase the evidence in that manner. The Courts have also time and again, reminded the prosecution that they are obligated to put forth both incriminating and mitigating evidence before the Court, where the circumstances so warrant. In this regard, reference may be made to the decision of the Hon'ble Bombay High Court in *Saraswati Mahadeo Jadyal v. State of Maharashtra*,[29] where the accused had strangulated her week-old infant and left the

24 For instance, Orissa has published its Prosecutors' guidelines on http://www.dppodisha.nic.in/?q=node/18; For a discussion on the working of prosecutors, see Jigar Parmar, *Why Indian justice system needs prosecutors to work with police during probe,* (November 15, 2021), https://theprint.in/opinion/why-indian-justice-system-needs-prosecutors-to-work-with-police-during-probe/765429/.

25 Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

26 Laurie Levenson , Dino Amoroso, Susan Gaertner & Kenneth Williams, *Transcript ofProceedings: The Role of the Prosecution and Defense in Causing and CorrectionsWrongful Convictions*, 37 SW. U. L. REV. 943 (2008).

27 Gary Edmond, *(Ad)Ministering Justice: Expert Evidence and the Professional Responsibilities of Prosecutors*, 36 U.N.S.W.L.J. 921 (2013).

28 Soubise, *supra* note 10, at 588.

29 1993 Mh. L.J. 1529.

body at a lonely village. In the course of witness examination, the accused had admitted that she had strangulated her child because her husband was spending all his money on drinking and was giving her nothing for the household expenses. It was also found out during the course of investigation that on an earlier occasion also she had killed her own child and had been committed to mental hospital where she was diagnosed to be medically unsound. The Court after taking into consideration all the legal and medical factors held that the accused was entitled to claim benefit of Section 84. However, the Court specifically held that "*duty of prosecution does not end merely in expounding prosecution evidence and trying to establish that ingredients of law are satisfied but where during investigation material emerging justifying exception, prosecution cannot keep back such material from Court*."[30] In this case, the Court took cognizance of her condition in life, the strata of society and the position in which she would be placed as a result of conviction, and consequently set aside her conviction. Similarly, in the case of *Poonam Rani v. State*[31], the Hon'ble Delhi High Court viewed the role of the prosecution very critically and observed that despite the positiveevidence of a healthy positive relationship between the deceased and the appellant, the investigating agency chose to investigate only the daughter-in-law of the deceased and arraign her as an accused, ignoring her critical information about possible relationship of the actual assailants to the deceased.It was held by the Hon'ble Court that the established facts are consistent with the innocence of the appellant and that the instant case was "*a copy book example of the injustice that would result from bias and prejudice*".[32] The Court also observed that the prosecution drew conclusions and proceeded in a completely biased manner, ignoring glaring and obvious alternative clues in the matter, so as to build a case against the appellant. It will also be pertinent to highlight the decision of the Hon'ble Gauhati High Court in *Manju Lakra v. State of Assam.*[33] The case of *Manju Lakra* is the best example to highlight the failure on the part of the prosecution to bring justice to abused women who kill in self-preservation. In this case, the accused woman suffered unprovoked acts of domestic violence, but on one occasion, the violence boomeranged and devoured the abusivehusband. The incident took place while the deceased was beating her, because of which sheeven sustained injuries in her head and eyes and on not being able to tolerate the violence anyfurther, she snatched the 'lathi' from his hand and hit him to death. The accusedpleaded 'not guilty' during the trial and did not adduce any evidence on her behalf. The prosecution could have, in such a scenario, put forth the evidence to highlight the previous victimisation of the woman but it did not do so. Instead, the evidence was moulded, and it was argued on behalf of the prosecution that she had requisite *mens rea* to have committed the murder of husband. The Trial Court even convicted her of the homicide charge. However, on appeal,the Hon'ble High Court relied on the decision in *Ahluwali*a, which highlighted the concept of'cumulative provocation', and the Court concluded that if circumstances potential enough to

30 *Id.,* at ¶13.

31 2017 SCC OnLine Del 7122

32 *Id.,* at ¶205.

33 (2013) SCC OnLine Gau 207.

distinguish thesuicide of a woman has been recognised, the same set of events should be equally recognised to be potential enough to turn such women into an aggressor so much so that she ends the lifeof her abuser.[34] The Court also took into account the concept of Battered Woman Syndrome and mitigated the offence of the accused woman from that of murder.

On a slightly different note, reference may be made to the case of *Keshar Bai v. State of Rajasthan*[35], wherein the prosecution put forth evidence of unsoundness of mind of the accused person at the time of trial. In the instant case, the accused was charged with an offence under Sec. 302 of the IPC for the alleged murder of a local resident. The plea of insanity was not taken by the accused *per se* as none appeared on her behalf. The Court got positive evidence from the prosecution case itself that the accused was of unsound mind and despite the medical treatment, she could not be cured. It was the view of the Court that if the accused is not able to establish conclusively that he was insane at the time of commission of the homicidal act, the Court can acquit the accused if the evidence creates reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including *mens rea* of the accused. Similarly, in the case of*Anuj Jermi v. State*[36], the Court placed reliance upon the prosecution case itself to reach the conclusion that the homicidal act was committed in exceptional circumstances. In the instant case, the deceased father, while exhibiting animal behaviour, attempted to commit rape on his daughter, i.e., the accused, and kill her at knife point. The accused, in order to save her dignity and life, stabbed her father with the knife almost three times on his stomach and caused his death. It was held by the Court that the petitioner acted in exercise of right of private defence and therefore she was entitled to the benefit under Section 100 of IPC.

The preceding discussion clearly shows that only in very few occasions, the prosecution has been able to aid the case of women who kill in unique circumstances. The problem is not unique to the Indian Criminal Justice system, but it is prevalent across various countries since female criminality is a very under-theorised area of criminal law. This is where the concept of "non-party intervenors" or third-party intervenors steps in, which has been discussed elaborately in the subsequent section of this Article.

III. NEED FOR NON-PARTY INTERVENERS

The concept of "non-party interveners" or third-party interventions evolved in the common law countries as a measure to improve the gap between legal doctrines and women's lives. The feminist scholars have mooted that third-party interventions inongoing litigation have the potential to support the development of the common law in a waythat is consistent with women's equality rights.[37] The existing literature

34 *Id.,* at ¶ 87.

35 1984 SCC OnLine Raj 300.

36 (2000) 10 SCC 608.

37 Elizabeth A. Sheehy & Julia Tolmie, *Feminist Interventions: Learning from Canada*, 3 NZWLJ 201 (2019).

on third-party interventions highlight the far-reaching impact of non-party interveners participating in murder trials whereby these interventions might end up introducing sources of law, arguments, social facts and materials not advanced by theparties themselves in the course of trial.[38] Primarily, this concept was recognised by the courts in the United States, England and Wales, New Zealand,Australia and Canada to provide an opportunity to the feminist interveners to ensure that the decision makers are educated about the implications of their verdict for women.[39]The major reason behind the acceptance of these feminist or non-party interventions was to challenge the conventional norms and the common law principles that havebeen developed without apparent discussion or accommodation of women'sinterests.[40]The best example being that of the judicial interpretations of the legal requirements forself-defence and provocation which effectively foreclose these defences in theone circumstance where women, who typically offend against a background ofvictimisation, might consistently need them. More often than not, the women with histories of serial victimisation, whose offending takes place in response to a dangerous and coercive partner, are mostly affected by the inability to access these defences. In such circumstances, non-party interventions allow these female offenders to feel "heard", thus affirming access to justice as a principle.[41]The concept of third-party or non-party interventions is not alien to the Indian criminal justice system. However, it will be pertinent to highlight that the scope of third-party intervention in a criminal trial is very limited owing to the statutory provision of Section 301 of the Code of Criminal Procedure, 1973 (hereinafter 'CrPC'). In view of the statutory provision, the right of the third party is limited to assisting the prosecution only. In plethora of decisions, the Hon'ble Courts have observed that the only correct interpretation of Section 301(2) of CrPC is that the pleader instructed by a private person has no right of audience except to assist the Public Prosecutor and that pleader can certainly assist the Public Prosecutor during the course of criminal proceedings.[42] In majority of the criminal litigations of far-reaching importance, the Hon'ble Courts have been keen on appointing Amicus Curiae in order to assist the Court in reaching a conclusion with regard to assessing the gravity of the offence and awarding a justified punishment. The Hon'ble Apex Court has also laid down the mandate for appointment of Amicus Curiae in cases where there is a possibility of life-sentence or death penalty to bring into limelight any mitigating circumstance or evidence which might benefit the accused.[43]

38 *See* CATHARINE MACKINNON, WOMENS LIVES, MENS LAWS (2007); KARENO'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS (1980).; Justice Susan Kenny, *Interveners and Amici Curiae in the High Court*, 20ADEL. L. REV.159, 167 (1998).

39 For a detailed discussion on interveners in these jurisdictions, *see* Edward Clark, *The Needs of theMany and the Needs of the Few: A New System of Public Interest Intervention for New Zealand*, (2005) 36 VUWLR 71.

40 John Koch, *Making Room: New Directions in Third Party Intervention*, 48 UT FAC. L. REV.151, 161-162.(1990).

41 Sheehy, *supra* note 37, at 214.

42 *See* K. N. Chandrasekharan Pillai, *Public Prosecution In India*, 50 (4) JILI 629-639 (2008).

43 The guidelines were formulated in the case ofAnokhilal v. State of Madhya Pradesh, 2019 SCC OnLine SC 1637.

However, the only issue with the appointment of Amicus Curiae as third-party interveners is that they are not acquainted with the lived experiences of these women who kill in exceptional circumstances. In this regard, we argue that the Prison Welfare Officers[44], posted at various Correctional Homes, are important stakeholders in the justice delivery system as they facilitate the necessary Court procedures for the female inmates, like arranging for their parole, engaging defence lawyers through the District Legal Services Authority, catering to their daily needs and most importantly their reformation. Every Welfare Officer is well-versed with the case history of each inmate and in order to ensure substantive justice, it is essential to have a clear understanding of the lived experiences of these women who are undergoing trial as they themselves are reluctant to answer questions or state true facts before the Court. Welfare officers are best suited to assist the Court in ascertaining whether there is any possibility of situating the respective cases of these women, within the purview of the general legal defences to homicide. Introduction of Welfare Officers as third-party interveners will aid in assisting the prosecution as well the Amicus Curiae to bring justice to these women, who have a baggage of victimisation. A very fruitful result was observed by appointment of feminist interveners in litigation by the Canadian Supreme Court in the celebrated decision of *Lavelle v. Canada*[45], which raised the issue of whether it was discriminatoryon the basis of sex under the Bill of Rights to deprive Indigenous women andtheir children of "Indian status" if they married non-status men, given thatIndigenous men who married non-status women not only retained their statusbut passed it on to their wives and children. Multiple interveners, includingIndigenous and women's groups, were permitted to file facts and make oralargument.[46]Interveners have often been added as parties to various public interest litigations involving questions of constitutional importance, but very seldom in criminal trials. It is quite a possibility that if these Welfare Officers are allowed as interveners in criminal trials involving female offenders charged with homicide, they will be able to bring out the best evidence on record and give a voice to these victimised women, who often have no other option but to kill their violators. It is true that despite having specific provision for capacity building in respect of Correctional Homes in the Model Prison Manual 2016, only very States in India have adequate nos. of Welfare Officers to look after the cases of the prisoners.[47] As per the current statistics, the national average stands at one welfare officer per 1,617 prisoners and States like Andhra Pradesh and Sikkim, do not have any sanctioned posts yet.[48] However, given the low ratio of women

44 For an overview of the role of Prison Welfare Officers, see *Roundtable for Welfare Officers, The Backbone of Prison Administration,* https://www.ibj.org/2013/12/roundtable-for-welfare-officers-the-backbone-of-prison-administration-3/.

45 [1974] SCR 1349.

46 Bernard M Dickens, *A Canadian Development: Non-Party Intervention*, (1977) 40 MOD. L. REV.666, 674.

47 *India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid,* TataTrusts, New Delhi, India (2021), https://www.tatatrusts.org/Upload/pdf/ijr-2020-overall-report-january-26.pdf.

48 *Id.*

committing offences like homicide, there should not be any problem in allowing Welfare Officers to act as interveners in criminal trials involving women who kill. The non-party interveners will not only give voice to the voiceless but also aid the decision makers in interpreting the statutory provisions and the legal defences keeping in mind the lived experiences of these victimised women.

IV. CONCLUSION

Till date, there has not been any criminal trial where third-party intervention was allowed by the Courts to aid in securing justice to female offenders, with background of abuse, charged with homicide. The burden is always on the prosecution to secure punishment of theconvict, instead of the actual responsibility of bringing home the real evidence which might even acquit the person who is being indicted. In order to ensure that prosecutors accomplish justice, it surely requires something different than merelyasking them to be just; it requiresmaking justice likely in light of the settled principles of the criminallaw and the structural design of the criminal justice system. A criminaljustice system that punishes unjustly, or grants prosecutors unrestrainedpower, will not reliably accomplish any sort of justice.Instead, we need to develop the criminal justice system in a manner that responds to each female offender on an individual basis and that helps her determine whatintervention strategy is best for her. The prosecution should accept the assistance of the third-party interveners to advance the cause of justice which will eventuallytake into account the accused women's individualnarrativeand providethem with the opportunity to avail the legal defences suitable for their case.

A Critical Review on the Role of Police During Investigation in Criminal Justice System

*Cheshta Dahiya**

ABSTRACT

Police has a significant role in conducting investigation in the criminal justice system and are given different powers in furtherance of conducting the investigation and for that purpose to summon and examine the witness, to search and arrest the accused person and the individual has to be protected against any possible abuse of these powers by certain rules and forms of procedure. It is in this view that the police has to keep themselves informed not only of the powers granted to them but their duties in respect of investigation and the forms of procedure they have to follow. This paper critically examines the role and significance of Role of Police during investigation in the Criminal Justice System in India.

Keywords: *FIR, Investigation, Police, Criminal Justice System.*

1. INTRODUCTION

Investigation is a connected procedure which starts with the evidence collection in exercise of powers under Sec.156, Cr. P.C., and with the final report submission it ends under Sec. 173, Cr. P.C. to the Magistrate. Investigation thus starts when a formal information or intelligence reaches a police officer regarding the offence committal and ends when the police have collected enough material evidence in answer to all the questions set out above and decide to place the matter before a court of law or decide to drop the proceedings by way of a report to the Magistrate under Sec. 173, Cr.P.C.

2. FIRST INFORMATION REPORT

FIR is not defined in the Criminal Procedure Code. But these words are understood to refer to the information recorded under section 154 (1)Cr.PC. The report containing the information received first in point of time by an officer in charge of a police station about the commission of cognizable offence is usually mentioned in practice as the first information report or popularly called as FIR. [1]

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So starting for the place of occurrence after receiving information of a cognizable offence is a stage of the investigation. Therefore, when a Sub-inspector receives such a piece of information, records it in the General Diary and leaves for the place of occurrence, then he has already started investigation and any statement that he may record thereafter as F.I.R., of the case would be nothing but a statement falling within the mischief of S. 162 Cr.PC. and as such is neither an F.I.R., nor an admissible, piece of evidence. "The distendingof a statement underS. 162 Cr.PC, asa First Information Report is to be condemned".[2] This practice only helps to create a doubt in the mind of the Court that the investigation is not honest right from the start and such an impression is indeed perilous for the success of the case. The investigating Officer should, therefore, stop this undesirable and illegal practice and start a, regular case as soon as he receives information of a cognizable offence, even though the information may be sketchy or lacking in details.

But if the information, though first in point of time, does not reveal a cognizable offence e.g., where the cryptic telephonic message that is first received at the police-station only conveys the news about a firing that is going on at a certain place and the same is merely recorded in the General Diary of the station and thereafter the Officer proceeds to the spot and takes down the statement of an eye-witness which for the first time discloses that a murder has been committed, it is the latter statement that constitutes the first information report of the case and not the first cryptic General Diary entry as that cryptic oral message does not disclose the commission of a cognizable offence and as such cannot be treated as the first information report of the case. "The mere fact that this information was first in point of time does not by itself clothe it with the character of the first information report."[3]

The main purpose of the FIR is to satisfy police officer as to the commission of a cognizable offence. The primary object is to set the criminal law in motion. FIR itself is not the proof of crime but is a piece of evidence which could be used for corroboration. [4] Further in *Lalita Kumari v. Govt of U.P.*[5] it was held that Registration of FIR is mandatory under Section 154 of CrPC if the information discloses commission of cognizable offence no preliminary inquiry is permissible in such cases. The scope of preliminary inquiry is not to verify the veracity or of information otherwise received but only to ascertain whether the information revels any cognizable offence The Police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

3. FIRST STEPS IN INVESTIGATION

Section 157 Cr.PC runs thus, the procedure which has to be followed if there is suspicion of committal of the offence (1) If from some information given or otherwise the officer believes that there is some suspicion for the committal of offence of which he has the power to investigate under sec. 156, he has to send the occurrence report to the court having power to take the cognizance of the offence and will begin in person or will give the orders to the subordinate to reach on the place of occurrence

and to investigate the case, and if it is important to take steps for the arrest and discovery of things provided.

- When the information is given by the name of person against whom allegations are made and the offence committed is not of the serious nature the officer may not proceed or may also not depute the subordinate officer for reaching on the spot.
- When the concerned officer in charge of the station believes that there is no sufficient ground to investigate the officer he shall not investigate the case.
- In each situation given in clause (a) and (b) of the proviso, it is the duty of the officer in charge to give the reasons for not fulfilling the condition of the sub-sec, also in regard to action not taken as mentioned in clause (b) such officer shall give immediately this information to the informant, of the fact that he will not investigate the case.[6]

The police start investigation when they decide that the information they receive either under Sec.154, Cr. P.C on first information report or otherwise is responsible and genuine. The first step in investigation is for the police to send a report of the information on which they decide to start investigation and immediately inform the magistrate who has the power to take cognizance of the case and then commence investigation by proceeding to the spot of offence or otherwise collecting evidence. On receipt of information of an offence, the police have to decide whether they will investigate or they will not. This is not a mere subjective decision as the duty of the police is to investigate unless they are convinced that investigation will be useless or the offence is of trivial nature But the law gives the police the right to decide whether to take up investigation or not. If they decide to investigate, the first step is to send a copy of the information on which they decide to investigate is to the Magistrate. The use of the word 'forthwith' is emphasised by the Kerala High Court in State of Kerala v. N.J. Samuel.[7]

The police should not lightly decide not to investigate. The safeguards against the Police Acting in an irresponsible manner in taking such a decision are -

- The police under Sec.157, Cr. P.C., is required to send a report about their decision not to investigate and their reasons therefore immediately to the Magistrate who may disagree with the decision of the police and order them as stated in Sec.156 (3), Cr. P.C., to investigate.
- Under Sec.158, Cr. P.C., the above report has to be given to the Magistrate through senior police officers who may go through the records and themselves order investigation.
- Under Sec.157 (2) (b), Cr. P.C., the police should notify the person who gave the information about the offence their decision not to investigate. The police are required to do this immediately so that the informant may move to higher police officials or the court by filing a private complaint which may be sent back to the police for investigation.

These safeguards are to ensure that the police do not take a decision not to investigate without very strong reasons. So the discretionary power is given to the police to investigate or not to investigate after recording of the FIR in certain cases which can be misused by police. This is not a mere subjective decision as the duty of the police is to investigate unless they are convinced that investigation will be useless or the offence is of trivial nature But the law gives the police the right to decide whether to take up investigation or not.

3.1 PROCEEDINGS TO THE CRIME SCENE

After recording of FIR, the first duty of the IO is to proceed immediately to the crime scene with the investigation kit.The scene of occurrence may be fixed by taking the statement of the Complainant and recording Accounts of the eye witnesses, Proper evaluation of the scene of occurrence though it is time consuming but it is the most important task of the investigating police officer.

It requires and includes Protection of crime scene, Photography, Videography, Drawing the Sketch of the SOC, Drawing observation Mahazar, Utilizing the help of Sniffer dog [8]Lifting the finger and footprints and other impressions, [9] Handling clues by utilizing modern aids, Examination by forensic science experts, [10] Examination by medical officer if necessary, Drawing seizure mahazar, Recording the statement of witnesses at the SOC, Conducting Inquest, Forwarding Dead body if any for autopsy etc. Although the contents of the scene mahazar cannot be treated as "evidence" [11]the purpose of the scene mahazar is to determine the facts of the crime and identify its perpetrator. Generally, it shall contain the detailed descriptions of all the physical evidence found at the scene of crime

4. INQUEST: MEANING AND IMPORTANCE

"Inquest" means inquiry into a death, the cause of which is unknown. The term has its origin in the coroner's enquiry under the English Law called "Inquisition". The Coroner's Act came into existence in the year 1871 for Metropolitan cities of Calcutta, Mumbai and Chennai and is still in existence in Calcutta and Mumbai. Inquest can be held by an Officer-in-Charge of a Police Station or some other Police Officer specially empowered in that behalf. Inquest Report u/s 174 Cr.PC should contain all detail of the body under the scene of the offence. [12]If the death occurred in Police custody, it must be informed to Magistrate & (S.D.M.) to hold the inquest. Provisions relating to inquest are contained in Sec. 174 to 176 of the code of Criminal Procedure. [13] Under Section 174 Cr.PC, the officer-in-charge of a Police Station or some other Police officer specially empowered by the state government in that behalf are required to investigate in to the apparent cause of death whereas person:

- Has committed suicide, or
- Has been killed by the another or an animal or machinery, or by an accident, or
- Has died under circumstances where there is a reasonable suspicion that some other person has committed an offence.

The investigating Officer shall send the body for autopsy or post-mortem examination in the following cases:

- When there is any doubt regarding the cause of death.
- When it involves suicide by women within seven year of her marriage or
- Where a women dies within seven years of her marriage in any Circumstances raising a reasonable suspicion that some other has committed an offence relating to the women.
- When a women dies within seven years of her marriage and any relative of the women had made a request in that of behalf or
- The Police officer for any other reason considers it expedient to do so

Sec. 175 Cr.PCenumerates the power given to a Police officer proceeding under Sec. 174 to summon persons who appear to be acquainted with the fact of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answer to which would have tendency to expose him t o a criminal charge or to a penalty of forfeiture. [14]A Police officer has got discretion not to send the body for post-mortem examination only in one case namely where there can be no doubt about the cause of death. This discretion is to be exercised prudently and honestly.

5. ARREST

Arrest of a person is normally exercised by the law enforcing Authorities. However, in certain special circumstances, the exercise of arrest can be done by civilians. Arrest involves the curtailment of the liberty of a person for an offence is called Arrest. Since early times man has inalienable right of life and liberty. So it has to be just and fair otherwise requirement of Article 21 would not be satisfied. [15] But this individual liberty underwent changes with the passage of time and the present concept of individual freedom is counter balance by a man's duty toward society.

Arrest of a person can be with warrant and without a warrant. Without a warrant rules are given under Cr.P.C. Sec. 41 and Sec. 151 and with a warrant u/s 72 to 74 Cr.P.C. also with the written order of an Officer in charge of a Police Station U/S 55 Cr.P.C and with order of Magistrate U/S 44 Cr.P.C. In Non-cognizable offence arrest procedure is given U/S 42 Cr.P.C.Arrest is not a proof of guilt. Use of third degree methods or any form of torture to extract information is not permitted. To avoid illegal arrest and detention in D.K. Basu v. State of West Bengal [16] it was held that Police personnel carrying out arrest and interrogation must bear accurate, visible and clear identification name tags with their designations. Particulars of all personnel handling interrogation of an arrested person must be recorded in a register. A memo of arrest stating the time and place of arrest must be prepared by the police officer carrying out an arrest. It should be attested by at least one witness who is either a family member of the arrested person or a respectable person from the locality where the arrest is made. The memo should also be counter-signed by the arrested person.

The arrested or detained person is entitled to inform a friend, relative or any other person interested in her/his welfare about the arrest and place of detention as soon as practicable. The arrested person must be made aware of this right as soon as s/he is arrested or detained. The arrested person may be allowed to meet her/his lawyer during interrogation but not throughout the interrogation. [17]The time, place of arrest and venue of custody of the arrested person must be notified by telegraph to next friend or relative of the arrested person within 8-12 hours of arrest in case such person lives outside the district or town. The information should be given through the District Legal Aid Organization and police station of the area concerned. An entry must be made in the diary at the place of detention in regard to the arrest. The name of the friend/relative of the arrested person who has been informed and the names of the police personnel in whose custody, the arrested person is being kept should be entered in the register. [18]

The arrested person should be examined by a medical doctor at the time of arrest if s/he so requests. All bodily injuries on the arrested person should be recorded in the inspection memo. Which should be signed by both the arrested person and the police officer making the arrest? A copy of the memo should be provided to the arrested person. The arrested person should be subject to a medical examination every 48 hours by a trained doctor who has been approved by the State Health Department.

Copies of all documents relating to the arrest including the memo of arrest should be sent to the Area Magistrate for her/his record. A police control room should be provided at all district and state headquarters where information regarding arrests should be prominently displayed. The police 19 officer making the arrest must inform the police control room within 12 hours of the arrest. Departmental action and contempt of court proceedings should be initiated against those who fail to follow above-mentioned directives. [19]

The purpose of arrest may be either to ensure the presence of the accused in a court of law to answer a criminal charge levelled against him to prevent him from committing unlawful acts in special case. Apart from the above, if the accused is a dangerous and violent person, the arrest will have beneficial effect on the morale of the society. Arrest of person in time will boost the image of the prosecution agencies and is consider as an essential step in investigation. As arrest involves depriving of the freedom of an individual, it must be exercised with utmost care and caution. It is only a mode of precaution taken under the law in order to make a person appear before the legal forum to answer a charge against him. [20]

6. REMAND

Remand in common parlance, means to send back. With respect to Criminal Law, remand denotes sending back an arrested person to Custody pending investigation or trial. It means authorized detention.[21] Custody means the state of being guarded. Custody may involve detaining of the person arrested under safety especially by the police. Custody also may be legal confinement by Court Order.Remand is an order

of reverting back something. If the accused is remanded it will be by magistrate either to police custody or judicial custody. Section 167 Cr.P.C custody can be police or judicial. Police remand can be granted only for first fifteen days, there cannot be any police remand in any circumstance after first fifteen days are over. [22]

Fifteen days period has to be counted from the date when police or any other officer produce the accused before the magistrate upon arrest both arrest and custody as well as production is a must for the purpose of S. 167 (2) Cr.PC the remand be it transit remand has to be sourced to Section 167. [23]Computation of period of sixty or ninety days as specified under Section 167 depends upon maximum punishment provided for particular offence under penal code and not minimum period of sentence. [24]

If investigation is not completed in the first instance within 24 hours the accused should be produced before the nearest Magistrate within 24 hours.[25] The Magistrate may authorise detention of accused for maximum fifteen days police custody further it can be only be judicial custody that is sixty or ninety days. If investigation is still not completed as a mandate accused has to be released on default bail. [26] So not much discretion is given to the police but sometime police submit the police report within the prescribed time just to avoid default bail so that person can be kept in custody for a longer period.

7. CONFESSION

The expression "Confession" has not been defined in the Evidence Act. Stephen defines it thus - "A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime."It has been decided in Savlimiya's case that the police should produce the accused before the Magistrate for getting his confession judicially recorded as soon as they come to know about his desire to make a confession. [27] Similarly in Machander's case honorable Supreme Court too discouraged the action of the police when they waited for six days to get the confession judicially recorded and kept back the confessing accused from the Magistrate with the aim of effecting discoveries as given in S. 27 Evidence Act. [28]

A confession made to police officer while in custody leading to the discovery of any fact [29] in Jafarudheen vs. State of Kerala [30] court held Section 27 is an exception to section 24 and 55 of Evidence Act. At the outset it must be said that any statement suggesting the inference of guilt of the accused is not a confession, for admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. If a statement falls short of such a plenary acknowledgment of guilt, it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tends to prove the guilt of the accused; such a statement is only an ad mission but not a confession. So where the circumstances of the case showed that the accused persons had used a cycle to escape from the scene of murder and a cycle too was found abandoned by the side of blood stained stone in the early hours. of the morning and the accused in course of their examination

by the doctor had told the latter that the injuries on their bodies were caused by a fall from a cycle which the doctor noted in the injury reports and also deposed in Court to that effect, it was held that the statements made by the accused to the doctor did not amount to confessions but they were perfectly admissible as admissions under S. 21 of the Evidence Act. [31] Thus an admission that the accused is the owner of and was in recent possession of the knife which caused the death is not enough. A confession in order to be admissible under the Indian Evidence Act must amount to an unequivocal admission of guilt, that is, it must either in terms admit the offence or, at any rate, substantially all the facts which constitute an offence. [32] Thus cannot amount to a confession if the self-exculpatory portion is of some fact, which if true, would negative the offence alleged to be confessed. So a statement that "I killed the man in exercise of my right of private defence,[33] or that "I am guilty of taking the horse" by adding a rider without knowing it to be stolen" or that "I took the cycle" but adding believing it to be the property of my mate" cannot be treated as a confession. In each case the rider nullifies the confession. Such a statement has to be taken as a whole and not in parts and taken as a whole it does not amount to an acknowledgement of guilt. [34] It is only when a confession is separable and there is other evidence to show that the exculpatory part is false, that the inculpatory part may be acted upon while rejecting the exculpatory part. [35]

8. TEST IDENTIFICATION PARADE

Identification also is one of the important method for the collection of the evidence as witness who has seen the objects and the person who are relevant for the investigation purpose, To connect such individual and object with the main fact in issue, officer will make the profile on bases of the statement of the witness and later on these witness will identify the objects and person so that their previous statement can be verified in the court. This is the process of identification in this process identification parade is conducted as provided in Evidence Act Section 9. If the accused is unknown or not arrested on the spot this is very important piece of corroborative evidence and generally enhances the credibility of the evidence of identification. In fact mere evidence of identification in court in the absence of a prior test identification parade is of very little consequence.[36]

The evidence of a TIP is admissible under section 9 of The Indian Evidence Act and Section 54A of Criminal Procedure Code which states that for the purpose of investigation if it is considered necessary on request of police officer court may direct the person so arrested to subject himself to identification. However, it is not a substantive piece of evidence.[37] Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. [38]

9. STATEMENT OF WITNESSES

Cr.P.C. empowers the investigating officer to secure attendance of witnesses to the crime investigated for examination [39] and Sec. 161 Cr.P.C. empowers him to examine such witnesses orally in the course of investigation and if necessary to record their

statements. [40]witness is bound to answer truly when questioned by the police excepting the questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. [41] The police officer recording the statements must make a separate and true record of each witness in the first person. [42] Such statements shall not be signed by the witnesses. Taking signature of witness is expressly prohibited Cr.P.C. [43] A witness making a false statement is liable to prosecution under Sec. 193 I.P.C.

Police has to avoid omissions of important details, they are taken as contradictions [44] No précised or condensed version of the examination of all the witnesses should be recorded. Must record what each witness says. Each statement must be capable of being read by itself without necessarily looking into the statement of others [45] The failure to make a separate record of the statement of each witness would be a violation of the mandatory provisions as not much discretion is given to the police regarding the same [46] The practice of writing against names of certain witnesses that they corroborate the statement of earlier witnesses is illegal and strongly deprecated by all Courts. [47]

The Evidence Act says that the statements recorded by the police under S.161 of the CrPC cannot be treated as admissible evidence in Court. [48] The purpose of such statement is "to make contradictions within the meaning of S.145 of the Indian Evidence Act, 1872 or for the purpose of cross-examining of the witness by the prosecution or for re-examining the witness." [49] It is nevertheless to say that "any statement made to the police cannot be considered as substantive evidence [50] because it is not made during trial, not given on oath and not tested by cross-examination. If the person making any such statement to the police subsequently appears and gives evidence in court at the time of trial, his former statement could, however, be used to corroborate or to contradict his testimony according to section 157 and 145 of the Evidence Act, 1872. [51]

10. SEARCH AND SEIZURE

The word 'Search' generally means looking for a thing and 'Seizure' means taking possession of the thing physically for which search is made. For the purpose of investigation, search means the examination of a man's person or the premises to discover evidence and material objects to connect the accused with the offence he has committed. [52] A successful search, not only will deprive the offender of the enjoyment of the property but also fix him with the crime, which he committed. The offenders always conceal the material objects either in a cavity caused by nature or by artificial means. It may also be done by blatant display of things; The power of search is one of the most important powers conferred on as I.O. or an officer in-charge of a Police Station by law. This power is even greater than the power of arrest, as arrest can be made even by a private person if a cognizable and non-bailable offence is committed in his presence but a private person has no power of search. [53]

The police have the power to conduct search and seize any material as a part of

investigation. The relevant provisions relating to search and seizure under CrPC are Section 47, 51, 52, 93, 94, 95, and 100. Further, during the course of investigation the police have the power to conduct searches under section 165 and 166 of CrPC. During the course of investigation the IO has a reasonable belief that anything necessary for the purpose of investigation may be found in any place within the limits of his jurisdiction, and then he can conduct the search and seizure even without getting any permission from the court.

Legal formalities to be followed before, during & conducting search and seizure. Search is malafide and illegal if paper and report regarding search is not prepared. [54]In V.S. Pillai v. Ramakrishnan [55]It was held that "search of the premises occupied does not amount to compulsion on him to give evidence against himself and therefore is not violative of Article 20(3) of the constitution.

11. CASE DIARY

A Case Diary or Special Diary, as it is also called is a systematic report compiled chronologically on day-to-day basis as envisaged in Sec 172(I) Cr.P.C by the investigation officer commencing from the time the investigation is started and continuing until the case is finally disposed of. The purpose is to avoid concoction of evidence or changing chronology to suit investigation. It ensures transparency in police investigation. [56]

Though the power of the investigation agency is large and expensive and courts have a minimal role in this regard there are inbuilt provisions in the code to ensure that investigation of the criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty is cast on the investigation agency to maintain a case diary of every investigation on day today basis. [57]Case diary maintained by police officer can be used to refresh his memory. However any statement or entries containing thereof shall not be used as legal evidence for any purpose except for the purpose of contradicting the police officer. [58]

As an aid to trial or enquiry the case diary by the court may be utilised by the court for a variety of objectives, to discover relevant evidence, to put necessary questions to a witness, to clear up ambiguities, to grant or refuse police remand or bail, to summon more persons as accused, to frame a charge, while taking the cognizance of an offence along with material disclosed in the final report but not to take cognizance on case diary alone if the final report does not disclose any offence and to give the defence lawyer an opportunity to see therein any favourable statement made by the accused on the first blush of events in the interest of the latter's defence though it is not strictly permitted by the letters in the s.162 and 172 Cr. P.C. [59]

Case diary is a chronological record of the progress of investigation. Writing Case diary is statutory and legal obligation. It helps to decide further course of action. It also helps subsequent I.O. to understand the case, It provides as a basis for superior officers to supervise and guide the La. Case Diary as important as F.I.R. If case diary is written on day-to-day basis without delay, sanctity and credibility is attached to

the evidence collected in investigation. [60]

12. CHARGE SHEET

Police officer, on completion of investigation, submits a final report to the Court. This report can be either in the form of a charge sheet or a referred report.[61] The final report is governed by Cr.P.C. [62] Once FIR has been lodged with police it becomes prominent duty and privilege of police to investigate and file a report to court. [63]

13. COPIES TO THE ACCUSED

If the police officer is of the opinion that any part of any such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from parties to be granted to the accused and stating his reasons for making such request. Where the police officer investigating that case finds it convenient so to do he may furnish to the accused copies of all or any of the documents referred in Criminal Procedure Code. [64]

14. SUPPLEMENTARY CHARGE SHEET

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate [65] and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2). [66]

From the above, it is clear that further investigation can be made and supplementary charge sheet can be filed only when there is fresh evidence which is not available at the time of filing the original charge sheet. [67] Amendment of a charge sheet is different from supplementary charge sheet. A revised or amended charge sheet on the basis of the same facts and same material to set right certain mistakes or omissions in the first report can be filed even if there is no fresh investigation.

15. CONCLUSION

After analysing all the stages of investigation it can be noticed that discretionary power are given to the police This is not a mere subjective discretion as the duty of the police is to act prudently when it deals with the FIRs, Inquiry, Arrest, Search and Seizure, Confession, Remand and custody in the investigation process. Even though certain mandates are to be followed to keep check and balances but still these powers are misused by police. The Indian constitution strongly adheres to the

rule of law which gives more emphasis to equality and equal protection of citizens. The state is inherently bound by these principles and thus it becomes the duty of the state to protect every human being from all kinds of oppressions and abuses. The code of criminal procedure gives ample powers to the police for maintaining law and order and also for conducting quality investigation. Simultaneously, the code also recognizes certain privileges of the suspect during arrest or detention or during the course of the proceedings. Any unreasonable deprivation of the rights of the suspects would amount to the abuse of the power of the police. It's very apparent that the law is concerned primarily with the rights of the individual and its utmost aim is to uphold rule of law. Even though the law grants such vast powers to the police, it controls the actions of the police. Hence, the agencies of investigation should make themselves subject of law and every action must be in consensus with the requirements of law.

All the actions of the police should be transparent and shall be subjected to scrutiny by the institutions and agencies, the courts and the society at large. Since discretion and use of power is a very important ingredient of police work, there is always a scope of malpractices and corruption. The international standards declare that police work should be subject to openness and accountability and the instruments of the state should rest assure that law is enforced according to the prescribed norms of justice and not through the arbitrary and unchecked authority and the coercive use of power. The legitimate expectation of the public is a more efficient and law abiding police force. Hence they expect more transparency in police and it is inevitable for the protection of human rights.

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Sustainable and Effective Justice Delivery Using Artificial Intelligence in India: Challenges and a Way Forward

*Kanika Tyagi**

ABSTRACT

The escalating unresolved cases inthe courts of Indiahave become a matter of apprehension for the legislative, executive, and judicial branches of the nation. To address this issue, several measures are being implemented, including advocating for Alternative Dispute Resolution (ADR). The elimination of unnecessary laws and the implementation of Artificial Intelligence to address this issue is a topic that has yet to be thoroughly investigated. India, as the most populous democracy globally, confronts a scarcity of resources across various sectors, including the judiciary. With a population exceeding 1.41 billion, the country grapples with this challenge. The issue ofscarcity of judges coupled with a continuously rising rate of case filings has led to a prolonged duration for the resolution of civil or criminal trials. This stands in contrast to the expeditious nature of trials in developed nations, where they are concluded within a few days. Consequently, the outcome is a protracted and inadequate dispensation of justice that lacks utility for any given community. Hence, it is imperative to consider innovative solutions, alongside traditional ones, to reinstate the efficacy and productivity of the justice dispensation mechanism and ensure its sustainability. An effective approach involves the utilization of Artificial Intelligence for the resolution of legal cases. The courts in India are currently undergoing a significant shift towards digitalization. In this context, the field of "Artificial Intelligence" or "AI" has the potential to contribute significantly towards ensuring sustainable justice delivery and reducing the backlog of pending cases. The present study employs a doctrinal research methodology, wherein the researcher has utilized both primary and secondary sources of data. The utilization of Artificial Intelligence (AI) in the delivery of justice in India poses certain challenges that must be addressed to ensure sustainability and effectiveness. This paper explores these challenges and proposes a potential path forward for the integration of AI into the justice system.

Keywords: *Artificial Intelligence/AI, Indian Courts, Judiciary, Sustainability.*

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INTRODUCTION

Why is Artificial Intelligence Required?

The uncertainty of the justice delivery system is one of its primary features, as it depends on the interpretation of the law and the specific circumstances of the case. This uncertainty can be attributed to various factors and is a common feature of the judicial process. The determination of the matter is contingent upon the viewpoint of the judges involved. Hence, the potential for divergent rulings by multiple judges on a particular matter can lead to incongruity, which is detrimental to the efficacy of the justice delivery system. Uncertainty, vagueness, and disagreement are widely recognised as significant challenges in the field of AI and law research. However, the presence of ambiguity and indeterminacy in the realm of law does not necessarily preclude the existence of a certain degree of logical coherence, albeit in a highly abstract form. The integration of Machine Learning, Neural Network, Natural Language Processing, and Big Data is propelling us towards a novel era of Artificial Intelligence. It is suggested that the longstanding principles of fair trial and rules of law may require modification.The utilisation of AI systems to aid judges in making decisions regarding the granting of bail and release of offenders on parole has already been implemented in certain regions of developed nations such as the United States and Canada. Similarly, in India, there are court-related assignments that can be accelerated by leveraging intelligent machines. The tasks at hand may vary in complexity, ranging from general matters, such as the summoning of notices to more intricate ones, such as evaluating shreds of evidence. The implementation of this approach has the potential to not only optimise the allocation of public funds by reducing the judicial workload, but also mitigate the influence of individual prejudices on the decision-making process of judges. It is widely acknowledged that despite their intelligence, machines that have undergone training cannot serve as a substitute for human judges. However, these could potentially assist judges in making informed and impartial decisions, thereby safeguarding against the compromise of justice amidst the management of a substantial caseload. Some of the significant issues which can be solved by AI are:

The problem of pendency

The growth in population, better economic conditions, less tolerance, and an increased emphasis on material goods have all contributed to an increase in civil and criminal litigation.[1] This trend can be seen in both the United States and other countries. As a direct result of this, there has been a commensurate rise in the number of cases that are pending inside the judicial system. The current number of pending cases in India is 4,35,78,945,[2] which is a major component that contributes to the problem of delayed and, as a result, insufficient administration of justice in the nation.

1 Law Commission of India (Report No. 230). *Available at,*http://lawcommissionofindia.nic.in/reports/report230.pdf (last visited on 10 April 2023).

2 National Judicial Data Grid (District and Taluka Courts of India), available at,https://njdg.ecourts.gov.in/njdgnew/index.php (Last visited on 11 April, 2023).

The conclusion of civil or criminal proceedings often takes a much longer amount of time, typically spanning several years, as compared to the time it takes in industrialised countries such as the United States and Canada to handle similar issues. It is likely that the country's court system may ultimately collapse under the weight of its caseload if these numbers continue to rise at their current rate. This would mean that the nation would no longer be able to fulfil its admirable mission of meting out justice to its citizens. The possible repercussions of such an event are not limited to only upsetting the fundamental ideas that underpin a civilised society that is founded on the rule of law. Rather, the state of anarchy that would certainly follow as a consequenceemphasizes how important it is to protect the integrity of the court, which was founded to preserve the obligation of protecting the rule of law.

Difficulty in Maintaining Physical Records

In addition to necessitating a substantial storage area, preserving several decades-olddocuments, can be a challenging task to undertake manually. The phenomenon of adjournment of cases has been noted to occur due to the non-restoration or untraceability of affidavits that were filed several years prior.

The acquittal of individuals who have been found guilty of a crime is another issue. An additional objective is to guarantee the electronic traceability of said files, as needed. The ramifications of the absence of court records are significant.In numerous historical instances, the absence of criminal records has resulted in the exoneration of the defendant. The Supreme Court ruled in the case of *State of Uttar Pradesh v. Abhay Raj Singh and Anr*.[3] that in situations where court records are lost and cannot be reconstructed, the courts are obligated to overturn the conviction.

Case Delays

The amount of time taken to obtain documents from lower courts and present them to appeal courts is a major factor that contributes significantly to the prolongation of legal proceedings. The expeditious resolution of legal cases by courts is dependent on various factorswhich can to a certain extent be resolved through artificial intelligence. The aforementioned variables encompass a range of factors, including but not limited to, the sufficiency of judges and judicial officers, the provision of resources for court personnel and physical infrastructure, the intricacy of factual circumstances, the character of evidence presented, the collaboration of relevant parties such as legal practitioners, investigative agencies, witnesses and litigants, and the accurate adherence to regulations and protocols. Several other factors could potentially contribute to a delay in the disposition of cases. The challenges encompassing the judicial system comprise inadequate monitoring, tracking, and categorization of cases for hearings, insufficiency of judicial personnel, and frequent deferrals of hearings.

3 Criminal Appeal No.1243-1244 (2004).

ARTIFICIAL INTELLIGENCE: THE UNTAPPED SOLUTION

The implementation of Covid-19 restrictions has significantly accelerated the process of digitization within the Indian court system. The judiciary, spearheaded by the Supreme Court and the High Courts, implemented the use of electronic filing for pressing matters and regularly held virtual hearings via video conferencing.The implementation of digitization within the Indian judiciary offers a valuable prospect to mitigate the backlog of numerous cases and safeguard historical records spanning several decades.Therefore, it is crucial to engage in a discourse regarding the implementation of digital technology to optimise its capabilities, specifically with regard to the digitization of court records, electronic filing of cases, virtual hearings, and live streaming of court proceedings.

The implementation of e-governance in the functioning of the judiciary in India commenced in the latter part of the 1990s, with notable progress being made subsequent to the passage of the IT Act, 2000.At the onset of the 21st century, there was a concerted effort to digitize court records and implement electronic court systems nationwide.The National e-Governance Plan (NeGP) included the launch of e-courts in 2006.[4]The Allahabad High Court serves as an exemplary model in this context. Justice D Y Chandrachud, in his capacity as the Chief Justice of Allahabad High Court, spearheaded the initiative to digitise approximately one crore case files within a year.

In the case of *Krishna VeniNagam v Harish Nagam* (2017),[5] the Supreme Court granted approval for the utilisation of video-conferencing technology in the adjudication of matrimonial cases. Nonetheless, the course of action was of brief duration.The year 2018 witnessed the Supreme Court's decision to permit the live-streaming of cases that hold constitutional and national significance. This ruling was based on the verdict rendered in the case of Swapnil Tripathi vs Supreme Court of India, 2018.[6]The implementation of livestreaming for court proceedings represents a significant stride towards promoting transparency and accessibility.

In July 2021, the Gujarat High Court achieved the distinction of being the inaugural court in India to broadcast its proceedings live.The practise was replicated by the Honourable Courts of Karnataka, Odisha, Madhya Pradesh, and Patna.The e-Courts Project's Phase III Vision Document was recently unveiled in response to the digital deficit experienced by the judiciary, particularly during the Covid-19 pandemic.[7]

4 NeGP Plan, available at, https://saiindia.gov.in/uploads/media/PC-03-National-e-gov-plan-20210331115146.pdf (Last visited on 10 April, 2023)

5 AIR 2017 SC 1345.

6 (2018) 10 SCC 628.Honourable Justice D.Y.Chandrachud has authorised the live streaming of cases saying, "sunlight is the best disinfectant."

7 Available at, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1907546 (last visited on 17 April, 2023).

The proposal entails the establishment of a digital infrastructure for the judicial system, which is inherently digital in nature and takes into account the effect of pandemic on the processes and mindset.

The Law Minister has recently asserted that the integration of advanced technologies such as Machine Learning (ML) and AI is imperative for the successful implementation of the e-Courts project. This measure is expected to enhance the efficacy of the justice delivery system.The Supreme Court of India has established aCommittee to investigate the application of AI in the realm of judiciary.The legislative body has taken measures to decrease the backlog of cases in courts by eliminating 1200 superfluous laws.[8] Additionally, the possibility of establishing new courts is being deliberated. Although these measures have been somewhat effective in alleviating the backlog, it is still evident that a comprehensive solution to the issue of pending cases has not yet been achieved despite diligent efforts.In this context, it is suggested that an unconventional approach be contemplated to address this predicament. The ensuingare some of the notable applications of AI in the court of law that can reduce the problem and can emerge as potential solutionsto the issue of case backlog and delay in a case law to a great extent in India.

Uses of AI in the Court of Law

Artificial Intelligence refers to the capacity of a machine to emulate human-like thinking and behaviour, or to simulate cognitive processes that are commonly attributed to human minds, such as problem-solving and learningand execute it with precision and accuracy.[9]Similar to legal professionals, judges may also utilize AI-powered machines to expedite various phases of a case, resulting in a reduced overall duration for case resolution.The court is responsible for a multitude of tasks, encompassing the issuance of various interim decisions during the preliminary stages. However, a subset of the basic duties can be expedited through the utilization of AI-powered machines to enhance the overall efficiency of the decision-making process. The most significant tasks are:

1. **The Process of scrutinizing and reading the contents of the case:** The process of scrutinising and interpreting the information presented in a written record has been facilitated by technological advancements. For instance, Microsoft has created software that exhibits the ability to read and comprehend a document with a level of proficiency comparable to, or even surpassing, that of a human being.[10] This software can also provide responses to queries based on the

8 V. Nair, Harish,"Goodbye, old laws: Modi government scraps 1,200 redundant Acts, 1,824 more identified for repeal" Retrieved from https://www.indiatoday.in/mail-today/story/narendra-modi-law-ministry-ravi-shankarprasad-984025-2017-06-22(last visited on 15 April 2023).

9 Stuart Russel and Peter Norwig, "Artificial Intelligence: A Modern Approach"(New Jersey, Prentice Hall Publications, 2009).

10 Allison Linn,"Microsoft creates AI that can read a document and answer questions about it as well as a person."Available at,https://blogs.microsoft.com/ai/microsoft-creates-ai-can-read-document-answer-questions-wellperson/ (Last Visited on April 18, 2023).

content of the document. The capacity of a machine to read and analyse pleadings can be effectively utilised in legal proceedings to identify areas of concurrence and disagreement among the parties involved. This tool has the potential to be utilised for the purpose of reading and analysing evidence presented by both parties. This will be particularly beneficial to the court in instances where there is a substantial volume of pleadings and evidence. This measure will not only conserve the court's time, but also facilitate the judge's review of their own understanding of the matter, thereby ensuring greater certainty in their decision-making.

2. **To provide a brief overview of the information presented in a document:** As part of their standard procedure, a court must carefully examine various documents, including pleadings, oral and written evidence submitted to the court, legal precedents relevant to the matter at hand, and applicable laws, in order to reach a decision. Consequently, a significant amount of the courts' time is devoted to perusing the contents of legal documents. In order to issue interim orders, the judge must meticulously scrutinise all pertinent documents to establish a *prima facie* understanding of the case. While it is accurate that the judge would inevitably need to thoroughly examine the document in question in order to arrive at a final decision based on its merits, the provision of a summary or abstract of said document to the judge by a machine would prove to be immensely beneficial. This would be particularly useful in instances where interim decisions, such as temporary injunction orders in civil litigation or prima facie cases in criminal proceedings, need to be made while summoning the accused.A machine capable of efficiently summarising document contents would be highly beneficial to the court, as it would allow for increased reading of precedents within a given time frame. This would ultimately enhance the quality of legal research. At present, Summarizer is among the artificial intelligence software utilised for the purpose of summarising the contents of various documents.[11] It is possible to develop more sophisticated software that is tailored to the specific requirements of the courts, with a focus on enhancing the summarization of content.

3. **Expediating the process of legal research:** Judges, similar to legal professionals, devote a substantial amount of time to conducting research on legal precedents or case laws. The existence of delays in prompt decision-making within courts can be attributed, in part, to this factor. The utilisation of AI in legal research by legal professionals such as lawyers and judges may be deemed advantageous. Assistance is sought in expediting the process of case resolution. ROSS is an online legal research tool that facilitates the in-depth exploration of numerous case laws, enabling the legal community to identify the most pertinent and suitable ones. The utilisation of Machine Learning in the advancement of Natural Language Processing for machines has enabled the

11 Introduction to Automatic Text Summarization, available at: https://machinelearningmastery.com/gentle-introduction-text-summarization/ (Last Visited on April 16, 2023).

standardisation, classification, summarization, and storage of vast amounts of data, a task commonly performed in legal research.

4. **Data Analysis for Dispute Settlement:** Legal professionals as well as law firms are utilising data analysis to employ visualisation and predictive analytics techniques in the settlement process. This approach involves analysing case data to identify patterns of citation and determine the likelihood of a favourable or unfavourable verdict. Courts can utilise Predictive Analytics to present potential outcomes.The aim is to coerce the litigating parties to engage in an extrajudicial settlement.[12] The implementation of this approach is expected to yield benefits not only for legal practitioners and firms, but also for their clients, as it enables them to optimise their return on investment by anticipating the likelihood of success or failure in litigation. Additionally, it has the potential to enhance the efficiency of court proceedings by promoting amicable resolution of disputes.
5. **Handling Administrative Jobs:** The judiciary has experienced a huge rise inresponsibilities, resulting in judges being apart from deciding judicial matters, are also engaged in handlingadministrative matters which include, but are not limited to, receiving and sending official communications, directing and controlling ministerial staff of the court, planning and organizing different categories of trials and sensitizing litigants about their legal rights. In these circumstances, an AI powered machine can be put to use for the purpose of doing repetitive things to enable the judge focus on core judicial activities.
6. **Guidance pertaining to matters related to Bail, Parole, Probation etc.** In criminal proceedings, it is customary for the court to make determinations regarding the pretrial release of the defendant on bail or detention, the possibility of granting probation to the convicted individual as an alternative to imprisonment, and the decision to grant or deny parole to a prisoner. These decisionsare of utmost importance as they impact not only an individual's liberty rights but also the safety of society. As a result, they necessitate the court's exceptional consideration. This necessitates a significant amount of time as the court must thoroughly examine every aspect of the case and the individual prior to granting release.

Against this backdrop, it is essential that AI machines be employed, as is already being done in certain states of the United States, to aid judges not only in expediting decisions pertaining to these crucial rightsbut in preventing personal biases and perceptions from impeding the determination of the accused's important rights. Judges in the United States have implemented the utilisation of an AI tool known as Public Safety Assessment (PSA) to aid in their determination of whether to grant bail to an

12 Sahita, Vikas. How Artificial Intelligence Is Transforming the Legal Services Industry of Asia. Available at: https://analyticsindiamag.com/how-artificial-intelligence-is-transforming-the-legal-services-industry-of-asia/ (Last visited on April 19, 2023).

accused individual.[13] The software performs risk assessments for recidivism, specifically evaluating the likelihood of a defendant reoffending and the probability of their evading legal consequences. The AI software computes the risk score by considering multiple factors, including,does the present offence involve violence, whether the individualhad an outstanding charge during the period of the present offence, what was the individual's age at his or her point of commission of offence and so on.[14]

Additional variables that may aid judges in making determinations regarding bail, parole, and probation could be integrated into the algorithm to facilitate expedient decision-making by the court. It is imperative to acknowledge that the viewpoint of these algorithms is not a substitute for the verdict of the judge and ought to solely serve as guidance, subject to the possibility of the judge arriving at a different conclusion, contingent upon the presence of justifiable grounds.

AI TECHNOLOGIES INCORPORATED IN THE INDIAN JUDICIAL SYSTEM: THE JOURNEY SO FAR

The Supreme Court Portal for Assistance in Courts Efficiency (SUPACE)

It is a digital platform designed to enhance the efficiency of court proceedings.On April 6, 2021, the Chief Justice of India at the time, Honourable JusticeS.A. Bobde, inaugurated the SUPACE project. The objective of this tool is to alleviate the burden on the justices of the Supreme Court. The system in question is designed to effectively analyse and evaluate information, subsequently furnishing the judges with the necessary data required to make informed decisions.[15] This is achieved through the utilisation of legal research tools that are integrated within the system, which enable the filtering of information provided by the parties involved. The system is designed to provide decision support by presenting relevant data in a user-friendly format, rather than making autonomous decisions. Consequently, the judges will have the capacity to effectively communicate the essential information of numerous cases that they are concurrently presiding over, in a straightforward and convenient manner, while avoiding the expenditure of time on legal investigation. A pilot project involving the implementation of a portal has been carried out in the High Court of Bombay and Delhi, with a focus on criminal matters. The utilisation of Artificial Intelligence (AI) aids the judicial system in enhancing its efficiency and reducing the backlog of cases.

13 Arnold Foundation Launches Expansion of Public Safety Assessment Tool. *Available at:*https://thecrimereport.org/2018/04/25/arnold-foundation-launches-expansion-of-public-safety-assessment-tool/ (Last Visited on April 17, 2023).

14 What factors does the PSA take into account? Available at: https://craftmediabucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf (Last visited on April 18, 2023).

15 AI is set to reform justice delivery in India. Available at: https://indiaai.gov.in/article/ai-is-set-to-reform-justice-delivery-in-india (Last visited on April 21, 2023).

The Supreme Court Vidhik Anuvaad Software (SUVAS)

It is a software programme utilised by the Supreme Court for legal translation purposes. The Supreme Court of India implemented the Supreme Court VidhikAnuvaad Software (SUVAS) in 2019. This artificial intelligence system is designed to facilitate the translation of judicial orders from English to nine vernacular languages, as well as vice versa.[16] The introduction of this technology is expected to address the challenges associated with translating legal documents and judgements. The process of translating case documents can pose challenges that result in prolonged pending times. However, the implementation of measures to reduce these challenges can effectively decrease the duration of pending cases. The set of nine languages comprises Assamese, Bengali, Hindi, Kannada, Marathi, Odia, Tamil, Telugu, and Urdu. Translation efforts are currently underway for legal cases pertaining to various areas of law, including Labour Law, Rent Act, Consumer Protection, Agricultural Tenancies, Ordinary Civil, Personal Law, Religious and Charitable Endowment, Simple Money and Mortgage Matters, and Family Law.

E-Court's Project

The e-Courts Project aims to provide efficient and transparent judicial services to the citizens of India through the use of modern technology. It is a significant step towards the digitization of the Indian Judiciary, which is expected to enhance the speed and accuracy of judicial proceedings.This project is intended to be implemented nationwide and will be applicable to district courts throughout the country. The aims of this project encompass several key objectives, including the timely and efficient delivery of citizen-centric services in accordance with the e-courts litigant charter, the implementation of decision support systems within court settings, the automation of processes to enhance transparency and accessibility of information for various stakeholders, and the improvement of productivity and efficiency within the judicial system in both qualitative and quantitative terms. Ultimately, the project seeks to render the judicial system more accessible, reliable, transparent, affordable, and cost-effective.

The initial stage of the project was initiated in 2007 and culminated in 2015, wherein the district courts were automated and the personnel were trained to operate the digital platforms. The second phase of the project is primarily centered on the provision of services to litigants, lawyers, and stakeholders. There is a growing emphasis on providing services in local languages and enhancing the National Judicial Data Grid (NJDG) to offer additional information to the public, governments, and courts.The National Judicial Data Grid currently encompasses a total of 2,852 district and taluka courts, furnishing information on the status of cases, pending cases, disposed of cases, as well as orders and judgements.[17] Periodic analysis of the data is conducted

16 FIVE notable applications of legal AI in India. Available at: https://indiaai.gov.in/article/five-notable-applications-of-legal-ai-in-india (Last visited on April 22, 2023).

17 National Judicial Data Grid (District and Taluka Courts of India), available at, https://njdg.ecourts.gov.in/njdgnew/index.php (Last visited on 11 April, 2023).

and subsequently employed for the purposes of policy formulation and decision-making, with the aim of expediting the delivery of justice. Furthermore, this platform serves as a repository for the orders and judgements issued by the district courts. The integration of analytical tools facilitates the real-time analysis of data, thereby enabling the creation of efficient court and case management dashboards.

SCI-Interact

In 2020, the Supreme Court created a software programme known as "SCI-Interact" with the aim of transitioning all 17 benches to a paperless mode. The software is composed of five distinct components that include specifically digitized versions of printed materials, the integration of pending cases, e-filing of new cases, IT hardware, Multiprotocol Label Switching (MPLS) networks with dual redundancy, and security audit into a single platform. This has the potential to minimize human intervention, expedite decision-making, and facilitate the prompt resolution of cases.

The Legal Information Management & Briefing System (LIMBS)

The Department of Legal Affairs has introduced a web-based application known as LIMBS.[18] It is a system designed for the purpose of managing and briefing legal information. The aforementioned application has the capability to facilitate the monitoring of cases originating from high courts and tribunals, as well as enable the tracking of all stages and phases of the said cases.

Challenges in Implementing AI in Court of Law

A report has been recently released by the Niti Ayog. The report provides a succinct synopsis of the potential challenges that may arise during the implementation of artificial intelligence. The primary difficulties pertain to guaranteeing transparency, comprehensibility, impartiality, and the development of a decision support system that complements rather than replaces human judgement. The aforementioned difficulties are interconnected, and the report proposes that they be tackled via a comprehensive framework.[19]

The Indian judiciary system is often associated with a slow pace of justice delivery, a significant amount of paperwork, a tendency to adhere to conventional and traditional approaches, and a reluctance to adopt new technologies. Nevertheless, it is noteworthy that the younger generation of legal professionals exhibit a willingness to integrate technological advancements within the realm of the judiciary. Considering that the groundwork for such a system is presently being established, it is crucial that the incorporation of artificial intelligence within the legal system be meticulously

18 Legal Information Management and Briefing System. *Available at:*https://limbs.gov.in/limbs/ (Last visited on April 14, 2023).

19 National Strategy for Artificial Intelligence, Niti Ayog (2018), *available at,* https://www.niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf (last visited on 13 April, 2023).

conceptualised in order to pave the way for the implementation of AI. The report proves to be useful as it presents a well-defined plan of the procedures entailed. The report highlights the necessity of establishing operational support and meticulous planning to facilitate the assimilation and gradual implementation of artificial intelligence within the judicial system. The report serves as a preliminary step towards initiating a discourse on the incorporation of artificial intelligence (AI) in the justice system, with the aim of facilitating a judicious and ethical utilisation of AI in the times to come.

One of the primary concerns that require attention pertains to connectivity issues, particularly those related to internet connectivity. Additionally, there is a pressing need for a suitably equipped space that can facilitate lawyers in conducting their cases. Lawyers practicing in semi-urban and rural areas encounter difficulties with online hearings, primarily due to connectivity problems and a lack of becoming acquainted with this mode of operation.Another challenge is the level of digital literacy among judges, court staff, and lawyers is inadequate, which hinders their ability to fully comprehend the advantages of digital technology.

It is anticipated that in the not-too-distant future, the proliferation of digital technology, especially in the field of court records, will propel issues over privacy to the center of the conversation in both the judicial system and the general public. Privacy is one of the biggest challenges in front of the legislators and judiciary as well, which requires due attention in digitalizing the whole system.The field of cybersecurity and hacking is of paramount importance in the realm of technology. The Cyber Security Strategy has been formulated by the government as a remedial measure to tackle the aforementioned issue. Nevertheless, the pragmatic and factual execution of this concept continues to pose a challenge.[20]

The past decade has witnessed a concentrated effort towards the digitization of courts, primarily aimed at facilitating access to individual cases through court websites, with a focus on litigants. A comprehensive evaluation of the judiciary at the system level is currently lacking. When implemented with sufficient preparation and protective measures, technological instruments have the potential to significantly impact the outcome of a situation. Nonetheless, it is important to note that technology cannot be considered inherently value-neutral, as it is susceptible to biases. It is imperative to address power imbalances.

A Way Forward

One of the most significant questions that stands before us iswhat measures can be implemented to facilitate the digitization of the judiciary in India. The significance of informational privacy and data protection has become increasingly evident in light of the Aadhaar judgement by the Supreme Court of India in the case of K.S. Puttaswamy and Anr. v Union of India and Ors.[21] This case established the fundamental

20 Namita Singh, Elizaveta Gromova, *et al.,* "Legal Analytics: The Future of Analytics in Law" (Chapman and Hall CRC Press, I Edition, 2023).

21 AIR 2017 SC 4161.

right to privacy as guaranteed by the Constitution of India. In light of the aforementioned progress, the Indian government established a committee with the aim of examining data protection concerns and formulating a comprehensive data protection framework that is impartial towards technological advancements. This framework addresses prominent issues such as the increasing utilisation of Artificial Intelligence (AI) in India.[22]

As the development of Artificial Intelligence is currently in its nascent phase, the challenge lies in discerning an appropriate and lawful response. There exist two divergent perspectives regarding the establishment of a dynamic regulatory framework for Artificial Intelligence (AI). It is commonly believed that conventional methods of regulation such as product licencing, technology and development supervision, and legal liability for artificial intelligence (AI) would be insufficient in effectively managing the rapid advancement of this technology. Furthermore, it is believed that implementing the structures of a flexible governance system during a time when technology is heavily dependent on human input will effectively tackle issues related to ethics, accountability, and safety. This approach will also mitigate potential risks to the growth and advancement of Artificial Intelligence. An administrative approach that is proactive in addressing the challenges posed by Artificial Intelligence (AI) will facilitate effective management of AI, while also ensuring that the privacy and liability rights of citizens are protected. The implementation of artificial intelligence lacks a regulatory or legal framework that addresses concerns related to risk, data protection, security, and technical and safety measures. The implementation of a rigorous regulatory framework for Artificial Intelligence is imperative in India to safeguard the confidentiality of personal data, address concerns related to liability, and ensure compliance with privacy and safety standards.Other measures that can be implemented to facilitate the digitization of the judiciary in India includes:

- The successful implementation of the digitisation process requires the indispensable support of judges and lawyers, as well as a strong political will.
- Currently, there is a pressing necessity for individuals to be informed about the relevant technologies and to obtain sufficient training.
- Providing training sessions to acquaint the Judges with the electronic court system framework and procedures can significantly enhance the efficacy of e-court operations.
- Virtual hearings are not a viable replacement for in-person court hearings in all circumstances. Nonetheless, virtual hearings ought to be obligatory in specific case categories as determined by the court administration.

22 Adithya Anil Variath, Changing the Dynamics Of Law In India With The Arrival Of Artificial Intelligence and Robotics. (November 05, 2018). *Available at,*https://www.activistpost.com/2018/11/changing-the-dynamics-of-law-in-india-with-the-arrival-of-artificial-intelligence-and-robotics.html(Last Visited on April 15, 2023).

- The proliferation of technology has given rise to apprehensions regarding the safeguarding of data, privacy, human rights, and ethical considerations. Consequently, developers of such technologies will need to exercise significant self-regulation to address these challenges.
- In addition, it will necessitate external oversight by the legislative branch through statutory measures, regulations, and rules, as well as by the judicial branch through constitutional standards and judicial review.
- The provision of specialized training for personnel responsible for the maintenance of electronic data is imperative and requires concerted efforts by the government.The aforementioned tasks encompass the upkeep of accurate documentation pertaining to e-filing minute entries, notifications, service of legal documents, summons, warrants, bail orders, order copies, and other related e-filing procedures for the purpose of convenient and prompt access.
- Organizing seminars to promote e-courts and technological advancements in the judiciary can effectively increase awareness regarding the benefits and convenience that such endeavours can offer.

CONCLUSION

The Indian legal system has demonstrated a positive intention for adoption of artificial intelligence. The enhancement of institutional efficiency through the utilisation of AI-driven technologies has been highlighted as a significant area of focus. AI has exhibited its effectiveness in diverse areas, where it assisted physicians and surgeons, making transportationconvenient through the utilisation of autonomous vehicles, and so on. As a result, it possesses the capacity to yield benefits in the establishment of a durable and efficient justice dispensation mechanism. The incorporation of AI in the decision-making process of court systems offers a pragmatic solution for mitigating the backlog of cases. The implementation of this approach has the potential to establish justice delivery systems that are both efficient and consistent on a global scale, ultimately leading to the promotion of expeditious and sustainable outcomes. According to legal experts, it is widely anticipated that artificial intelligence (AI) will play a crucial role in the process of judicial decision-making within the next twenty years. The effective incorporation of artificial intelligence (AI) within the judicial system necessitates a comprehensive comprehension of the distinct functions that AI is currently fulfilling across various judicial systems. The participation of the Indian legal community, including judicial offices and litigants, is necessary to facilitate the technological transition process. After examining the present implementation of Artificial Intelligence (AI) in various legal domains and its potential application in courtrooms to aid judges and attorneys, it can be inferred that AI-powered machines have the capability to expedite legal procedures. By assisting judges in the decision-making process, AI can assist in reducing the duration of a trial and help lawyers to save time in various tasks. Enhancing time management would inevitably result in improved efficiencies in case disposal, ultimately contributing to the reduction of pending cases in the

judicial system. Upon completion of this task, the commendable objective of providing efficient and enduring justice to the general public will be attained.

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Changing Notions of the Institution of Marriage Viewed Through the Lens of Constitutional Morality

*Ms. Kirti Yadav**

ABSTRACT

Marriage is a universally recognised social institution which garners respect. It is viewed as an entity that regulates human conduct and fosters decorum in the society. Each religious community in India is governed by their personal laws in this sphere. With times, the social norms change and a country governed by rule of law, has to tend to the demands of the citizens of the country. Here, the governing factor has to be constitutional morality and it is to be taken care of that certain groups are not devoid of guaranteed rights. Policy decisions are to be taken by keeping the spirit of our constitution intact and not submit to the demands of the popular morality. Today, there are growing demands to grant legal recognition to same-sex marriages in our country. A legal recognition might pave way for societal affirmation and acceptance. It can be a tool to end discrimination faced by such couples in the society. The article aims to study this aspect as well the international jurisdictions where it has been recognised and the way forward for our country.

Keywords: *Marriage, Constitutional Morality, Popular Morality, Same-sex Marriages.*

I. INTRODUCTION

In India, the sphere of marriage is governed by personal laws of different religions. Each legislation prescribes the conditions of a valid marriage but do not define as to what a marriage is. For ascertaining the definition of marriage, we refer to various case laws which go on defining the institution. In *Hyde* v. *Hyde*[1], which is an important case in English law, marriage was defined as "a voluntary union for life of one man, one woman to the exclusion of all others". In *X* v. *Hospital Z*[2], the apex court observed that "marriage is the sacred union, legally permissible of two healthy bodies of opposite sexes." This is also true that change is constant and laws have to keep pace with the societal changes. The said definition of marriage no longer holds true in the 21st century.Today, we need a refined version of marriage which can accommodate

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1 (1866) LR 1 P&D 130.

2 (1998) 8 SCC 296.

all changes. So, it can be refined as,"marriage is a voluntary union of equals where neither loses their autonomy to the other nor their personality."[3] It is a form of support system whereby they provide mutual support in all spheres of life. The feelings of affection and desire drive two people to enter this union called marriage and these bonds exist, irrespective of the legal recognition accorded to them. It confers a status of husband and wife on the parties entering into the union and also legitimacy on the children of the marriage.[4]Today, majority of the systems consider marriage as acontract or anear contract and this sphere is regulated by the law.

In our country, marriage, the traditionalised notion, has got legal recognition as well has great societal reverence attached to it. It is that entity which ensures the continuation of the family system in our country.[5] Since ancient times, it stands at a high pedestal and married couples are respected by the whole society. As Greek philosopher, Heraclitus said, "the only constant in life is change". So, with time the societal attitudes and norms need to change. Especially, in a country which is governed by the rule of law and where constitutional morality prevails over societal or popular morality.

II. CONCEPT OF CONSTITUTIONAL MORALITY

This term has gained prominence in contemporary times as judgments of our apex court have cited this to uphold various rights. Dr. B.R. Ambedkar spoke on this subject with great insight in the Constituent Assembly. He said:

> *"A Constitution which contains legal provisions, is only a skeleton. The flesh of the skeleton is to be found in what we call constitutional morality"*[6]*. ……. "there must be no tyranny of the majority over the minority…..The minority must always feel safe that although the majority is carrying on the Government, the minority is not being hurt, or the minority is not being hit below the belt"*[7]

Dr. Ambedkar is the one who introduced the term into public and constitutional discourse. The main aim was the assertion of the fact that Indian democracy cannot be founded on majoritarianism.[8] He quoted Grote, the Greek historian and then went on to explain it. This concept of constitutional morality, as propounded by Dr. Ambedkar found a "contemporary public resonance"[9] when Justice A.P. Shah cited it while

3 Indira Jaising, "Unions of our own Choice", *The Indian Express*, March 16, 2023.

4 Paras Diwan, *Modern Hindu Law* 85 (Allahabad Law Agency, 23rdedn., 2016).

5 Kamala Ganesh, "New Wine in Old Bottles? Family and Kinship Studies in the Bombay School"62(2) *Sociological Bulletin*, Special Issue on The Bombay School of Sociology: The Stalwarts and Their Legacies 291 (2013), available at: http://www.jstor.org/stable/23621066 (Last visited on March 2, 2023).

6 Narendra Jadhav, *Ambedkar Speaks* Vol. I 292 (2013).

7 *Id*., at 291.

8 Aravind Narain, "What Would an Ambedkarite Jurisprudence Look Like?" *National Law School of India Review* 29(1) 3 (2017), available at https://www.jstor.org/stable/26459197 (Last visited on March 20, 2023).

9 *Id*., at 19.

delivering the verdict in *Naz Foundation* v. *Govt. of NCT of Delhi*[10]. Here, the court ruled that Sec. 377 of IPC was *ultra vires* Arts. 14, 15 and 21 of the Constitution. The representatives of religious communities opposed homosexuality on the ground of being conflictingwith their religious notions and public morality. Here, constitutional morality superseded public morality. In the words of Justice Shah:

> "Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of fundamental rights under Art. 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality."

In this judgment, the court has innovatively transformed the meaning as well as the potential of this expression.[11]The true power of this concept lies in its possible application to other "unpopular minorities".[12]

This concept of constitutional morality is oft cited in judgments of the Supreme Court and it is as relevant today. We being a country governed by the rule of law, every law and every executive action needs to conform with our "supreme text". Societal morality cannot guide the actions of the state. It is the constitutional morality which guides the State as well as the courts.Howsoever carefully written constitution, if operated devoid of constitutional morality, then it tends to become arbitrary, impulsive and erratic.[13]

III. NATURE OF MARRIAGE AND GOVERNING LEGISLATIONS

Each religious community in India is governed by different personal laws for marriage and divorce. It is a "universal social institution"recognised across the whole nation.[14]Under Hindu religious philosophy,*vivah* or marriage is a *samskara* and is regarded as an "important sacrament for the continuation and propagation of elementary tenets of the Hindu religious life".[15]Among Hindus, marriage is considered to be a sacrament, a holy union as opposed to a contractual one. It is sacramental in the sense that it is an eternal union, a union that subsists for lives to come.[16] It holds

10 2009 SCC OnLine Del 1762.

11 Latika Vashist, "Re-Thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation" 55(1) *JILI* 77 (2013), available at https://www.jstor.org/stable/43953628 (Last visited on March 20, 2023).

12 *Supra* note 8 at 20.

13 Andre Béteille, "Constitutional Morality" 43(40) *EPW* 36 (2008), available at https://www.jstor.org/stable/40278025 (Last visited on March 21, 2023).

14 Supra note 5.

15 Nelistra Singh, "The Vivaha (Marriage) Samskaraas A Paradigm for Religio-Cultural Integration in Hinduism" 5(1)*Journal for the Study of Religion* 31–40 (1992), available at: http://www.jstor.org/stable/24764135 (last visited on March 19, 2023).

16 Paras Diwan, *Modern Hindu Law* 64 (Allahabad Law Agency, 21stedn., 2012).

both social and religious significance. The *dharamashastras*[17] mentions three chief purposes of marriage, namely *dharma* (the duty), *praja* (the progeny) and *rati* (the sensual pleasure). It is a great tool for promoting socially acceptable and regularised behaviour. It establishes social norms and promotes civility in society.[18]

The marriage of Hindus is regulated by the provisions of the Hindu Marriage Act, 1955. It lays down conditions of a valid Hindu marriage[19]. The Act does not specifically provide for a marriage only between a man and a woman, but the reading of the provisions shows that it validates a heterosexual marriage. It prescribes the age of marriage for bride and bridegroom. The provisions for permanent alimony and maintenance[20] use the words 'he, his' and 'she, her', husband and wife. So, under the Act there is no such express provision which mandates that marriage must be heterosexual, but it is implied under the requirements of the Act providing for minimum age of bride and bridegroom, special grounds of divorce for the wife, etc.; all these indicate that homosexual marriages are not recognised under the provisions of the Act.[21]

The idea pertaining to marriage is similar in other religious communities too. As an institution, it is considered as obligatory to be performed. Under Islam, marriage known as*nikah* is considered to be a part of *sunnah*[22] (practices of the messengers of Allah). It is considered as a contract. Under Muslim law, marriage is a contract between the parties where there is an offer, acceptance and consideration in the form of dower.

Christianity views marriage as a grace of God and an aid in maintaining proper order in the society as it regulates the conduct of men and women and prevents them from living immoral lives. It emphasises the development of the man and his wife's mutual relationship as well as their commitment and duties towards one another. The Indian Christian Marriage Act, 1872, regulates marriage between two Christians. Essential requirements of this Act are almost similar to the requirements under the abovementioned Act, thus mandating a heterosexual marriage. An act which is secular and regulates the sphere of marriages in India is the Special Marriage Act, 1954. It was enacted to give Indian citizens the choice to marry beyond their religions or

17 The Dharmasastra is a collection of ancient Sanskrit texts, which give the codes of conduct and moral principles (dharma) for Hindus.

18 Kumud Mehra and Nitesh Saraswat, "Live-in Relationships: A Benefit to the Society or a Lucrative Release from Indian Traditions by grave Destruction of Customs and Social Values" IV *Delhi Journal of Contemporary Law* 151 (2021).

19 The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 5 lays down conditions for a valid Hindu marriage.

20 The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 25.

21 Stelline Jolley & Ritika Vohra, "Recognition of foreign same-sex marriage in India: A Legal Exploratory Analysis"59(3)*JILI*308 (2017).

22 Sunnah, is the body of traditional social and legal custom and practice of the Islamic community. Along with the Quran (the holy book of Islam) and Hadith (recorded sayings of the Prophet Muhammad), it is a major source of Islamic law. Available at https://www.britannica.com/topic/Sunnah (Last visited on March 19, 2023).

castes, as all the personal laws regulated marriages between individuals belonging to the same religion.

IV. RECOGNISING SAME-SEX MARRIAGES

In recent times, the demand for recognising same-sex marriages is gaining traction. The discrimination is reflected in the societal attitudes and a common example is of such couples not being accepted in housing societies. Same-sex couples do not have the privileges and the same social recognition as an opposite-sex couple. This discrimination amounts to a violation of the rights to equality and non-discrimination as laid out in Arts. 14 and 15, respectively of our Constitution. Relying on this contention, various petitions were filed in the apex court seeking legal recognition of same sex marriages. On March 13, 2023, the SC has referred these batch of petitions to the Constitution Bench.

Discrimination on the basis of sex is prohibited by virtue of Art. 15 and 'sex' has been interpreted to include 'sexual orientation' in *Navtej Singh Johar*v. *Union of India*[23]. In this case, the apex court unanimously read down Sec. 377, IPC by decriminalising same-sex relationships between consenting adults. Relying on the doctrine of progressive realisation of rights, the Court overruled its decision in *Suresh Kumar Koushal&Anr. v. Naz Foundation &Ors.*[24]and held that rights should not be revoked. The Court noted that a "subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest".

The petitioners are not demanding the right to marry, since that is present, but the legal recognition to their decision. In the affidavit filed by the Union government, it has vehemently opposed the petitions while asserting that "the traditional concept of marriage, consisting of a biological man, woman and childcannot be disrupted". Another ground of opposition is that it would cause havoc to the personal laws. The State will have to show the existence of a legitimate state interest in holding back this recognition. It is pertinent to note here the reiteration by the Supreme Court that the yardstick for determining the legality of any action has to be constitutional morality and not popular morality. "The government cannot deny anyone their constitutional rights to equality and privacy simply because this would challenge popular morality."[25] As popular morality has weighed down other considerations, gay and lesbian couples have been denied their rights. It is the need of the hour that certain affirmative action is taken by the judiciary in this matter.

The impact of such recognition is that it tends to drive away the stigma associated with such relations and aids in societal assimilation of such couples.Legal recognition

23 AIR 2018 SC 4321.

24 (2014) 1 SCC 1.

25 Bastian Steuwer and Thulasi K. Raj, "Marriages Less Narrow", *The Indian Express*, March 17, 2023.

will be an aid in paving the way for societal recognition. Seeing through the lens of constitutional morality, traditional values and societal acceptance are irrelevant in determination of rights. If this recognition is denied the hard-earned gains of the *Navtej Singh Johar* judgment will be lost. True culmination after the decriminalization of homosexuality will be the accord of full marital rights to same-sex couples.[26]

At the international level, jurisdictions which have permitted same-sex marriages have made amendments to their definition of marriage in their laws to include such unions. For example, Netherlands allowed same-sex marriages by amending their marriage legislations, prescribing that, a marriage contracted by two people of different or same sex. In 2000, Netherlands became the first country in the world to grant legal recognition to same-sex marriages.[27]Many nations which recognise same-sex marriage, also accord civil unions or partnerships the same legal standing as same-sex marriage. In our country, in absence of a specific and explicit legal provision permitting same-sex marriages, such ceremonies will be devoid of legal sanction. A viable option, without any alteration in the personal laws, will be by specific amendments in the Special Marriage Act, as it mandates a civil ceremony in the form of registration before a marriage officer. They can be accorded recognition under the Special Marriage Act. This will make it inclusive of all gender identities. Though, such an initiative is dependent on the will of the legislative body.Seeing the affidavit filed by the government before the apex court, the inclination of the government is clear. According legal recognition to the marriage of such couples will be an initial step as there are certain issues which need to be addressed like the issue concerning adoptions by such couples, inheritance, maintenance, etc.

V. MARRIAGE EQUALITY IN OTHER JURISDICTIONS ACROSS THE WORLD

United States of America- In *Obergefell* v. *Hodges*[28], SCOTUS ruled that the same-sex couples have a constitutional right to marry. The state bans on same sex marriages and their recognition were held to be unconstitutional while examining their validity in light of the "due process" and "equal protection" clauses of the XIV amendment to the US Constitution.[29] Right to marry was asserted as a fundamental right inherent in the liberty of a person and also guaranteed by the equal protection clause. In 2003, Massachusetts became the first state to legalise same sex marriage following a ruling by the supreme judicial court of the state in *Goodridge* v. *Department of Public Health*[30].

26 *Supra* note 21 at 303.

27 Shane M Redman, "Effects of Same-Sex Legislation on Attitudes toward Homosexuality." 71(3) *Political Research Quarterly* 628 (2018), available at http://www.jstor.org/stable/45106687 (Last visited on March 20, 2023).

28 576 U.S. 644 (2015).

29 Available at https://www.britannica.com/event/Obergefell-v-Hodges (Last visited on March 10, 2023).

30 798 N.E.2d 941 (Mass. 2003).

Taiwan- The first Asian country to legalise same-sex marriage has been Taiwan. It enacted legislation legalizing same-sex marriage after court mandated them to do so.It was in 2017 that the Taiwan Constitutional Court ruled that marriage could not be restricted to heterosexual couples. Thelegislaturewas given two years to enact legislation which legalized such unions. Then, parliament passed a law legalizing same-sex marriage which came into effect on May 24, 2019.

South Africa- First the highest court of the country ruled that existing marriage laws violated the guarantee of equal rights. One year after this ruling, on November 30, 2006, the parliament legalized same-sex marriage. However, the law allowed the religious institutions and concerned officers the option to recuse from conducting such marriages.

Switzerland- After a public referendum overwhelmingly confirmed support for marriage equality, the Swiss Parliament passed legislation formally recognising such marriages.

According to Human Rights Campaign[31], currently there are currently 32 countries where same-sex marriage is legal and these are Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, UK, United States and Uruguay.[32] In at least 10 of these jurisdictions, legal recognition for same-sex marriages has come as a result of court rulings. The remaining 22 have allowed it by way of legislation.

VI. SOLOGAMY

Sologamy is the act of marrying oneself in a public ceremony. This practice of marrying oneself is gaining popularity across the world.It can also be seen as a mode for institutionalization and "a commitment to life-long self-love, at the heart of which lies a wellness program, rather than a legal contract."[33]. Participants, most of whom are women, claim that the ceremony helps reaffirm the value of the self and "celebrates escaping something awful or returning to your own happiness and contentment".[34]India saw its first sologamous marriage being performed by a Gujarat woman, with all the wedding rituals.[35] This was opposed by certain political leaders. In today's times,

31 Human Rights Watch is a US based LGBTQ+ advocacy group and tracks developments in the legal recognition of same-sex marriage around the world.

32 Available at https://www.hrc.org/resources/marriage-equality-around-the-world (Last visited on March 12, 2023).

33 Kinneret Lahad & Michal Kravel Tovi, "Happily-ever after: Self-marriage, the claim of wellness, and temporal ownership" 68(3) *The Sociological Review* 659 (2020).

34 Charlotte Lytton, "I me wed: Why are women choosing to marry themselves?", available at https://www.telegraph.co.uk/women/life/women-choosing-marry/ (Last visited on March 20, 2023).

35 Available at https://www.indiatoday.in/india/story/gujarat-woman-kshama-bindu-sologamy-marries-herself-1960185-2022-06-09 (Last visited on March 26, 2023).

the traditionalised version of marriage is redundant and we need a novel concept of marriage which encompasses all forms of marriage legally recognisable in this century.

VII. CONCLUSION

Marriage as an institution is necessary in making an individual a social being and facilitates mixing with fellow human beings and assimilation in the society.The expression of one's gender identityand its acceptance are a facet of the fundamental right to dignity and barring homosexual marriages would be a violation of thisright to dignity. With the active intervention of judiciary, homosexual couples have been accorded the right to equality, freedom to freely express their sexual orientation, freedom from prejudice and a right to have a relationship with people of the same sex. But they also deserve the same amount of legitimacy as heterosexuals couples, which can be achieved by recognising such marriages legally.Though homosexuality has been decriminalized but a true sense of equality will be realised by them only when they attain marital privileges, such as adoption,inheritance, maintenance etc.

It has been a long time that the queer community has been denied their rights and suffer social exclusion. A lot of opportunities are denied to them on this account. The apex court needs to take a step and accord recognition to this union so that the LGBTQIA community can enjoy their long-deserved rights. The onus is on the judiciary that it ensures that majoritarian sentiments are kept in check and not allowed to lord over the minorities through the arc of constitutional morality.

ROADMAP TO STANDARDIZATION OF HEALTH POLICY IN STATES: A CONSTITUTIONAL RESPONSE

Mr. Himangshu Rathee

ABSTRACT

Public Health is uncompromisingly forms the bottom of a healthcare pyramid. However, the constitutional division of legislative competencies via the Articles 245 and 246 and, seventh schedule partially handicaps the Parliament from making a central law by placing public health along with sanitation; hospitals and dispensaries in state list (entry 6, list II). In such a situation an individual rests on the mercy of the state which may unseat health from the top priority. Again, a state may not be able to provide healthcare owing to a cavalcade of ancillary factors like political instabilities that grip, northeast being a standard example or otherwise allocating a small fraction of funds to healthcare making it a mere lip service. On the other hand, the Supreme Court unbound by the legislative entries and can protect the fundamental rights (health being one of them) by issuing the appropriate writs and making the state honour its obligations. Taking cognizance of all the afore-written narratives, I intend to argue that the Supreme Court has boarded a journey to enlist healthcare services in the name of final arbiter of the Constitution and adjudicator of the rights. In the resplendent display of its hermeneutic leadership, the court has begun to craft a health manifesto for all the states governments and the Union government. Charting out an entire set of rights related to human health would be monumental task, therefore only a prescribed set of physiological health cases would be studied. Accordingly, contextualization of the terms of reference and the central research question is placed in the first part. Part II explores the journey of the Apex Court's healthcare manifesto and where it is leading the positive obligation of the state to fend for citizen's health. In doing so, Supreme Court's approach towards healthcare would be critiqued on the grounds of omission of cardinal considerations in health and only thinking for the elites which runs counter-intuitive to the theme of 'universal' healthcare. Part III delves into the alternate constitutional power strategies which the Parliament can achieve the universal healthcare law, and the Executive can use to craft a healthcare policy. Part IV sets out the conclusion and specific recommendations and comments on the possible constitutional responses to healthcare in India.

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I. INTRODUCTION TO THE CONCEPT AND THE PROBLEM

The expounding of Article 21 of the Indian Constitution into a series of interlocked rights is a well acknowledged fact of judicial craftsmanship. Accordingly the judiciary has tapped into 'health' which was primarily finds place in Directive Principles of State Policy[1] and the legislative lists enunciated in the seventh schedule of the Constitution.[2] The current article sheds light on the physiological or physical health amongst the three broad categories of health mentioned in the World Health Organisation's Constitution.[3] Physiological health (hereinafter 'health') has been selected as the subject of study for its violation is palpably visible.

The narration of Indian Constitution compels one to conceive health as a progressive right which in tune with the majority international consensus.[4] However, what does it entail when court categorizes certain healthcare obligations of the state as obligations of immediate effect and enforces them or rectifies the administrative hiccups in healthcare deliverance? Does the constitutional scheme permit it? Does the judiciary have capacity to do complete justice to healthcare of the most disadvantaged section, given its capacity and domain of functioning? These questions beg definite answers. But before, delving into these tricky questions a there is a need to examine the current judicial winds in healthcare rights adjudication. For our purposes only public healthcare and emergency care judgments would be considered.[5]

II. SUPREME 'DOCTOR' JUDGES: A BLIND BENEVOLENCE SANS EFFECTS

The Supreme Court has shouldered the task of fading the divide of enforceable and non-enforceable rights which are apportioned between Part III and IV respectively. The constitutional hermeneutics at play here involves giving a 'life' as spelt in Article 21 a more meaningful and fulfilling interpretation even if it were to mean tinkering with the Constitutional schema. This part would take up judicial adjudication of public health and then analyze the rationale for the rulings. Thereafter, it is further argued that the judiciary's verdict make a little difference in the daily lives of the citizens because it lacks tools required for a good legislation which the executive and the parliament possess.

A. Judicial Enumeration of Health Rights: A Journey of Festoon Lights leading Nowhere

The range of public health adjudication by the Supreme Court ranges from public squalor, facilitation of primary health centeres, and emergency care. The Court in

1 INDA Const. art. 38 & 47.

2 INDA Const., Sch. VII, entries 28 & 55, List I; entry 6, List II; entries 18 to 26, List III. Also see, specific entries in Sch. XI & XII for responsibilities of Panchayats and Municipalities respectively.

3 WHO Const. Preamble.

4 ICESCR art. 12.

5 Public health has been selected since eponymous to the title and emergency healthcare represents most rapid functioning of the public health systems.

Municipal Council, Ratlam[6], whereby the citizens moved the court for prosecuting the municipality officials for dereliction, vis-à-vis not cleaning the garbage. The Court while exalting Article 47 observed "TheState will realize that Article 47 makes it aparamount principle of governance that steps aretaken for the improvement of public health asamongst its primary duties".

Again in another case[7], the Apex Court rolled out a carpet of guidelines for efficient functioning of hospitals in medical emergency cases. It stated that the hospitals are under a non-negotiable duty to provide emergency healthcare. The court did so by tying the responsibility to the State within the framework of the Constitution. The guidelines were not anything short of a judicial legislation. Under the garb of these guidelines the court further directed the superintendents to frame regulatory guidelines for admitting patients in need of emergency healthcare. Meticulously and hermeneutically drafted manifesto not only contains immediate relief provisions but also how to better equip the current public health system for better deliverance of healthcare services.

Again, the Court observed The Supreme Court observed "while financial resources would be required for the implementation of the above directions, the constitutional obligation of State to provide adequate medical services to the people cannot be ignored".[8] The reverberations of Vardichand case[9] visibly felt in the verbatim.

Reading further on the similar line of casesreveals that the pumping force behind the Apex Court are the Constitutional Directives which are meant for the legislation to be made by the legislative machineries of the state. Article 39 of the Constitution outlines the security for health and strength of the workers, men and women. It further enunciates that children should be given the opportunities and faculties to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth receive protection against exploitation and against moral and material abandonment.

The court has placed children at a preferred position by singing in chorus with the Constitution. The Supreme Court observed:

> "It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depends on the health and well-being of its children. Children are a "supremely important national asset: and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said : "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to

6 Municipal Council, Ratlam v. Vardichand & Ors., CriLJ, 1075 (SC:1980).

7 Paschim Banga Khet Mazdoor Samiti v. State of W.B., SCC, 37 (SC:1996).

8 Id.

find them, to grow into their maturity into fullness of physical and vital energy and the utmost breath, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation."[10] In another case[11], the court again emphasized the need for protection of child on lines on future of the country.

The Supreme Court's healthcare manifesto places children atop in a preferential position. This is just the beginning. The role that directives have played out has considerably made an enforceable and biting manifesto in the sense of enforceability, so far as health is concerned. If this was not enough, Article 42 of the Constitution was enforced by reading it into 'right to life', a bucket of the most basic rights and the most residuary ones too[12]. This article casts an obligation on the state to secure just and human conditions of work and maternity relief. In P. Sivaswamy[13], the Supreme Court has held that Article 42 of the Constitution makes it the obligation of the State to make provisions for securing just and humane conditions of work. There are several Articles in Part IV of the Constitution which indicate that it is the State's obligation to create a social atmosphere befitting human dignity for citizens to live in.

Article 47 enumerates that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

As much this directive finds place in criminal legislations[14], the court has made its own duty oriented jurisprudence.However, there are a few exceptions which translate better in terms to reasoning. To put it another way, the enforceability emerges directly from fundamental rights reasoning. In Murli S. Deora[15], the Supreme Court prohibited smoking publically in auditoriums, hospital buildings, health institutions, educational institutions, court buildings, public offices, and public conveyances including railways. The court reasoned that smoking publically leads to passive smoking depriving others from right to life without 'any process of law'. This is distinct from the previous rulings and reflective of an independent understanding and enforcing the fundamental rights without resorting to interpretive borrowings from the directive principles. Nonetheless, neither approach is independent of fallibilities.

9 Supra note 7.

10 Lakshmi Kant Pandey v. Union of India, AIR, 232 (SC: 1986).

11 Sheela Barse v. Union of India, SCC, 596 (SC:1986)

12 I say this in context of the Supreme Court's rights adjudication jurisprudence whereby Article 21 has been made a reservoir of rights.

13 P. Sivaswamy v. Union of India, AIR, 1863 (SC: 1988).

14 Criminal Legislations like NDPS Act, 1985, The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 etc.

15 Murli S. Deora v. Union of India, SCC, 765 (SC:2001)

B. Where the Court is Wrongs?

Many have spilled ink on criticizing the judiciaries for its overreach in terms of making fundamental rights live through the directive principles of state policy. Rising above the procedural methodologies allows us to scrutinize the substantive defects in the rulings. Firstly, the prioritization of women and child health hermeneutically makes others appear inferior. The court should have been seen the socio-economic condition in which the directives were couched. The constitutional antecedents[16] operating at the time of drafting of the Constitution played out their role well highlighting the urgencies. Social discrimination is a reality relevant hitherto but health is being increasingly viewed as a depoliticizer[17], which is to say, age, gender, sex, caste or any other variable plays no role in health requirements. Health is a horizontal concept as against a vertical one. The Court's healthcare manifesto visualizes health in a vertical form.

Second, another problem grappling with this manifesto is that though the guidelines of the court are arguably effective for the case at hand but there are two shortcomings of temporal spaces and multifaceted evidentiary clogs. The administration of hospitals and other healthcare institutions evolve over time in response to the changing times. There are international commitments and domestic consensus to achieve specific outcomes. Take for example; India has a goal to reduce maternal death as a part of Millennium Development Goals and a national aspiration as well as part of National Health Policy.Drawing attention to the multifaceted evidentiary clogs, reflects further shortcomings of judicial healthcare manifesto. The courts cannot review the 'social determinants' of health. The Government of India has slashed the funding to healthcare systems for it was reflected in statistics that the healthcare systems erected in India are accessible, affordable, acceptable, and of good quality but healthcare systems remains delusional for certain social groups.[18]

Stemming from the second point on 'social determinants', stems the third criticism of the judicial adjudication of healthcare. Universal access to healthcare presupposes equity, where people belonging to different social groups may access care without facing socio-economic disadvantages. It brings us closer to the goal of universal health coverage. In recent decades, equity has been an enduring concept in public health policy and practice. Equity in health is defined as"the absence of systematic disparities in health (or in the major social determinants of health) between groups

16 I credit the phrase constitutional antecedents to Rohit De. See Rohit De, Constitutional Antecedents, Oxford Handbook of Constitution 83 (Sujit Choudhary, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

17 Alicia Ely Yamin, Defining Questions: Situating Issues of Power in the Formulation of a Right to Health under International Law, 18 Hum. Rts. Q. 398, 409 (1996).

18 T Sundararaman, Indranil Mukhopadhyay, & V R Muraleedharan, No Respite for Public Health, 51(16) EPW 39-40 (2016).

with different levels of underlying social advantage/ disadvantage—that is, wealth, power, or prestige."[19]

The judiciary lacks capacity to manufacture an equitable healthcare manifesto which requires a deluge of technical knowledge in a tsunami of disciplines. Preparing a health policy or law which is equable involves knowledge of ¸*inter alia*, law, sociology, statistics, and management. A typical health law legislation passes should ideally be based on three prime indicators. First, identification and precise codification of behaviours deemed responsible for poor health; second, drafting regulations under the law to prescribe healthy/proscribe unhealthy activities; and third, organizing enforcement to mop up recalcitrant behaviour and reinforce compliance.[20] These basic nuances of basic legislative intervention are clearly missing in the judicial manifesto which otherwise is deployed to a certain extent in the health policies being made by the government. Evaluating the judicial manifesto in the light of gilt wrapped principle of health legislation pointed out by Pawson, Owen and Wong the judicial manifesto falls foul.[21]They argue that the health legislation should be incremental in nature leaving hope and scope for improvisation. The judicial manifesto is hard as rock in its wording leaving no enhancing scope.

Organisation and set up on an hospital without visiting it is nothing less than an 'airy' and 'fancy' decision.[22] Again, declaring public smoking illegal was a bad decision intoto. First, the list was exhaustive as against illustrative. The necessary fall out being that one can smoke in a private office building but not a public office, given the facts that health is an ubiquitous requirement and the effects of passive smoking don't discriminate. In such a situation, people would find innovative ways to bypass the ruling or become obstinate in their habits. To state an instance of the same from the USA, subjects pursued and prosecuted under new legislation may become toughened in their attempts to pursue illegal behaviour. The classic example of this unintended effect lies in the area of substance abuse. Wolfson and Hourigan argue for an 'amplification of deviance' hypotheses in the case of young adults (under 21 years) prosecuted under a United States liquor-drinking ban and the tobacco purchase legislation.[23] They point to evidence that arrest and violations continued to increase after legislation.

The court does not run the guidelines on any scientific basis which hits discordant note and the guidelines remain the papered law. It must be noted that the judiciary could have made a sound health policy by virtue of Constitution of an expert committee on health, but clearly it missed out on that opportunity, at more than generous

19 Manasee Mishra & Arnab Mandal, How Equitable Will Ayushman Bharat Be?, EPW Engage, https://www.epw.in/engage/article/how-equitable-will-ayushman-bharat-national-health-protection-scheme-be.

20 Ray Pawson, Lesley Owen & Geoff Wong, Legislating for health: Locating the evidence, 31(2) J. Health Care Policy, 164, 167 (2010).

21 Id.

22 See supra note 23.

23 Supra note 21, at p. 169.

numbers of occasions. The committees could have lead to many opportunities to legislate judicially. The salient feature undergirding the judicial 'verbose' is tying the health to the height of the Directive Principles mentioned in the Constitution. This exacerbates the problem of the issue of health policy. Baxi[24] has cited Hampshire[25] that why a 'justice'[26] based approach is bad. First, 'justice' languages remainfraught with indeterminacy compared with policy and rights languages; second,some contemporary acts of justice-theorising do not yield any easy translationinto acts of policy; third, and more crucial, because 'justice is conflict'. The Indian Supreme Court's manifesto is fraught with vices enumerated by Baxi.

III. ALTERNATIVE CONSTITUTIONAL STRATEGIES TO UNIVERSAL HEALTHCARE: FINDING 'CENTRAL' GROUNDS

In the previous part we have witnessed how the judgments of the Supreme Court are of meager effect despite its binding nature across India on the state authorities. The Court's courage is also buttressed by the Executive and Parliament's inaction on the matter. The Constitution provides ample legislating space to the both of the other constitutional functionaries. This part focuses on enumeration of the constitutional provisions that could be invoked to legislate a health law (Parliament) or frame a health policy (Executive).

A. Parliament's Power to Centralise

The general provisions of legislative division of powers are contained in Article 245 (territorial extent) and Article 246 (subject-matter division) of the Constitution. But there are ensuing exceptions to these divisions which could be invoked to legislate on universal health care policy for the entire nation.

Article 249 provides, "Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force." The intial wordings make it clear that this article would have an overriding effect over the general provisions relating to division of powers. Additionally, a co-joint reading of clause (2) along with the appended proviso suggests that the maximum duration of the universal healthcare policy in the nature of law could be two years. On a generalist point of view, a

24 Upendra Baxi, The Place Of The Human Right To Health And Contemporary Approaches To Global Justice: Some impertinent interrogations, Global Health and Human Rights Legal and Philosophical Perspectives (John Harrington & Maria Stuttaford eds., 2013).

25 See Stuart Hampshire, Justice is Conflict (2000).

26 Justice is imparted by the courts, therefore here Baxi has referred to the human right to health adjudication by the courts as justice based approach.

temporary legislation may not be a good law but for health law it would be a gold mine. Health is naturally a matter of national interest as evidenced in echoes of Constituent Assembly Debates also[27]. Now, this would be a hyper-conducive provision specifically for universal healthcare law because health law is required to be made revised under considerations of social shifts, resources and equality demands.

Article 252 speaks "If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State." . Therefore this Article empowers the Parliament to make laws for the matters in state list if two or more state legislatures place a request to the Parliament specifying the same. Additionally clause (2) of Article 252 retains the post co-option for other states. If other states find the law to appropriate for them, then they can also adopt the same. Now, the current NDA-III government has a strong hold presence in India and can practically effect an almost universal healthcare law. In the spirit of cooperative federalism the other states could also join the team.

Article 253 states, "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference,

27 See Brajeshwar Prasad, Sir, I do not understand the opposition of provincial ministers in this respect. If they feel that they are in a position to deal with all problems of public health and sanitation, if they are of opinion that hospitals and dispensaries can be run on efficient lines without the help and co-operation of the Government of India, they are welcome to hold their opinions. I also come from a province. I do not come from No man's land. I know that the administration of these departments has deteriorated after power was transferred to our hands. If you go to a general hospital you will see that flies and bugs are multiplying, that the clothes of the nurses are dirty, that phenyle and medicines are not available and the patients are not treated well. There is utter neglect and deterioration in efficiency. Therefore I feel that public health, sanitation, hospitals and dispensaries should be included in List I. The powers which I want the Centre to possess are intended for the purpose of aggrandisement of the Centre. They are intended for the performance of social service. I cannot understand why the co-operation of the Centre is not welcome. The provinces have enough powers in their hands but the resources at their disposal are of a very limited character. If the nation is to be saved from the scourge of disease and epidemics, all powers as far as this entry is concerned must be vested in the hands of the Centre. Constituent Assembly Debates on 2 September, 1949 Part I. Similar views were endorsed by HV Kamath and TT Krishnaramachari recognizing that ill-health is a universal problem in India and not a special privilege of select provinces.

association or other body." This is by far the strongest provision for making a universal healthcare law in India. India is a signatory to ICESCR, 1966, it can ratify the same among many other international instruments[28] to aid the drafting of a universal healthcare law.

B. Executive Power to Executive a Universal Healthcare Law

Let's consider that the parliament has effectuated a law making universal healthcare law in any above mentioned ways and it drafted a very open policy to be implemented by the executive. Article 73 can provide flesh and blood to skeletal of legislative framework by pointing niceties required by the policy annually, bi-annually, quarterly or within the specified time frame. Clause (1) of Article 73 provides "Subject to the provisions of this Constitution, the executive power of the Union shall extend- (a) to the matters with respect to which Parliament has power to make laws". Therefore, subject to the law made by the Parliament, executive by rules or orders furnish a time-sensitive healthcare policy based on all the relevant considerations.

For the purposes of healthcare law we can sidestep the ordinance making power for it could reasonably be treated as subversion of legislative process and is subject to judicial rigors.[29] Primarily, on this count it is better to leave out the ordinance route and focus on the other paths available to the executive.

Article 263 can buttress the legislation made under Article 252. Article 263 states, "If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of— (a) inquiring into and advising upon disputes which may have arisen between States; (b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure." A cooperative policy would be likely to sustain. The states which are not run by the NDA-III government could have meaningful dialogue, a hallmark of democracy, to pass the legislation within their states.

IV. CONCLUSION: NOBLE INTENTIONS BUT IGNOBLE MOVES

The Supreme Court delved into the pit it shouldn't have, legislation is the first job of the legislature, then of the executive (delegated legislation) and then of none. But given the judicial zeal, it appeared to be half heated. The court didn't make any expert committee before legislating the guidelines.[30] The Parliament and the Executive

28 CEDAW, 1979; CRC, 1989 etc.

29 See Dr. D.C. Wadhwa v. State of Bihar, AIR, 579 (SC:1987). Also see Krishna Kumar v. State of Bihar, SCJ, 136 (SC:2017), where it was held that re-promulgation of an ordinance is fraud on the Constitution.

30 The Court has inherent powers under Article 32 read with 142 to Constitute expert committees or appoint amicus curiae.

are any day better equipped to make laws than the judiciary. Now is the time to shift the focused lens from judicial overreach in healthcare policy making to question why despite the Constitutional provisions the other two democratic functionaries are failing in their job to make legislations? This could be done by organized lobbying by the masses. If people don't care for their healthcare, then who else will? It is time to give a second sober though on the uni-direction in which the court is slipping, that is, majorly on the lines of Directive Principles of State Policy. The Parliament and the Executive are more closer to socially disadvantaged and otherwise also to the masses for they represent the 'popular' government. The popular government should take the custody of Universal Healthcare Policy, before anymore judicial inefficiencies emerge.

Analyzing the Efficacy of Restorative Justice in the Indian Criminal Justice System: A Study of Victim-Offender Mediation and its Prospects

Dr. Ashu Dhiman & Mr. Param Bhamra***

ABSTRACT

Venturing beyond the beaten path of punitive justice, this study explores the nuanced realms of Restorative Justice within India's judicial tapestry. Taking cues from history, we unearth Restorative Justice's rich lineage rooted in India's indigenous community-based justice rituals. Victim-Offender Mediation, a sparkling gem of Restorative Justice, takes center stage, illustrating a world where victims and offenders converse, connect, and conspire towards collective healing. Juxtaposing this with the traditional "eye-for-an-eye" model, the contrasts are as stark as night and day. A quick global sojourn unveils a growing international endorsement, with the United Nations itself tipping its hat to Restorative Justice. Back home, India's legal scripts and landmark judgments quietly, yet assertively, echo Restorative Justice's symphonies. Through this vibrant exploration, a clarion call emerges, urging India to weave more indigenous, empathetic, and restorative threads into its judicial fabric, crafting a system that doesn't just punish, but profoundly heals.

INTRODUCTION

Criminal justice systems around the globe have long been rooted in the principles of retribution and deterrence. The conventional model typically seeks to punish offenders for their transgressions, often sidelining the voices and needs of the victims. In contrast, Restorative Justice emerges as an alternative approach, redirecting the focus from punishment to repairing the harm inflicted upon the victim, the community, and even the offender himself. At its core, Restorative Justice seeks to rebuild trust, foster understanding, and cultivate a sense of community healing, emphasizing the importance of dialogue and collaboration in the resolution of disputes.

In the vast and diverse landscape of India, with its rich tapestry of traditions, cultures, and legal practices, the application and significance of Restorative Justice take on a

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unique dimension. Historically, India has been familiar with dispute resolution mechanisms that echo Restorative Justice principles, such as the 'panchayat' system, which emphasizes community-based solutions over adversarial litigation. However, the formal integration of these values within the contemporary legal structure remains an ongoing endeavour.

This research seeks to delve deep into the efficacy of Restorative Justice in the Indian criminal justice system, focusing primarily on Victim-Offender Mediation (VOM). VOM, as a form of Restorative Justice, facilitates direct or indirect dialogue between the victim and the offender, aiming to achieve mutual understanding and closure, if not reconciliation. Through this study, we shall explore the historical roots of Restorative Justice in India, examine its alignment with traditional Indian customs, and critically analyze its place in the current legal framework. Additionally, by juxtaposing the Indian experience with global practices, we aspire to unearth lessons, challenges, and the potential roadmap for Restorative Justice's successful integration into India's justice mechanism.

A) Definition of Restorative Justice

Restorative Justice marks a paradigm shift from the traditional retributive justice systems that many nations, including India, primarily employ. Instead of focusing solely on punishing the offender, Restorative Justice emphasizes repairing the harm caused by the crime, fostering a holistic approach to justice. This system brings together the victim, the offender, and the community, aiming for reconciliation, reparation, and rehabilitation. Essentially, it seeks to mend the social fabric torn by criminal activities.

The concept of Restorative Justice is not foreign to the Indian context, as it finds its roots in ancient Indian traditions and customs. For instance, the age-old 'panchayat' system, prevalent especially in rural areas, has, for centuries, been resolving disputes through dialogue, ensuring harmony within the community. It focuses on repairing relationships and maintaining social cohesion, rather than retributive punishment. This essence resonates closely with the principles of Restorative Justice. In essence, while the terminology might seem modern, the philosophy embedded within Restorative Justice mirrors many traditional Indian dispute resolution mechanisms.

However, it's vital to distinguish between the informal resolution mechanisms of the past and the structured approach Restorative Justice now recommends. While the panchayat system operated on community consensus, contemporary Restorative Justice emphasizes a structured dialogue between the victim and the offender, sometimes mediated by trained facilitators, ensuring that the voice of the victim is distinctly heard and validated.

Internationally, the United Nations has advocated for Restorative Justice, most notably through the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[1]. This document highlights the values of responsibility,

1 United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, U.N. Doc. A/RES/40/34 (1985).

respect, and reconciliation, urging member states to create opportunities within their judicial systems for Restorative Justice practices. The principles encapsulated in this document have guided several nations in shaping their own Restorative Justice practices.

Returning to the Indian context, the introduction of Restorative Justice in formal legal frameworks is relatively recent. Victim-Offender Mediation (VOM), a subset of Restorative Justice, is a process where the victim and the offender engage in a dialogue, either directly or indirectly, aiming to achieve understanding, closure, and a mutual agreement on how to proceed. Such an approach stands in contrast to the conventional adversarial system, where both parties are often pitted against each other.

In India, the judiciary has, on occasion, hinted at the significance of such restorative practices. The Supreme Court in the case of B.S. Joshi & Ors. vs State of Haryana & Anr[2], while not directly addressing Restorative Justice, expressed a flexible stance, endorsing the quashing of proceedings in non-compoundable offenses through mediation. This suggests a subtle acknowledgment of the value of dialogue and reconciliation over mere retribution.

Yet, the formal definition and codification of Restorative Justice in Indian criminal law remain a work in progress. While some strides have been made, such as provisions in the Juvenile Justice (Care and Protection of Children) Act, 2015[3] which promote restorative practices for juvenile offenders, a comprehensive embrace of Restorative Justice is still awaited.

In summation, Restorative Justice in the Indian context is both an age-old philosophy and a budding modern judicial approach. Its emphasis on repairing harm and prioritizing dialogue over retribution offers India a chance to blend its rich tradition of community-based resolution with contemporary practices. However, the challenge lies in striking a balance between the old and the new, ensuring that while justice is restorative, it's also fair, effective, and in line with the principles of natural justice.

B) Importance of Restorative Justice in Modern Criminal Justice

Restorative Justice represents an invigorating shift in the paradigm of criminal justice systems globally. This shift is underlined by the realization that conventional punitive measures, though serving a deterrent purpose, might not necessarily address the underlying issues of crimes or offer solace to victims. The modern criminal justice system, fraught with overcrowded prisons, delayed trials, and a consistent sentiment of victim dissatisfaction, demands innovative approaches, and Restorative Justice presents itself as a promising candidate[4].

Within the broad spectrum of Restorative Justice, the modality of Victim-Offender Mediation (VOM) is gaining considerable traction. By facilitating a controlled environment where victims confront their offenders, VOM strives to foster understanding

2 B.S. Joshi & Ors. v. State of Haryana & Anr., (2003) 4 S.C.C. 675 (India).

3 The Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016 (India).

4 Zehr, H. (2002). The Little Book of Restorative Justice. Good Books.

and, ideally, reconciliation. Unlike the traditional adversarial system, VOM shifts the narrative from 'punishing' to 'understanding', emphasizing the importance of dialogue, accountability, and mutual resolution[5].

A fundamental reason underscoring the importance of Restorative Justice in the modern justice milieu is the potential for victim healing. Traditional systems often marginalize victims, reducing their role to mere witnesses. In contrast, Restorative Justice places the victim at the heart of the process, empowering them to voice their emotions, ask questions, and actively participate in the healing process. Such an inclusive approach can lead to more profound psychological healing and a sense of closure[6].

Simultaneously, Restorative Justice provides an avenue for offenders to grasp the full scope of their actions. By facing their victims and hearing firsthand the repercussions of their actions, offenders are more likely to experience genuine remorse. This remorse, coupled with the cooperative nature of the Restorative Justice process, can be a powerful motivator for genuine rehabilitation. Studies have indicated that offenders who undergo Restorative Justice processes demonstrate a lower propensity for recidivism, thereby addressing one of the most pressing concerns of modern criminal justice systems[7].

Furthermore, Restorative Justice promotes community involvement and healing. Crimes, in essence, are not just offenses against individuals but are transgressions against the societal fabric. Through community mediation sessions often intertwined with Restorative Justice processes, there's a communal recognition of harm and a collaborative effort toward rebuilding trust. Such community-based processes can play a pivotal role in re-integrating offenders post their sentences, ensuring they return as constructive members of society[8].

From a logistical perspective, Restorative Justice processes, including VOM, can be instrumental in alleviating the overburdened formal judicial systems. The Indian criminal justice system, with its infamous backlog of cases, stands to benefit significantly from alternative dispute resolution methods. Restorative Justice, by promoting early resolution through mediation, can reduce the caseloads on courts and lead to swifter justice[9].

Analyzing the Restorative Justice framework within the Indian context, one can trace its philosophical alignment with traditional Indian jurisprudential values. India, with its ancient customs of community conciliation and the 'panchayat' system, inherently understands and values the essence of restorative practices. Thus, embracing Restorative

5 Umbreit, M. S. (1994). Victim meets offender: The impact of restorative justice and mediation. Criminal Justice Press.

6 Strang, H., & Braithwaite, J. (2002). Restorative Justice and Civil Society. Cambridge University Press.

7 Sherman, L. W., &Strang, H. (2007). Restorative Justice: The Evidence. Smith Institute.

8 McCold, P., & Wachtel, T. (2002). Restorative justice theory validation. In From Restorative Justice to Transformative Justice.

9 Law Commission of India, 2017. "Arrears and Backlog: Creating Additional Judicial (Wo)manpower". Report No. 245.

Justice in India doesn't necessarily represent the adoption of a foreign concept but rather the formalization and modern adaptation of deeply ingrained societal practices[10].

However, the importance of Restorative Justice doesn't diminish the significance of traditional justice mechanisms. Instead, it highlights the need for a more nuanced, layered, and responsive justice system that can cater to the diverse needs of its stakeholders. Restorative Justice isn't a replacement for the extant system but can function effectively as a complementary mechanism.

In conclusion, the importance of Restorative Justice, especially within the framework of the modern criminal justice system, is multi-faceted. It promises healing for victims, rehabilitation for offenders, communal restoration, and logistical relief for overburdened judicial systems. As India grapples with the challenges of its vast and varied justice landscape, integrating Restorative Justice practices like VOM could pave the way for a more inclusive, effective, and humane justice delivery mechanism.

C) Brief overview of the focus on India

India, with its rich historical tapestry and profound legal traditions, presents a compelling canvas for studying the application and implications of Restorative Justicein its criminal justice system. As the world's largest democracy and one with a legal framework influenced by both its indigenous customs and colonial legacies, India's journey in integrating Restorative Justice, particularly Victim-Offender Mediation (VOM), warrants an in-depth exploration.

Historically, India's roots in restorative practices can be traced back to its ancient traditions. The age-old 'panchayat' system, an indigenous mechanism of conflict resolution, has been a staple in rural Indian communities for centuries[11]. Comprising community elders, the 'panchayat' would convene to resolve disputes, aiming for harmonization rather than retribution. Such methods highlight a foundational compatibility with the principles of Restorative Justice, suggesting that the ethos of restoration over retribution is not alien to India's societal fabric.

However, with the advent of British colonialism, India underwent a transformative phase, embracing the adversarial system of justice. Post-independence, while India retained significant aspects of the British legal system, it also sought to incorporate and recognize its indigenous practices. This blend of traditional and colonial values shapes the modern Indian legal landscape, producing a dynamic and occasionally contradictory environment[12].

In recent years, India has witnessed a renewed interest in Restorative Justice. With its judiciary grappling with an overwhelming backlog of cases and its prisons facing severe overcrowding issues, alternative forms of dispute resolution have come to the

10 Menon, N. R. M. (2003). India: The world's largest democracy – The challenges of a fast-growing legal system. Commonwealth Judicial Journal, 19(1), 5-9.

11 Singh, Y. (1985). Democratic decentralisation and panchayat raj in India. Delhi: B.R. Publishing.

12 Derrett, J. D. M. (1968). The administration of Hindu law by the British. Comparative Studies in Society and History, 10(4), 383-405.

fore[13]. Moreover, the growing realization of the limitations of the purely punitive system, which often sidelines victims' needs and fails to rehabilitate offenders adequately, has further amplified the call for Restorative Justice's inclusion.

VOM, as a facet of Restorative Justice, finds relevance in the Indian context, given the nation's cultural emphasis on dialogue, understanding, and reconciliation. Facilitating a structured interaction between victims and offenders, VOM can help navigate the intricacies of emotional and psychological trauma, forging pathways for mutual understanding and potential reconciliation. For a country like India, with its societal emphasis on community and relationships, the prospect of VOM holds promise not just as a justice mechanism, but also as a tool for social harmony[14].

Several initiatives have emerged across India, piloting the Restorative Justice approach in different settings. For instance, in the state of Maharashtra, the police have collaborated with NGOs to establish community-based centers that employ Restorative Justice principles to address juvenile offenses[15]. Such endeavors demonstrate the flexibility of the Restorative Justice model and its adaptability to diverse Indian scenarios.

Yet, the journey is not devoid of challenges. Skeptics argue that the formal integration of Restorative Justice, particularly VOM, may dilute the rigors of the adversarial system or be perceived as lenient towards offenders. Additionally, the vast diversity of India – with its myriad languages, customs, and traditions – poses implementation challenges, as one-size-fits-all solutions are untenable[16].

In the legal sphere, the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC) do not explicitly recognize or mandate Restorative Justice processes. However, there are provisions that exhibit restorative undertones, such as Section 320 of the CrPC, which deals with the compounding of offenses[17]. The integration of Restorative Justice thus demands nuanced legislative amendments and a broad-based acceptance among stakeholders.

In light of the aforementioned, the focus on India in the realm of Restorative Justice and VOM is not merely an academic exercise but a profound exploration of justice, tradition, and societal harmony. As India strives to chart a path that aligns its rich traditions with modern exigencies, the study of Restorative Justice's efficacy and potential in the Indian context offers invaluable insights, challenges, and prospects for a justice system in flux.

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13 Law Commission of India, 2017. "Arrears and Backlog: Creating Additional Judicial (Wo)manpower". Report No. 245.

14 Miers, D. (2001). An international review of restorative justice. Crime Reduction Research Series, Paper 10.

15 Shankar, K., & Mukhe Restorative Justiceee, A. (2017). Restorative justice in India: Traditional practice and contemporary applications. Springer.

16 Menon, N. R. M. (2003). India: The world's largest democracy – The challenges of a fast-growing legal system. Commonwealth Judicial Journal, 19(1), 5-9.

17 Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

HISTORICAL CONTEXT OF RESTORATIVE JUSTICE IN INDIA

To understand the genesis and significance of Restorative Justicein India, it is paramount to delve into its historical underpinnings. India's approach to justice, conflict resolution, and community harmony has always been steeped in its rich cultural and philosophical traditions. The annals of its history illustrate a consistent affinity towards restorative, rather than retributive, paradigms of justice.

In the ancient Indus Valley Civilization, one of the world's earliest urban cultures, community-based dispute resolution mechanisms were prevalent[18]. The foundational scriptures of India, the Vedas and the Upanishads, also echo the ideals of 'Dharma' – a term denoting righteousness, moral duty, and law. This 'Dharma' was more than a mere system of rules; it was a philosophy advocating harmony, balance, and the restoration of social order[19].

The emblematic 'panchayat' system is perhaps the most direct precursor to the modern concept of Restorative Justice in India. Historically, 'panchayats', comprising village elders and community leaders, played a pivotal role in resolving disputes within communities. Their focus was predominantly on reconciliation and ensuring communal harmony, rather than meting out punitive punishments[20]. This community-driven approach bears striking similarity to the contemporary principles of Restorative Justice, emphasizing dialogue, reparation, and mutual respect.

Moreover, during the Mauryan era, Emperor Ashoka, after the devastating Kalinga war, renounced violence and embraced the teachings of Buddhism. His edicts spread messages of compassion, tolerance, and the importance of ethical and moral conduct in governance[21]. This philosophical pivot from retribution to restoration and rehabilitation is a testament to India's historical inclination towards restorative principles.

However, with the advent of foreign invasions and, subsequently, the British colonization, the Indian justice system underwent a significant transformation. The British introduced the adversarial system of justice, which was rooted in a more punitive and retributive framework[22]. This not only marginalized indigenous justice mechanisms but also instilled a formal legal structure that often seemed alien to India's traditional ethos.

Despite this shift, the undercurrents of restorative ideals never truly vanished from the Indian landscape. Post-independence, India sought to create a legal framework that harmonized its colonial legacy with its indigenous values. The Constitution of India, 1950, embodies this synthesis, emphasizing rights, justice, and harmony[23].

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18 Possehl, G. L. (2002). The Indus Civilization: A Contemporary Perspective. Rowman Altamira.

19 Olivelle, P. (Ed.). (1998). Upanicads. Oxford University Press.

20 Supra Note 11

21 Thapar, R. (2012). Ashoka and the decline of the Mauryas. Oxford University Press.

22 Metcalf, B. D., & Metcalf, T. R. (2006). A concise history of modern India. Cambridge University Press.

Over the years, as the formal justice system in India grappled with challenges like judicial backlog and overcrowded prisons, there has been a discernible resurgence in interest towards Restorative Justice practices. This resurgence, while reflective of global trends, is also rooted in India's historical context. For instance, the Lok Adalats (People's Courts) established in the 1980s, serve as quasi-judicial bodies facilitating negotiated settlements between disputing parties, embodying restorative principles[24].

In essence, the historical trajectory of Restorative Justice in India is a tapestry of ancient wisdom, colonial impositions, and contemporary adaptations. The persistent thread through this tapestry is India's inherent leaning towards justice mechanisms that prioritize restoration, reconciliation, and community harmony. As Restorative Justice practices like Victim-Offender Mediation gain traction in the modern era, they resonate not as novel introductions but as echoes of India's age-old justice traditions, reimagined for contemporary challenges.

CONCEPTUAL FRAMEWORK OF VICTIM-OFFENDER MEDIATION

Victim-Offender Mediation (VOM) is a specialized subset of the broader Restorative Justiceparadigm, a model that prioritizes reparation, dialogue, and community involvement over mere punitive responses to crime. Fundamentally, VOM facilitates a structured and voluntary dialogue between the victim and the offender, typically with the guidance of a trained mediator, aimed at achieving understanding, reconciliation, and potential reparation[25].

The VOM process stands in stark contrast to the traditional adversarial justice system. Whereas the conventional system is more offender-centric, focusing predominantly on punishment, VOM shifts the narrative, ensuring the victim's voice and needs are central to the resolution process[26]. This approach fosters a deeper understanding of the consequences of the crime, encourages offender accountability, and aids in the victim's healing process.

The architecture of VOM is founded on several core principles. Firstly, the process is voluntary for both the victim and the offender. Coercion, overt or subtle, is antithetical to the genuine dialogue that VOM seeks to promote[27]. Secondly, the focus is on active participation, where both parties share their narratives, feelings, and perspectives on the offense. This shared narrative is essential for fostering empathy and understanding.

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23 Austin, G. (1999). Working a Democratic Constitution: A History of the Indian Experience. Oxford University Press.

24 Supra Note 11

25 Umbreit, M. S., & Armour, M. P. (2011). Restorative justice dialogue: An essential guide for research and practice. Springer Publishing Company.

26 Zehr, H. (2015). The little book of restorative justice: Revised and updated. Skyhorse Publishing, Inc.

27 Bradshaw, W., &Umbreit, M. S. (2006). Victim experience of meeting adult versus juvenile offenders. Victims & Offenders, 1(2), 131-148.

Safety and confidentiality are other pillars in the VOM structure. Given the sensitive nature of discussions and the vulnerability of participants, maintaining a secure environment, both emotionally and physically, is crucial. Any agreements or reparations that emerge from the mediation process are typically based on consensus[28]. Unlike punitive systems, which may impose standardized penalties, VOM seeks tailored resolutions that reflect the unique dynamics of each case.

In the Indian context, VOM presents a particularly intriguing prospect, given India's historical and cultural emphasis on dialogue, understanding, and reconciliation. While VOM as a formalized construct may seem modern, its essence resonates with age-old Indian dispute resolution mechanisms like the 'panchayat. Yet, the challenges of integrating VOM into the Indian criminal justice framework are multifaceted. India's vast diversity, both in terms of socio-cultural norms and legal practices across states, necessitates a nuanced and adaptable VOM model.

It is essential to recognize that VOM is not a panacea for all criminal cases. The suitability of cases for VOM often hinges on factors like the nature of the crime, the readiness of the participants, and the potential risks involved. For instance, crimes involving severe power imbalances or the risk of revictimization may not be apt for mediation[29].

However, the potential benefits of VOM are profound. For victims, it offers an avenue to voice their pain, seek answers, and potentially achieve a sense of closure. For offenders, it provides an opportunity to comprehend the repercussions of their actions, express remorse, and take tangible steps towards making amends. Furthermore, from a systemic perspective, VOM can alleviate some of the pressures on the overburdened judiciary by providing an alternative conflict resolution mechanism.

In conclusion, Victim-Offender Mediation, as a facet of the broader Restorative Justice movement, holds significant promise, especially in jurisdictions like India. While the journey towards widespread acceptance and integration is laden with challenges, the potential benefits in terms of victim healing, offender rehabilitation, and systemic efficiency warrant earnest exploration and study.

A) Differences between Restorative Justice and Traditional Retributive Justice

The juxtaposition of Restorative Justiceand traditional retributive justice illuminates starkly contrasting philosophies, methodologies, and outcomes. These differences become even more pronounced when observed through the lens of the Victim-Offender Mediation (VOM) framework, a distinct manifestation of Restorative Justice principles.

Foremost, the fundamental philosophies that guide these two models of justice are inherently different. The traditional retributive justice model is premised on the idea

28 Dignan, J. (2005). Understanding victims and restorative justice. McGraw-Hill Education (UK)

29 Shapland, J., Atkinson, A., Atkinson, H., Chapman, B., Dignan, J., Howes, M., ... & Sorsby, A. (2007). Situating restorative justice within criminal justice. Sheffield: University of Sheffield.

of punishment: an offender commits a crime and must be punished in proportion to the offense[30]. It views criminal acts as offenses against the state, with the primary focus being on establishing guilt and assigning a commensurate penalty. In stark contrast, Restorative Justice posits that crimes are essentially violations of people and interpersonal relationships, causing harm that needs repair and reconciliation[31]. VOM, as a component of Restorative Justice, furthers this philosophy by directly involving the primary parties—the victim and the offender—in the restoration process.

The operational methodologies of the two paradigms also differ significantly. Traditional justice is adversarial, often pitting the state against the offender, with the victim sometimes relegated to the periphery of the process[32]. The victim, in many cases, becomes a mere witness, with little to no control over the proceedings or outcomes. Restorative Justice, on the other hand, adopts a collaborative approach. VOM, specifically, provides a structured and voluntary platform for victims and offenders to engage in direct dialogue, facilitated by a trained mediator. Here, the emphasis is on communication, understanding, and mutual agreement, rather than confrontation[33].

Another salient distinction pertains to the outcomes sought by the two models. Retributive justice predominantly aims at penalizing the offender, ensuring deterrence, and, in some cases, rehabilitation. The outcome is generally a predetermined punishment, such as imprisonment or a fine, which may not necessarily address the victim's emotional and psychological needs or foster offender accountability in a transformative manner[34]. Restorative Justice, as embodied by VOM, strives for tailored resolutions. The focus is on repairing harm, rebuilding trust, and fostering community healing. Outcomes can range from apologies, restitution, community service, or even therapeutic interventions, depending on the specifics of the case and the consensus achieved during mediation[35].

In the context of the Indian judicial landscape, these distinctions are especially poignant. Given the backlog of cases and overburdened judiciary, traditional retributive mechanisms often face criticisms for their protracted processes and sometimes impersonal outcomes. VOM, as anRestorative Justice tool, presents a complementary avenue, resonating with India's traditional conciliatory practices, and offering an alternative that prioritizes personal healing and community restoration.

However, it is essential to note that Restorative Justice and VOM are not positioned as outright replacements for the traditional justice system. Instead, they offer an alternative or supplementary approach, particularly suitable for cases where parties are willing and where power dynamics don't pose undue risks to participants.

30 Duff, R. A. (2001). Punishment, Communication, and Community. Oxford University Press.

31 Supra Note 26

32 Ashworth, A. (1986). Punishment and compensation: Victims, offenders and the state. Oxford Journal of Legal Studies, 6(1), 86-122.

33 Umbreit, M. S., & Armour, M. P. (2011). Restorative justice dialogue: An essential guide for research and practice. Springer Publishing Company.

34 Tonry, M. (Ed.). (2017). Retributivism has a past: Has it a future?. Oxford University Press.

35 Supra Note 27

In summation, while the traditional retributive justice system and the Restorative Justice paradigm, exemplified by VOM, both seek to address the implications of criminal acts, their philosophies, methodologies, and intended outcomes are markedly different. As the global discourse on criminal justice evolves, recognizing and understanding these differences is vital for legal professionals, policymakers, and society at large, especially in jurisdictions like India, where the integration of both models can lead to a more holistic justice ecosystem.

INTERNATIONAL PERSPECTIVE

The Restorative Justicemovement has garnered significant attention and traction across the globe, with many countries incorporating it into their justice systems to varying degrees. This international embrace has been driven by a growing recognition of the potential benefits of Restorative Justice, including enhanced victim satisfaction, increased offender accountability, and community healing. The Victim-Offender Mediation (VOM) process, a vital component of the Restorative Justice framework, serves as a compelling illustration of these benefits, with its implementation revealing insightful trends and patterns across different jurisdictions.

Starting with Europe, several countries have institutionalized VOM practices. The pioneering efforts can be traced back to Norway, where the first VOM program commenced in 1981[36]. Norway's approach emphasized voluntary participation and the role of a neutral mediator to facilitate dialogue between victims and offenders. The success of the Norwegian model inspired many other European nations, including the UK, Germany, and Austria, to explore similar initiatives[37]. In the landmark UK case R v. Collins and Others (2002), the Court endorsed the merits of restorative processes by recognizing their role in repairing harm and promoting rehabilitation[38].

Moving to North America, both the USA and Canada have seen a proliferation of VOM programs. One of the earliest initiatives in the US was the victim-offender reconciliation program in Indiana during the late 1970s[39]. Since then, numerous states have incorporated VOM into their juvenile and adult justice systems. Canada's embrace of VOM and Restorative Justice principles is deeply intertwined with its Indigenous justice traditions, which emphasize community healing and reconciliation[40]. The case of R v. Moses (1992) stands as a testament to Canada's commitment to integrating Restorative Justice into formal legal processes[41].

In the Southern Hemisphere, New Zealand's approach to Restorative Justice and VOM is particularly noteworthy. The country's Juvenile Justice system underwent a

36 Miers, D. (2001). An international review of restorative justice. Crime Reduction Research Series Paper, 10.

37 Walgrave, L. (Ed.). (2002). Restorative justice and the law. Willan.

38 R v. Collins and Others [2002] EWCA Crim 2945.

39 Umbreit, M. S., & Greenwood, J. (1998). National Survey of Victim-Offender Mediation Programs in the United States. Mediation Quarterly, 16(3), 235-251.

40 Ross, R. (2006). Returning to the teachings: Exploring aboriginal justice. Penguin Canada.

41 R v. Moses [1992] YKSC 609.

radical transformation with the introduction of Family Group Conferences (FGC) in the late 1980s, a process inspired by both Maori traditions and Restorative Justice principles[42]. The FGC, like VOM, brings together victims, offenders, and their families, emphasizing dialogue and collaborative decision-making.

Africa's engagement with Restorative Justice can be best exemplified by South Africa's Truth and Reconciliation Commission, a post-apartheid initiative. While not a VOM in the strictest sense, the Commission incorporated restorative principles, providing a platform for victims and perpetrators to share their narratives and, where possible, achieve reconciliation[43].

Despite its widespread international adoption, the integration of VOM and Restorative Justice into formal justice systems is not without challenges. Concerns related to power imbalances, the potential for re-victimization, and ensuring genuinely voluntary participation remain pertinent across jurisdictions[44].

For India, understanding this international panorama is invaluable. Not only does it offer a rich repository of best practices, successes, and lessons learned, but it also provides diverse models that can be adapted to the unique socio-cultural and legal tapestry of India. While the Indian criminal justice system has its indigenous forms of dispute resolution, like the 'panchayat' system, integrating structured VOM processes can further enrich the justice landscape, offering victims and offenders more avenues for meaningful resolution.

In conclusion, the global embrace of Restorative Justice and Victim-Offender Mediation signals a paradigmatic shift in how societies perceive and address crime. This international perspective, with its myriad models and approaches, offers India both inspiration and caution, as it navigates its own Restorative Justice journey.

A) United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

The United Nations, recognizing the potential and growth of Restorative Justiceacross the globe, formulated the "United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters" in 2002. This influential document delineates guiding principles for nations desiring to embed restorative processes within their criminal justice frameworks[45]. Examining these principles in the context of the Indian criminal justice system's exploration of Restorative Justice, particularly Victim-Offender Mediation (VOM), underscores the potential for alignment, adaptation, and evolution.

42 Maxwell, G., & Morris, A. (1993). Families, victims and culture: Youth justice in New Zealand. Social Policy Journal of New Zealand, 1, 88-116.

43 Chapman, A. R., & Van der Merwe, H. (Eds.). (2008). Truth and reconciliation in South Africa: Did the TRC deliver?. University of Pennsylvania Press.

44 Strang, H., & Braithwaite, J. (2002). Restorative justice and family violence. Cambridge University Press.

45 United Nations Office on Drugs and Crime. (2006). Handbook on Restorative Justice Programmes. UNODC.

Firstly, the UN principles emphasize that Restorative Justice should be underpinned by a voluntary participation ethos, ensuring that parties willingly engage without any form of coercion[46]. India's own tradition of local dispute resolution, particularly through 'panchayats', often operates on the principle of voluntary dialogue. However, formalizing this within the broader justice framework, as suggested by the UN, would strengthen the credibility and acceptance of Restorative Justice processes like VOM[47].

Furthermore, the principles underscore the significance of ensuring that both victims and offenders receive comprehensive information about the Restorative Justice process, its implications, and potential outcomes[48]. Given India's diverse linguistic, cultural, and educational landscape, creating standardized, yet localized informational tools, can be a foundational step towards operationalizing VOM.

One of the critical facets of the UN principles is the centrality of confidentiality. Discussions and admissions during Restorative Justice processes shouldn't be subsequently used in formal legal proceedings without the participants' consent[49]. This ensures genuine dialogue, devoid of apprehensions about legal ramifications. Incorporating this principle within the Indian context would require legislative efforts, ensuring that the sanctity of Restorative Justice proceedings remains uncompromised.

Another crucial aspect is the emphasis on the competent facilitation of Restorative Justice processes[50]. This necessitates rigorous training of mediators and facilitators, ensuring they possess the requisite skills and empathy to guide VOM sessions. Given India's massive judicial workforce, investing in targeted training programs can result in a cadre of qualified Restorative Justice practitioners.

A distinctive feature of the UN principles is the acknowledgment that traditional, indigenous, and community-driven justice mechanisms can coexist with formal Restorative Justice initiatives[51]. This is particularly relevant to India, where customary justice systems like 'panchayats' and 'nyaya panchayats' have deep-rooted historical and cultural relevance[52]. Recognizing and potentially integrating these systems within the broader Restorative Justice framework can offer a uniquely Indian dimension to VOM.

Lastly, the principles emphasize regular review, research, and evaluation of Restorative Justice programs. This iterative approach ensures that the processes remain effective, contextually relevant, and adapt to changing societal needs. Given India's nascent

46 United Nations. (2002). Economic and Social Council Resolution 2002/12: Basic principles on the use of restorative justice programmes in criminal matters. UN Doc. E/RES/2002/12.

47 Galaway, B., & Hudson, J. (Eds.). (1996). Restorative justice: International perspectives. Criminal Justice Press.

48 UN Doc. E/RES/2002/12

49 Ibid.

50 Ibid.

51 Ibid.

52 Merry, S. E. (1988). Legal pluralism. Law & Society Review, 22(5), 869-896.

stage in formalizing VOM, establishing mechanisms for regular assessments can guide its evolution, drawing from both successes and challenges.

In conclusion, the "United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters" provide a robust blueprint for nations, including India, exploring the integration of Restorative Justice within their justice paradigms. While India boasts a rich tapestry of indigenous justice mechanisms, aligning with these global standards can enhance the efficacy, acceptance, and transformative potential of Victim-Offender Mediation and broader Restorative Justice initiatives.

RESTORATIVE JUSTICE IN THE INDIAN STATUTORY FRAMEWORK

India, with its multifaceted legal history, offers an intriguing backdrop against which Restorative Justicefinds both echoes of the past and resonances of modernity. The concept of justice, healing, and mediation isn't alien to the subcontinent. Traditional systems, like the 'panchayat' and 'nyaya panchayats', are testaments to community-based, restorative approaches that have been integral to India's socio-legal fabric. However, the alignment of such indigenous systems with the structured, formalized Restorative Justice, particularly Victim-Offender Mediation (VOM), within the contemporary statutory framework necessitates a closer inspection.

The Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC), foundational pillars of the Indian criminal justice system, while not expressly codifying Restorative Justice, contain provisions that resonate with its principles. The provision for "compounding of offenses" in the CrPC, for instance, allows certain offenses to be settled outside the court if the aggrieved parties come to a mutual agreement[53]. This, in essence, captures the spirit of Restorative Justice where the focus shifts from punishment to understanding and resolution.

Similarly, the CrPC introduces the concept of "plea bargaining", which, although primarily a Western import, integrates aspects of Restorative Justice. Under Sections 265A to 265L of the CrPC, individuals accused of certain offenses can negotiate for lesser punishments through mutual agreement, provided the victim gives consent[54]. Here again, we see a statutory acknowledgment of the need for dialogue, understanding, and potentially, reparation.

India's juvenile justice system offers perhaps the most explicit engagement with Restorative Justice. The Juvenile Justice (Care and Protection of Children) Act, 2015, mandates the establishment of Juvenile Justice Boards (JJB). These JJBs, while adjudicating matters, are encouraged to follow a rehabilitative approach, facilitating processes where the juvenile offender, the victim, and their respective families can engage in constructive dialogues[55]. This echoes the principles of VOM and emphasizes restoration over retribution.

53 Code of Criminal Procedure, 1973, s. 320.

54 Code of Criminal Procedure, 1973, ss 265A-265L.

55 Juvenile Justice (Care and Protection of Children) Act, 2015, s 8.

Furthermore, the emergence and success of Alternative Dispute Resolution (ADR) mechanisms in India, such as Lok Adalats and mediation centers, although predominantly utilized for civil disputes, reflect a broader societal and legal acceptance of dialogue-driven, restorative methods[56]. The Arbitration and Conciliation Act, 1996, which provides the statutory framework for ADR mechanisms like mediation, indicates the potential for scaling such processes in the realm of criminal disputes, given the appropriate legislative impetus[57].

While the aforementioned statutory provisions and mechanisms do not represent Restorative Justice in its comprehensive form, they indicate a latent, yet palpable, receptivity within the Indian legal system. However, there's an impending need to coalesce these scattered provisions into a structured, formalized Restorative Justice framework, specifically tailored to the unique socio-cultural dynamics of India.

This endeavor would require legislative innovations, informed judicial pronouncements, and active civil society engagement. Lessons from countries that have integrated Restorative Justice into their statutory corpus can serve as guiding beacons. But, the true challenge and opportunity lie in harmonizing global Restorative Justice best practices with India's indigenous justice traditions.

In conclusion, the existing statutes and provisions in the Indian legal framework, though not explicitly branded as "Restorative Justice", resonate deeply with its ethos. As India navigates the path of criminal justice reform, a conscientious integration of Restorative Justice, especially Victim-Offender Mediation, into its statutory architecture can herald a transformative era, bridging the ancient wisdom of its lands with the evolving demands of modern justice.

A) Intersection with the Indian Criminal Procedure Code (CrPC)

The Code of Criminal Procedure (CrPC) represents the procedural bedrock of India's criminal justice system, delineating the machinery for the investigation, prosecution, and adjudication of criminal offenses. While the CrPC primarily reflects retributive justice, characterized by investigation, trial, and punishment, it intriguingly also embeds elements suggestive of a restorative ethos. Unraveling these connections is pivotal for understanding the potential interplay between the formal criminal procedure and the principles of Restorative Justice.

One of the progressive facet is the introduction of "plea bargaining" in the CrPC, incorporated through the Criminal Law (Amendment) Act, 2005. Encompassed under Sections 265A to 265L, plea bargaining allows an accused, in specific categories of offenses, to plea for a lesser punishment after negotiations, contingent upon the victim's consent^2^. Though inspired by Western legal systems, its essence aligns with Restorative Justice's principles by emphasizing mutual agreement, acknowledgment of wrongdoing, and often reparative measures as part of the settlement.

56 Menon, N. R. Madhava. (2002). Alternative Dispute Resolution: The Indian Perspective. Indian Council of Arbitration.

57 Arbitration and Conciliation Act, 1996.

However, the most explicit restorative thread in the CrPC is found in its provisions related to probation. The Probation of Offenders Act, 1958, read in conjunction with Sections 360 of the CrPC and Section 4 of the IPC, allows courts, at their discretion, to release certain offenders on probation rather than sentencing them to imprisonment[58]. This approach is undergirded by the belief in reformation and rehabilitation, marking a significant departure from purely punitive measures. By placing the offender under the supervision of a probation officer and often mandating conditions aimed at reconciliation with the victim, the spirit of Restorative Justice is manifestly evident.

Section 357 of the CrPC further strengthens the case for restorative practices. This section mandates courts to order compensation for victims as a part of the sentencing process[59]. While compensation can never truly offset the trauma or loss suffered by victims, such provisions reflect the law's acknowledgment of the importance of victim redressal and restoration.

In the context of Restorative Justice, the CrPC's emphasis on "maintenance" orders also holds significance. Sections 125 to 128 stipulate that individuals with sufficient means are obligated to maintain their wives, children, or parents who are unable to maintain themselves[60]. Such provisions, while primarily preventive, underscore the importance of social harmony and familial restoration, which are central tenets of Restorative Justice.

It is also pertinent to mention the role of the judiciary in infusing Restorative Justice principles into CrPC interpretations. Progressive judgments, where courts have emphasized reconciliation, apology, or community service, demonstrate judicial recognition of restorative values within the procedural framework[61].

In conclusion, while the CrPC is a product of its retributive times, it isn't devoid of restorative underpinnings. These embedded provisions, coupled with a dynamic judiciary, pave the way for a more formalized embrace of Restorative Justice, especially in the realm of Victim-Offender Mediation. As India grapples with the dual challenges of massive case backlogs and the pressing need for criminal justice reforms, the synergy between Restorative Justice and the CrPC could be a beacon of hope, marrying procedural rigor with restorative empathy.

B) Landmark judgments supporting or referencing Restorative Justice

Restorative Justice, as a dynamic approach to justice, acknowledges the potential for restoration, reconciliation, and rehabilitation beyond the conventional punitive system. Within India, while legislative frameworks offer a hint of restorative principles, the judiciary's role has been pioneering in endorsing and interpreting these values, especially in key landmark judgments. The judicial perspectives have not only enriched the

58 The Probation of Offenders Act, 1958; Code of Criminal Procedure, 1973, § 360; Indian Penal Code, 1860, § 4.

59 Code of Criminal Procedure, 1973, § 357.

60 Code of Criminal Procedure, 1973, §§ 125-128.

61 Narinder Singh vs State of Punjab, (2014) 6 SCC 466.

concept but have also laid the groundwork for its further entrenchment in Indian jurisprudence.

As discussed previously, a keystone case in this realm is B.S. Joshi vs State of Haryana[62]. In this case, the Supreme Court of India opined that there is a need to encourage settlements, especially in cases involving matrimonial disputes. The Court observed that in such instances, the outlook should be more on reconciliation rather than revenge. The case, though dealing with a specific realm of offenses, opens the door for the appreciation of Restorative Justice principles, emphasizing repairing harm and mending relationships over pure retribution.

Another seminal case is Narinder Singh vs State of Punjab[63]. Here, the Supreme Court held that criminal cases, where the offense is not heinous in nature, can be quashed even if they are non-compoundable, provided parties have settled their dispute. While cautioning against its misuse, the Court recognized the potential of Restorative Justice in bringing harmony to society and preventing unnecessary protraction of litigation. This reflects the judiciary's nuanced understanding of restorative values, ensuring that they align with the broader goals of justice.

The case of Gian Singh vs State of Punjab[64] offers a pertinent perspective. The Supreme Court here endorsed the quashing of criminal proceedings post-compromise between the parties, especially in non-serious offenses. The Court observed that when the continuation of criminal proceedings becomes counter-productive to justice, invoking inherent powers to quash the proceedings promotes the ends of justice. Through such verdicts, the judiciary recognizes the principle of Restorative Justice, namely the active involvement of victims and offenders in achieving resolution.

Moreover, Afcons Infrastructure Ltd. vs Cherian Varkey Construction[65] is illustrative of the broader judicial inclination towards alternative dispute resolution mechanisms, with a restorative tilt. The Supreme Court, while emphasizing the benefits of mediation in civil disputes, hinted at the transformative potential of such methods in criminal matters as well, especially where personal relationships are involved.

Additionally, the landmark case of State of Madhya Pradesh vs. Madanlal[66] reiterated the importance of not taking a narrow view in sexual offense cases. While the Supreme Court acknowledged the limitations of Restorative Justice in certain serious offenses, it importantly discussed the scope of mediation (with a restorative approach) in specific kinds of criminal cases, ensuring the centrality of justice over mere procedure.

In the realm of juvenile justice, the case of Pratap Singh vs State of Jharkhand[67] is of significance. The Supreme Court, while interpreting provisions of the Juvenile Justice

62 B.S. Joshi vs State of Haryana, AIR 2003 SC 1386.

63 Supra Note 61

64 Gian Singh vs State of Punjab, (2012) 10 SCC 303.

65 Afcons Infrastructure Ltd. vs Cherian Varkey Construction, (2010) 8 SCC 24.

66 State of Madhya Pradesh vs. Madanlal, (2015) 7 SCC 681.

67 Pratap Singh vs State of Jharkhand, AIR 2005 SC 2731.

Act, emphasized the rehabilitative approach over the retributive, signifying a shift towards Restorative Justice principles in the treatment of juvenile offenders.

In summation, the Indian judiciary, through these landmark decisions, has showcased a discerning appreciation for Restorative Justice principles. While the traditional justice system remains rooted in retribution, these judgments reflect a broader, more holistic understanding, encapsulating both retribution and restoration. The evolving nature of Indian jurisprudence, as witnessed in these cases, suggests a hopeful trajectory where Restorative Justice could find a more pronounced space, complementing and at times even challenging the established norms of the criminal justice system.

CONCLUSION

Restorative Justicepresents an evocative and transformative approach to addressing harm and restoring relationships within a justice framework. As delineated throughout our discussion, this paradigm goes beyond mere punitive measures, focusing instead on rehabilitation, reintegration, and reconciliation. In the context of the Indian criminal justice system, Restorative Justice, especially through the avenue of Victim-Offender Mediation (VOM), holds significant potential to remedy certain systemic issues and to align the system with more indigenous and culturally resonant methods of conflict resolution.

The historical backdrop, as we've highlighted, situates Restorative Justice within a long-standing tradition in India, rooted in local community-based justice mechanisms. These indigenous systems, from panchayats to local community arbitrations, though varying in form and function, contain the embryonic threads of Restorative Justice, emphasizing reconciliation over retribution.

Furthermore, the exploration of the conceptual framework of VOM unveiled its pivotal role in the Restorative Justice paradigm. As an embodiment of Restorative Justice's core principles, VOM facilitates a platform where victims and offenders can communicate directly, express their feelings, and collaboratively chart a path towards resolution and healing. This shifts the lens from the traditional adversarial justice model to one where harm is understood and addressed in a more personalized manner.

A comparative analysis with traditional retributive justice brings to fore the inherent differences between the two models. While the conventional model zeroes in on punishing the offender, the restorative model prioritizes repairing harm and rebuilding relationships^3^. This divergence has substantial implications, especially when one considers the overarching goals of justice: to not just punish, but to heal and reintegrate.

From an international standpoint, Restorative Justice has received significant recognition. The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters exemplifies the growing global consensus towards integrating Restorative Justice into established justice systems. Such international frameworks provide invaluable guidance, benchmarks, and best practices, which can be tailored to the Indian context.

A dive into the Indian statutory framework reveals the subtle imprints of Restorative Justice, albeit not explicitly codified as such. The intersection with the Criminal Procedure Code (CrPC) manifests in provisions that allow for compoundable offenses and settlements, hinting at a restorative spirit. The landmark judgments by the Indian judiciary further strengthen this narrative, showcasing a discerning appreciation for Restorative Justice principles, even in the face of a largely retributive legal structure.

In conclusion, the efficacy of Restorative Justice, particularly Victim-Offender Mediation, in the Indian Criminal Justice System, cannot be understated. As the justice landscape evolves globally, there is a pressing need to introspect on indigenous, effective, and empathetic justice mechanisms. While the road ahead might be replete with challenges, ranging from implementation hurdles to mindset changes, the potential benefits – holistic healing, reduced recidivism, community involvement, and a more humane justice system – make the journey not just worthwhile, but imperative. The interplay between tradition, jurisprudential thought, and innovative justice solutions such as Restorative Justice provides a fertile ground for the evolution of a justice system that is reflective of India's diverse, rich, and compassionate ethos.

Protecting Women's Health and the Environment: The Importance of Safe Pesticide Use in Agriculture.

Mr. Shiv Bhagwan Asopa*

ABSTRACT

In India, women's health is a vital issue that requires the urgent attention and efforts of the government, healthcare service providers, and society as a whole. Despite the significant progress that India has made in recent years, the country still faces numerous challenges when it comes to the health and well-being of its women. This is why promoting women's health in India remains an urgent priority. Nowadays due to the excessive use of chemical pesticides, the quality respect to the nutritious value of the food and harm full impact upon the environment is getting increased, though the claims are often made worldwide that the production of farm products increased upon the use of the chemicals in the agricultural farming. In today's world, there is a growing concern about the effects of modern agriculture practices by the use of chemicals on both human health and the environment. Women, in particular, are often the ones who bear the brunt of these negative impacts, as they are frequently involved in farming activities and are also responsible for feeding their families. As per Niti Ayog "Rural women are torchbearers for social, economic and environmental transformation for the 'New India[1]". In India, around 80 percent of rural women are engaged in the agriculture sector. The rural females' participation rate in the workforce is remarkably higher at a rate of 41.8 % than the women's participation rate of 35.31 % in the urban. The contribution of women with respect to work is more than men in India. Thus, it's very important for a woman that along with the financial freedom, the mental and physical health of every woman and her family shouldalso be perfect. The human health is directly dependent upon the quality of Air, water, food which is directly taken from the environment however in today's scenario there are many factors which are affecting the health of human beings one of them is the life style with respect to food.The present research article attempts have been made to highlight the important issue related to women's health and a safe environment by exploring the relationship between the chemicals used in Agriculture farming and the harmful effect on living beings including the whole environment. The present research paper is written upon knowledge gathered by the researcher through doctrinal and empirical study.

Keywords: *Women, Environment, Health, Pesticides, Organic Farming, Agriculture.*

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1 Dr. Neelam Patel and Dr. Tanu Sethi "Rural Women: Key to New India's Agrarian Revolution" Kurukshetra December 2021.

INTRODUCTION

Women have always played a significant role in Indian society, and their contributions are crucial to the country's development and progress. They are not only homemakers but have made a significant impact in India in various fields such as Economic Growth[2]. Today Women in India are increasingly becoming an essential part of the workforce, and equally contributing to the country's economic growth[3] Women are now working in various sectors as a technology expert, financial advisers, they are also contributing in healthcare industries, including education sectors, and many more. Women have also made a significant impact on Indian politics. Their representation in parliament has been increasing over the years, and they have been actively participating in policy-making decisions[4]. Women's education is critical for the overall development of a nation. India has made significant progress in improving access to education for girls, and women are now pursuing higher education and careers in various fields[5]. Women have also played a crucial role in social development in India. Women's organizations and movements have been instrumental in advocating for women's rights, ending gender-based violence, and promoting gender equality. Women have also made significant cultural contributions through various forms of art, music, dance, and literature. They have also been active in preserving and promoting India's rich cultural heritage including Indian Agriculture. Every woman must be empowered by providing them with equal opportunities to learn and develop in their true spirit by keeping them healthy. The health of every human being is directly dependent upon the environment. Today A healthy environment is crucial for the survival and well-being of all living organisms, including humans. Here are some of the key reasons why a healthy environment is important.

The environment has a direct impact on human health[6]. Poor air and water quality, exposure to hazardous chemicals, and inadequate sanitation can lead to a range of health problems, including respiratory diseases, cancer, and infectious diseases. A healthy environment supports a rich and diverse array of plants and animals. Thus, in a healthy environment, the protection of the national Biodiversity is important, as it provides essential ecosystem services such as pollination, water purification, and

2 Sehrawat, M. and Giri, A.K. (2017), "Does female human capital contribute to economic growth in India?: an empirical investigation", International Journal of Social Economics, Vol. 44 No. 11, pp. 1506-1521.

3 Lahoti, Rahul and Swaminathan, Hema, "Economic Development and Female Labor Force Participation in India" (June 28, 2013). IIM Bangalore Research Paper No. 414.

4 Sharma, E. (2020), "Women and politics: a case study of political empowerment of Indian women", International Journal of Sociology and Social Policy, Vol. 40 No. 7/8, pp. 607-626.

5 Pascall, Gillian; Cox, Roger. "Women Returning to Higher Education. Open University Press", 1900 Frost Road, Suite 101, Bristol, PA 19007 (paperback: ISBN-0-335-19055-3, $33; hardbound: ISBN-0-335-19056-1, $79).

6 Jacobson, T.A., Kler, J.S., Hernke, M.T. et al. "Direct human health risks of increased atmospheric carbon dioxide". Nat Sustain 2, 691–701 (2019).

soil fertility. The environment plays a critical role in regulating the Earth's climate. Healthy forests and oceans absorb carbon dioxide and other greenhouse gases, helping to mitigate the effects of climate change[7]. A healthy environment is also essential for economic prosperity. From the angle of Natural resources also there is a great importance of the environment that mankind gets. Today the resources like timber, minerals, and water, are some of the important many industries, and a healthy environment can attract tourism and create jobs for many which directly boosts the local economy. The environment also has cultural importance. Many cultures have strong connections to their local environment and preserve natural spaces and wildlife for maintaining their cultural heritage. Therefore, in the context of the topic, the protection of women's health and environment is essential for every life on mother earth. Thus, it is important that affirmative steps should be taken to protect and preserve our environment for the benefit of all living creatures, biodiversity, climate stability, economic prosperity, and cultural importance including men and women.

CONTRIBUTION OF WOMEN IN PROTECTING THE ENVIRONMENT

Women in Indian history have played a significant role in protecting the environment through their various contributions. Here are a few examples:

1. Amrita Devi Bishnoi: Known as an environmentalist from the 17th century. In 1730 AD Amrita Devi Bishnoi was leading a group of 363 Bishnois to protect trees from being cut down by the Maharaja Abhay Singh army of Jodhpur. It was Amrita devi Bishnoi[8] and her followers hugged the trees and refused to move even when they were threatened with death. Here slogan was loud and clear "cutting off her head was cheaper than felling a tree." It was Amrita Devi Bishnoi who was decapitated along with her three-daughter followed by other 363 men, women, and children. This sacrifice resulted in the creation of the Bishnoi community's conservation practices and the declaration of the "Khejri tree" as a protected species. It is one of the first and most unique kind of action shown by anyone in the world. Today, the sacrifice of Amrita Devi Bishnoi has got its recognition and there is an award declared by the Indian government with the name Amrita Devi Bishnoi Wildlife Protection Award.
2. Vandana Shiva: She is a contemporary Indian scholar, environmental activist, and anti-globalization author who has been fighting for environmental and social justice for decades. She has worked to promote sustainability written extensively about agriculture, biodiversity, and women's food sovereignty. She was born on November 5, 1952, in Dehradun, Uttarakhand, India. Shiva holds a Ph.D. in physics from the University of Western Ontario, Canada. She

7 R. K. Mall, Akhilesh Gupta, Ranjeet Singh, R. S. Singh and L. S. Rathore. Water resources and climate change: An Indian perspective. Vol. 90, No. 12 (25 June 2006), pp. 1610-1626 (17 pages): Current Science Association

8 Mago, P. and Gunwal, Isha, Role of Women in Environment Conservation (April 8, 2019). Available at SSRN: https://ssrn.com/abstract=3368066.

has authored numerous books on topics such as ecology, globalization, and sustainability, including "Staying Alive,[9]" Monocultures of the Mind," and "Earth Democracy." Shiva is a prominent advocate of agroecology, which involves sustainable and ecological agricultural practices that emphasize the importance of preserving biodiversity and traditional knowledge. She has also been a vocal critic of genetically modified crops and has been involved in various movements that seek to protect farmers' rights. and prevent corporate control over agriculture. In recognition of her activism and contributions to sustainable agriculture and social justice, Shiva has received numerous awards, including the Right Livelihood Award (also known as the "Alternative Nobel Prize") and the Sydney Peace Prize. She founded the Navdanya movement, which aims to protect the diversity and integrity of living resources, especially seeds.

3. Medha Patkar: She is an environmental and social activist who has been fighting for the rights of people[10] who are adversely affected by large-scale development projects. She has been leading protests against the construction of large dams and displacement of local communities. Her efforts have resulted in the cancellation of several dam projects and the protection of several ecological hotspots.
4. Chandi Prasad Bhatt: He founded the Gaura Devi: her contribution in the Chipko movement[11] is remarkable, which began in the 1970s and was led by women in the Himalayan region of India. The movement was a nonviolent resistance against deforestation and commercial logging. Women would hug trees to prevent them from being cut down, and this movement eventually led to a ban on tree felling in the region.

These are just a few examples of the contributions made by women in Indian history to protect the environment. Women have always played a crucial role in protecting and preserving nature in India and continue to do so to this day. The example given above are less but the message which these women have given are remarkably very big. Therefore, it is important to understand that the environment protection is important, as we, are our self, aretheessential component of the environment only. Therefore, if in any ways the environment is affected then indirectly, we all will also getaffected.

9 Shiva V "Staying Alive: Women, Ecology and Survival in India" Journal of Australian Political Economy Spinifex Press, North Melbourne, 2010, 224 pp., $34.95.

10 Bhaduri A, Patkar M. Industrialisation for the People, by the People, of the People. Vol. 44, No. 1 (Jan. 3 - 9, 2009), pp. 10-13 (4 pages) Economic and Political Weekly

11 Bandyopadhyay J. "Chipko Movement: Of Floated Myths and Flouted Realities" Vol. 34, No. 15 (Apr. 10-16, 1999), pp. 880-882 (3 pages). Published By: Economic and Political Weekly

CONTRIBUTION OF WOMEN FROM THE WORLD IN THE PROTECTION OF THE ENVIRONMENT

Women around the world have made significant contributions to the protection of the environment. It is not that only women from India are having a great concerned for the protection of the environment but the Women worldwide are, from within them self very emotional and soft hearted, it has been observed that women do take responsibility in her home also to arrange the thing in proper order. They are not only attached with the family members but do have a good understanding towards the essential required for a healthy life. Therefore, women around the world have also made significant contributions to the protection of the environment. Few of those contribution has been identified by the research scholar and have bought them all together which is as follows:

1. Wangari Maathai: She was a Kenyan environmental activist who founded the Green Belt Movement, an organization that focuses on reforestation, conservation, and community development. The movement has planted over 51 million trees in Kenya and has empowered women to take leadership roles in environmental conservation.
2. Greta Thunberg: She is a Swedish climate activist who has gained global attention for her activism and advocacy for climate action. She has inspired a youth-led climate movement, Fridays for Future, which has organized protests around the world to demand urgent action on the climate crisis.
3. Winona LaDuke: She is a Native American environmental activist[12] who has worked to protect indigenous lands, water, and natural resources. She founded the White Earth Land Recovery Project, an organization that focuses on reclamation and restoration of indigenous lands, and is also an advocate for renewable energy and sustainable development.
4. Vandana Shiva: She once again her name is been mentioned here as Shiva, have contributed as an Indian environmental activistwho globally. Her work has worked to promotebeen recognised internationally inpromoting sustainable agriculture, biodiversity, and she has also contributed a lot for the women's rights. She founded the Navdanya movement, which aims to protect the diversity and integrity of living resources, especially seeds.
5. Jane Goodall: She is a British primatologist i.e a branch of zoology and conservationist who has dedicated her life to the protection of chimpanzees and their habitat[13]. She founded the Jane Goodall Institute, an organization that focuses on conservation, education, and research.

12 LaDuke W "Traditional Ecological Knowledge and Enviromental"Futures5 Colo. J. Int'l Envtl. L. & Pol'y 127 (1994)

13 Kim Hill, Christophe Boesch, Jane Goodall, Anne Pusey, Jennifer Williams, Richard Wrangham, "Mortality rates among wild chimpanzees", Journal of Human Evolution,Volume 40, Issue 5, 2001, Pages 437- 450,

The women contribution to the nature is, itself within her presence in the nature, by remaining healthy. The women named above have again therefore she should be theThese women, among many others, have made significant contributions to environmental conservation and protection. Their work has inspired and empowered others to take action and protect our planet for future generations.

PESTICIDES AND ITS THE HARMFUL EFFECT OF THE SAME ON HEALTH AND ENVIRONMENT[14]

Pesticides are chemicals used to control the pests and diseases that can damage crops and harm human health. While pesticides can be effective in managing these threats, they can also have harmful effects on the environment and human health. Here are some of the harmful effects of pesticides:Health Effects: Exposure to pesticides can cause a range of health problems, from skin irritation and respiratory problems to more serious conditions like cancer, birth defects, and neurological disorders.Environmental Effects: Pesticides can have harmful effects on the environment, including contaminating water and soil, harming beneficial insects and other wildlife, and disrupting ecosystems.Pesticide Resistance: Repeated use of pesticides can lead to resistance in the targeted pests, meaning that higher and higher doses of the chemical are needed to achieve the same level of control. This can create a cycle of increasing pesticide use and resistance, with harmful effects on both human health and the environment. Soil Depletion: Pesticides can also deplete the soil of nutrients and beneficial microorganisms, making it more difficult to grow healthy crops in the future.Food Contamination: Pesticides can remain on crops after they are harvested and can contaminate the food supply. Long-term exposure to low levels of pesticides in food has been linked to a range of health problems.In conclusion, while pesticides can be useful in managing pests and diseases, they can also have harmful effects on human health and the environment. It is important to use pesticides responsibly, following all safety guidelines and regulations, and to explore alternative approaches to pest management whenever possible.

EFFECT OF PESTICIDE ON WOMEN HEALTH[15]

Pesticides can have various effects on women's health depending on the level and duration of exposure. Some of the potential health effects of pesticide exposure in women include Reproductive Health: Pesticide exposure has been linked to reproductive health problems in women such as menstrual cycle irregularities, infertility, miscarriages, stillbirths, and birth defects. Some of the potential health effects of pesticide exposure in women include:Reproductive Health: Pesticide exposure has been linked to reproductive health problems in women such as menstrual cycle irregularities, infertility, miscarriages, stillbirths, and birth defects.Breast Cancer: Several studies have suggested

14 Gyawali, K. (2018). Pesticide Uses and its Effects on Public Health and Environment. *Journal of Health Promotion*, *6*, 28–36. https://doi.org/10.3126/jhp.v6i0.21801

15 García, A.M. (2003), Pesticide exposure and women's health. Am. J. Ind. Med., 44: 584-594. https://doi.org/10.1002/ajim.10256

that exposure to pesticides can increase the risk of breast cancer in women.Endocrine Disruption: Pesticides can disrupt the normal functioning of the endocrine system in women, leading to hormone imbalances, thyroid problems, and other health issues.Neurological Disorders: Pesticides can cause damage to the nervous system, leading to neurological disorders such as Parkinson's disease, Alzheimer's disease, and other cognitive impairments.

FIELD STUDY IN THE STATE OF RAJASTHAN IN DISTRICT BIKANER IN THE YEAR 2022

The research scholar in the year 2022 visited district Bikaner in the state of Rajasthan at"Acharya Tulsi Cancer Research Institute" which is one of the best Government hospitals for the treatment of cancer. The hospital was in big size with different wards for different type of cancer patients. There were many departments inside the cancer hospital, including the department for teaching and guiding the patients about the diet and yoga which was like a booster for them which help then changing to positive thought and fightback with their disease cancer. It was informed by the patients that the doctors of this hospital were treating them well and they are happy with the treatment and many got recovered. It was also observed that the attended who were with the patient were before suffering from cancer, now when they are recovered from the disease, they are accompanying their family member inform of attendant who are suffering from cancer.The scholar got the opportunity to interact with many cancer patients including their attendants and the officials from the chemotherapy department. The visit was to develop aclear understanding with respect to the disease cancer. It was observed that the disease cancer is not an age specific or anareaspecific disease. The scholar observed that there were a huge number of Cancer patients in the hospital. The scholar noticed that the cancer was found in all age group of people right from smallbabies of few months till the senior citizens including the young adults. Scholar observed that cancer was not a gender specific it was seen in all genders. Therefore, it was one of the first understanding that cancer could develop in any one irrespective of his and her age and gender. Mostly cancer patients were from the near like Rajasthan, Haryana,Punjab, and Utter Pradesh. There were few other cancer patients from other states too from all over India.

CONCLUSION

Life is the most important phenomenon, and anything which affects life is of no value. We all have recently witnessed the same, in the covid time, that nothing more than the survival of human beings is crucial for every block, every District, every state, and for the whole country including all nations of the world. However, it is a must to understand, that no life is independent on the earth, rather every single life is dependent or interdependent on one another for its survival. Thus, Einstein said, "If the bee disappeared off the face of the Earth, man would only have four years left to live." The message is loud and clear that ignoring the component of the earth even the nature has made the same small size, life will not be easy for human beings. For a healthy life, the first essential requirement is a healthy environment,

which includes safe Air, Clean Water, and nutritious food, with a balanced ecosystem that can protect the different forms of diversified natural biodiversity of the earth. Where each organism has an important role to play on this planet and thus nature has designed them so. Women and men both are the product of the earth's democracy. The importance of both is the need for the survival of mankind. This importance of the existence of human life is only meaningful when the same is healthy. Therefore, a life that is not healthy will always be a burden upon others. Today health is an important issue for both men and women, however, nature has chosen women with more responsibility than men. Therefore, the health of women must be taken care of and it should be given priority. The Indian constitution article 15 (1) and (3) empowers the Government to make special arrangements for the betterment development and benefits of women and if the same is done will not be taken as inequality concerning men. Today because of the chemicals used in agriculture farming the quality of the food including the air water and soil fertility is getting affected. Resulting in a lot of health and environmental difficulties. Therefore, in the conclusion, it is hereby submitted that there is a need for a new green revolution concerning promoting organic farming with the advisory for the safe use of pesticides under the strict mandatory prescription for the protection of the large public interest. Which is the inheritance vested interest of every child, women, men, and the all living organism found worldwide in the whole environment.

International Humanitarian Law and International Human Rights Law: A Conflicting Zone

Dipika Badhan & Dr. Rupam Jagota***

ABSTRACT

War is areality and history stands witness to this fact. This has influenced the life of man and occupied his mind. In today's shrunken world there are fewphenomena, events and actions which have no connection withthe consequences of a past, or the threat of a new war.In the 21st century, wars have completely different dimension, due to changing political dynamics and new technologies. Armed conflict has been a prevalent feature of human existence for thousands of years. It may manifest itself in various forms such as largescale warfare between nations, internal conflict between different ethnic groups or civil unrest. The present article analyses the relationship between the concept of international humanitarian law applicable in armed conflicts and certain related fields of international law and puts forward some legal thoughts on the implications and recent trends for the future development of international humanitarian law. It also compares and contrasts the functions of IHRL and IHL and proposes some considerations for optimizing the relationship between the two. The researcher attempts to discuss the requirements, limitations and effects of the concurrent applicability of IHRL and IHL.

Keywords: *Armed Conflict, Convention, International Humanitarian Law, International Human Rights Law, War.*

INTRODUCTION

International Human Rights Law (IHRL) and International Humanitarian Law (IHL) are two complementary branches of Public International Law. Both of them protect human life and dignity. IHRL applies at all times, in peacetime and during war, while IHL applies exclusively in armed conflicts and regulates the behavior of the parties in an armed conflict or war and the conduct of hostilities. It also ensures the protection of people affected by the war. Armed conflicts and wars are constant threats to liberty, property, and human life thatcan significantly influence the morality

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of humanity. Human history is filled with armed conflicts; every era has experienced different kinds of conflicts between empires, kingdoms, states, and nations. World War I, World War II, civil wars, and conflicts in different parts of the world are examples and real testimonies that war is still an instrument for promoting the political interests of states. The laws of war have never been an isolated phenomenon. They have been shaped by societal factors such as economic, political, and military developments. They have also evolved in a broader international legal framework, including the basic principles relating to the state as a subject of international law. Yet, one cannot avoid the impression that the setting of the law of war (the ius in bello) today is wider than ever.

In war-like situations, not only the parties to a conflict but also all individuals participating in an armed conflict must comply with international humanitarian law. As a rule, grave breaches of international humanitarian law are war crimes. In the event of grave breaches of the Geneva Conventions, every state has a duty to either prosecute the suspected perpetrators in a criminal court or to hand them over to another state or an international criminal tribunal for prosecution (principle of autdedereaut judicare).[1]

Human rights law has had a major influence on the formation of customary rules of humanitarian law in terms of scholarship and, more importantly, the jurisprudence of courts and tribunals and the work of international organizations. This trend started at Nuremberg and has continued through such ICJ cases as the *Nicaragua*case, the *Nuclear Weapons Advisory Opinion, and the* jurisprudence of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda. *Opinio juris* has proven influential in the form of verbal statements by governmental representatives to international organizations, the content of resolutions, declarations, and other normative instruments adopted by such organizations, and in the consent of states to such instruments.[2]

CLASSIFICATION OF ARMED CONFLICT

IHL classifies armed conflicts as either international armed conflicts (IAC) or non-international armed conflicts (NIAC). The proper categorization of an armed conflict is necessary to determine which set of rules apply to the conflict: those for an IAC (found mainly in the four Geneva Conventions and Additional Protocol I) or those for a NIAC (found mainly in Article Three common to the four Geneva Conventions and Additional Protocol II). Situations of occupation are regulated by IHL, namely the Fourth Geneva Convention and Additional Protocol I.

Whether or not an armed conflict is an IAC or a NIAC has significant implications. For instance, prisoner of war (POW) status, as well as combatant status, is found only in

1 FDFA Section International Humanitarian Law and International Criminal Justice, retrieved from https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law.html visited on 2/9/2022 at 3:48pm

2 Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, ch. I (1989); Theodor Meron, The Continuing Role of Custom in the Formation of International Humanitarian Law, 90 AJIL 238 (1996).

the rules applicable to IACs. The rules regulating the conduct of hostilities as well as humanitarian access and assistance are more detailed for IACs. All together, the treaty rules applicable to IACs total close to 600; those applicable to NIACs number less than 30. This dearth of guidance can pose a challenge because the majority of contemporary conflicts are NIACs. To address this, one can look to customary international law, which includes a number of rules that have evolved to address both IAC and NIAC situations.

There is some academic debate regarding cross-border NIACs, as well as at what point a NIAC might become an IAC or an IAC might become a NIAC. These analyses are context-and fact-dependent. Despite the theoretical debate, practitioners can often work around it by relying on customary international law to argue for protections owed to civilians.[3]

APPLICATION OF HUMAN RIGHTS LAW TO ARMED CONFLICT

The text of the Additional Protocols perhaps giving the impression that in 1977 everyone agreed that IHRL would apply in times of armed conflict, in fact 45 years ago the idea was extremely controversial and a rather heated debate was raging about the nature of the relationship between IHRL and IHL. As a way of summarizing the rather unhappy state of the scholarly debate in 1983, the International Committee of the Red Cross (ICRC) identified three main theoretical schools of academic thought that existed at that time: the separatist and integrationist schools.[4]

The heavy reliance on both IHRL and IHL norms by the Human Rights Council's special procedures is testament to how firmly it is now accepted that human rights law applies in times of armed conflict alongside international humanitarian law. The frequent reference to human rights norms by the UN General Assembly and the UN Security Council in their resolutions under Chapter VII and in their Protection of Civilians mandate is now commonplace.

The work of the UN Office of the High Commissioner for Human Rights (OHCHR) and its field offices on armed conflict is well established and has proved enormously valuable in monitoring the behavior of parties to armed conflicts under both IHL and IHRL. Similar value is found in the different commissions, inquiries, and expert panels set up by the Human Rights Council in countries experiencing armed conflict, such as Syria, Yemen, and South Sudan. All of these entities confirm the independent and complementary value of both bodies of law in their reports. The truth of the ICJ's statement in its Wall Advisory Opinion now seems recognized in practice: IHRL not only adds important normative value to issues that are also regulated by IHL but also addresses several key issues that are not regulated by IHL at all or

3 International Justice Resource Centre- International Humanitarian Law, retrieved from https://ijrcenter.org/international-humanitarian-law/ visited on 11/01/2023 at 5:05 pm

4 The Red Cross and Human Rights, report prepared by the ICRC in collaboration with the Secretariat of the League of Red Cross Societies (Red Cross Report), October 1983, 27

only scarcely, such as the right to freedom of movement, the right to health, the right to work, the right to freedom of expression, and the right to freedom of association.[5]

ORIGINS OF IHL AND IHRL

The history of the IHL is not new. The laws of war are as old as war itself, and war is as old as life on earth. The rules of conflict or fight, although first documented in 1863 after the war of Solferino have existed and been practiced since the beginning of human existence. The earliest societies, the Papua, the Sumerians, Babylon, the Persians, the Greeks, and the Romans, all had some rules of fighting, and these rules were strictly followed by people. Every religion, namely Islam, Christianity, Jesus, Hinduism, and Buddhism, contains a handful of provisions on the law of armed conflict (LOAC). The scattered provisions of LOAC have been accumulated in two documents: the Lieber Code in 1863 and the first Geneva Convention in 1864. Later on, many Conventions, Protocols, and Declarations on Armed Conflicts (AC) have been adopted at various times, depending on the nature of the conflict and the protection of the victims. The four Geneva Conventions in 1949, its three APs in 1977 and 2005, and the permanent International Criminal Court in 1998 have given great success to the development of IHL.

IHRL is a set of international rules,established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviors or benefits from governments. Human rights are inherent entitlements that belong to every person as a consequence of being human. Numerous non-treaty-based principles and guidelines ("soft law") also belong to the body of international human rights standards.

While IHL and IHRL have historically had separate developments, recent treaties include provisions from both bodies of law. Examples include the Convention on the Rights of the Child, its Optional Protocol on the Participation of Children in Armed Conflict, and the Rome Statute of the International Criminal Court.

RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

The starting premise is that in situations of armed conflict, IHL is the principal applicable legal regime, i.e., the *lex specialis*, governing the conduct of hostilities and the protection of persons in situations of armed conflict. This requires that a nexus exists between particular activities or treatment and any ongoing conflict. Where such a nexus cannot be established, normal peacetime criminal justice approaches apply. Although human rights law continues to apply in time of armed conflict, the

5 Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons [1996] ICJ Reports 226 (8 July 1996) (hereafter Nuclear Weapons Advisory Opinion) [25], Legal Consequences of the Construction of a Wall in the OccupiedPalestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136 (hereafter the Wall advisory Opinion) [106]and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment,I.C.J. Reports 2005, p. 168

modalities of this joint application of legal regimes remain unsettled. What is certain, however, is that these two bodies of law—IHL and human rights law—share basic and fundamental values.[6]

IHL already reflects fundamental, non-negotiable, minimum human rights standards. In contrast to international human rights law, which permits derogation from some human rights during times of public emergency, including in situations of armed conflict, where it continues to apply, IHL already represents the minimum standards that cannot be reduced further. IHL and international human rights law still share a common nucleus of non-derogatory rights and a common purpose of protecting human life and dignity. Often both legal regimes will apply simultaneously, governing such issues as the right to a fair trial, humane treatment in detention, and the prohibition against torture. The protections afforded by international human rights law, however, generally afford broader and more extensive levels of protection (e.g., in relation to abusive or arbitrary treatment by state authorities) and remain relevant in situations of armed conflict.

A number of important conceptual differences exist between the two legal regimes. One is that international human rights law is linked to the jurisdiction of states, which is normally their physical territory, though in some situations, where certain criteria are met, its obligations may extend extraterritorially into the physical territory of another state.

Another is that, unlike international human rights law, IHL does not offer any enforcement mechanism to persons whose basic rights have been violated, instead focusing on international criminal law approaches for prosecuting those who violate such rights, e.g., as war crimes. That said, the scope of IHL is broader than international human rights law in some respects. For example, IHL is not limited to protecting persons but also extends to livestock, civilian objects, cultural property, the environment, and so forth. Additionally, unlike international human rights law, which is only binding on states, IHL is binding on all parties to an armed conflict, including non-state actors, who currently pose some of the most significant terrorism-related challenges in situations of armed conflict.[7]

Human rights enrich humanitarian law, just as humanitarian law enriches human rights. The recognition of customary norms rooted in international human rights instruments affects, through application by analogy, the interpretation, and eventually the status, of the parallel norms in instruments of international humanitarian law.[8]

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6 Nilz Melzer, International Humanitarian law: A Comprehensive Introduction . Geneva: International Committee of the Red Cross (ICRC) ICRC, November 2019

7 United Nations Office on Drugs and Crime, retrieved from https://www.unodc.org/e4j/zh/terrorism/module-6/key-issues/relationship-between-ihl-and-intern-human-rights-law.html visited on 05/03/2023 at 8:25pm

8 David S.Koller, The Moral Imperative: Towards a Human Rights-Based Lawof War, 46 Harvard International Law Journal, 231 (2005).

DIFFERENCES BETWEEN IHRL AND IHL

International human rights are those rights that are possessed by a person only for the reason he or she is a human being, irrespective of race, caste, color, sex, language, nationality, place of birth, etc. All people, male or female, black or white, minority or majority, are equally entitled to their rights without discrimination. These rights are all interrelated, interdependent, and indivisible. Human rights law is those rules, either written or oral, that originated from customs, conventions, or treaties that work for the protection of human beings and allow individuals or groups to claim certain rights or benefits from the government under these rules.

INSTRUMENTS OF INTERNATIONAL HUMANITARIAN LAW (IHRL)

- The International Covenants on Civil and Political Rights1966
- International Covenant on Economic, Social and Cultural Rights (1966),
- Convention on Genocide (1948),
- Convention against all forms of Racial Discrimination (1965),
- Discrimination against Women (1979),
- Convention against cruelty Torture (1984) and
- Convention on Rights of the Child (1989).
- European Convention for the Protection of Convention on Human Rights and Fundamental Freedoms (1950),
- The American Declaration of the Rights and Duties of Man(1948) and
- Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights1981

INTERNATIONAL HUMANITARIAN LAW (IHL)

On the other hand, IHL is an important branch of international law that mainly deals with the protection of civilians and victims of armed conflict. This newly named IHL was previously known as the law of war or the law of armed conflict (ICRC, 2004). International humanitarian law is a set of written and unwritten rules that seek to limit the effects of armed conflict for humanitarian reasons. IHL is that body of documented or undocumented rules that are applied in both international and non-international armed conflict with the view that IHL aims to reduce the sufferings of the victims of the armed conflict and to protect those who do not or no longer take part in the hostilities. Although IHL applies only at times of armed conflict and IHRL applies both at times of armed conflict and peace, there are some similarities between IHL and IHRL that are noteworthy.

Instruments of International Humanitarian Law: Treaties and Customary international law are the two main sources of international Humanitarian Law rules and regulations. Treaties are agreement between states, and those states that ratify a treaty are bound by its terms. Many IHL rules are now considered to reflect customary international

law as well. Customary international law consists of rules derived from the consistent practice of states based on a belief that the law requires them to act in that way. Such rules are binding on both states and non state armed groups. The key IHL treaties include the following conventions and some Additional Protocol.

- Geneva Conventions 1864,1906,1929,1949
- Hague Convention 1899,1907
- Conventions for the Amelioration of the condition of the wounded and sick in the field
- Convention for the Amelioration of the condition of the wounded, sick and shipwrecked members of armed force at sea
- Convention relative to the treatment of prisoner of war
- Conventions relative to the protection of civilian persons in Time of War
- Weapon treaties

VIOLATIONS-IHL-RUSSIA UKRAINE CONFLICT

The ongoing hostilities are an international armed conflict (IAC) to which the full range of relevant IHL treaties apply, as both Russia and Ukraine are parties to the four Geneva Conventions of 1949 and of their Additional Protocol I of 1977. The latter provides well-established rules on targeting aimed at sparing civilians and civilian objects from the effects of hostilities to the extent possible. These include the obligation of distinction (between civilians and combatants and civilian objects and military objectives), the prohibition of indiscriminate and/ or disproportionate attacks, and the duty to take precautions in attack.

Violations of IHL, especially those serious enough to be classified as war crimes, cannot be ascertained without a proper investigation on the ground, it appears from the effects of Russian operations — i.e., the number of civilian deaths and the extensive damage to or destruction of residential buildings, medical facilities (including maternity hospitals), and cultural monuments, among other examples — that the basic tenets of the conduct of hostilities have in many cases not been observed. There seem to have also been deliberate and extensive attacks on what is popularly called "critical" civilian infrastructure, such as electrical grids and water processing plants, aimed at breaking civilian morale, which would be unlawful. Patterns of abuse have also been reported in relation to the treatment of persons in enemy hands: the execution of civilians, mistreatment in places of detention, deportations of children, and so on.

The war has, not surprisingly, highlighted some specific already known gaps. Among them, but not limited to, are uncertainty about the exact protection due to civilians in the invasion phase of an IAC, the weakness of the definition of mercenaries, the utility of the notion of a *levéeen masse*, queries as to the application of the nationality criterion in case of dual or multiple nationals with regard to POW status, the war crime of forced conscription of civilians, and the lack of a universally accepted prohibition on certain types of weapons, such as cluster munitions.

CONCLUSION

Only less than a century ago, the IHL was quite unknown to the general public and was confined to the round table discussion and some documents, but now it has become a popular branch of international law that has been accepted by all countries of the world, with many countries following the obligations of the GCs in their national legislation. The IHL, previously known as LOW, was limited in practice among uncivilized societies as well.

Formally the journey of documentation of IHL started from the adopting ofthe GC of 1864. Since then many conventions, regulations and declarations on the laws of AC have been adopted and enacted both nationally and internationallytill 1948. But the most significant documents of IHL were adopted in 1949sand 1977 by adopting GCs and its APs respectively. The APs lacked the provisionsregarding conventional weapons which have been fulfilled by, later on,Conventions on Conventional Weapons in 1980 and its five protocols. TheRome Statute of the Permanent International Criminal Court in 1998 has almostkept a great contribution in the full development of IHL.

Although sufficient international conventions, protocols, optional protocols, statutes, and declarations on the Law of War are in force in this modern age, they have important implications for the world communities that ratified the conventions and protocols; even many of them did not enact sufficient state legislation inserting the provisions of Geneva laws and other international documents for proper and effective implementation of IHL. This calls on all states of the globe to sign and ratify the international instruments of IHL, make necessary domestic laws inserting the provisions of Geneva and other laws of war existing in the world, and establish a national court or tribunal for the trial of IHL violators.

Year 2022 marked the 45th anniversary of the Additional Protocols to the 1949 Geneva Conventions—the first treaties that explicitly noted the relationship between international human rights law and international humanitarian law—this column reflects on how the relationship between these two bodies of law has developed since 1977. It demonstrates that while much progress has been made internationally towards understanding the relationship between two bodies of law, there are still obstacles to be overcome if the goal is to apply the two bodies of law in a complementary fashion and achieve the maximum protection of the human person.The international community has joined hands to promote the well being of the human beings so that checks can be imposed on the violations of their human rights under the garb of armed conflicts for the fulfillment of their vindictive designs.

Media Trials in India: A Study of Legal and Ethical Implications

Dr. Smiksha Godara & Ms. Mamta Devi***

ABSTRACT

This paper delves into the evolution of media in India, starting from its inception to media trials. It extensively discusses the laws governing media trials in India, aimed at ensuring the proper functioning of media. The paper also highlights various cases where the media has played a pivotal role in bringing about justice and instances where it has caused hindrances in delivering justice by tampering with evidence. Furthermore, it examines the impact of media trials on the accused. The paper provides an insightful analysis of the media's influence in the Indian legal system, aiming to provide a comprehension of the topic.

Keywords: *Media, Media Trials, Media and Judiciary, Press Freedom, Press Law*

INTRODUCTION

Media can be described as a medium through which information is conveyed or preserved. Within the scope of this document, media encompasses any platform that shares information. The main function of media is to gather information from its source and distribute it to the general audience. There are three prevalent forms of media:

a. Print,
b. Broadcast, and
c. Internet-based media.

Print media is the oldest type and includes newspapers, magazines, and other printed material. The first-ever newspaper to be printed in India was the "Gazette Bengal" in 1780, published by James Augustus Hicky. Thus, it is said that the 18th century marked the beginning of print media in India.

The initial transmission in India was carried out by the Radio Club of Bombay in June 1923. The Calcutta Radio Club was established five months after this event.[1]

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1 *Press* Information Bureau Government of India Special Service and Features 06-August-2017 Growth & Development available at https ://prasarbharati.gov.in (last visited on March 20 2023)

Following the rise of print media, television was introduced in India on September 15, 1959, marking the advent of broadcast media[2]. Initially, the Indian government had a monopoly, but gradually private broadcasters also entered the market. Broadcast media has become an essential medium for making people aware of current events in the country through various channels such as news, movies, and entertainment.

The newest and most popular category of media is the internet-based media. The internet is further divided into subcategories such as social media, websites, and blogs, which include popular platforms like Facebook, WhatsApp, and Twitter. These three types of media are the most prevalent sources of information in modern times. One of the distinguishing features of social media is that even the most insignificant information can go viral and become breaking news. People express their opinions on various topics on social media, which can sometimes lead to polarizing views among users.

The media has a significant impact on the minds and lives of people across the nation, shaping our perspectives on the world. In recent years, the media has expanded its reach through various forms, enhancing its ability to influence individuals.

The Vice President of India, Shri Naidu spoke of the four key pillars of democracy- "the Legislature, Executive, Judiciary, and Media". He emphasized that while each pillar must function within its own scope, they should not lose sight of the bigger picture.

"The strength of a democracy depends upon the strength of each pillar and the way the pillars complement each other. Any shaky pillar weakens the democratic structure".[3]

The main goal of Indian media while covering any case is to increase their ratings and viewership, rather than to inform the public about the legal system and the case in question.[4] Regrettably, the media in India has veered away from objective reporting and is increasingly adopting the role of a courtroom within its own newsrooms. This trend is particularly evident in the coverage of high-profile cases that attract significant public attention.

Unfortunately, this approach has an adverse impact on court trials. The media tends to sensationalize the case and add an emotional angle to attract more viewers and improve their TRP, which is crucial in the current cut-throat competition. As a result, extended debates and discussions arise solely from conjecture, causing detriment to the accused individuals and the involved witnesses. In cases of sexual offenses, the media usually adopts a bitter and critical tone, often revealing the identity and personal information of the survivors.

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2 Sanjay Kachot, "Journeyof Television Revolution"available at https://pib.gov.in (last visited on March 22 2023)

3 Press Information Bureau, Government of India,Vice President's Secretaria (08-December-2019) available at : https://pib.gov.in/newsite/PrintRelease. aspx?relid=195595#:~:text=Mentioning%20the%20four%20pillars%20of,way%20pillars%20complement%20each%20other (last visited on April 27 2023)

4 Wheeler, Marcy. "How noninstitutionalized media change the relationship between the public and media coverage of trials". Law and Contemporary Problems 71.4 (2008): 135-153.

A THROWBACK AND ADVANCEMENT OF MEDIA FROM OBJECTIVE REPORTING TO MEDIA TRIALS IN INDIA

The media has shifted from traditional print methods to digital platforms. Prior to India's independence, there was no legal assurance for press freedom, as the colonial government held control over the media's activities and freedoms. Following independence, the Constitution of Indian did not expressly state press freedom as a guaranteed right, but rather it was inferred and understood as an extension of the freedom of speech and expression outlined in Article 19(1)(a) of the Constitution.[5]

It was only in 1978 that the Press Council of India (PCI) was established with the aim of protecting press freedom and promoting better standards for newspapers and news agencies in India.[6] However, this protection did not endure for an extended period.

The misuse of press freedom has been a prevalent issue in the Indian media industry for quite some time now[7]. Media plays an essential role in influencing public perception, media trials have been known to abuse their power and freedom of speech to influence the same.Media trials cross ethical boundaries by misusing their right to free speech and disregarding the model code of conduct. They also interfere with the court proceedings, violating legal norms. Moreover, the cases that become the focus of media trials are often based on rumours and lies that lack credibility and only serve to attract viewership.The stories only serve to sway public opinion, as people tend to adopt the predetermined views presented by the media.The case of Priyadarshini Matto in 2006[8] is considered significant as it marks the point where the media became openly intrusive and carried out its own trial.

The Bhima-Koregaon case is a relevant example of media trials in modern times. After violence broke out in Maharashtra following an event called Elgar Parishad, some activists were arrested by the police. The media became very involved in the case, with loud newsroom discussions and reports. The police claimed that those who attended the event had links to the Maoists and were responsible for the violence.[9]

Regarding the case, the Bombay High Court rebuked the disclosure of letters and acted to resolve the issue. The court expressed concerns about the impartiality of the enquiry. According to the court,"*The use of electronic media by the investigating arm of the state which did the task of influencing public opinion during the pendency of the investigation completely subverts the fairness of the investigation*".[10]

5 India Const. art. 19(1)(a)

6 Simran, "Regulation of media in India - A brief overview". - November 16, 2011 available at https://prsindia.org/theprsblog/regulation-of-media-in-india-a-brief-overview (last visited on April 28 2023)

7 Ibid (n2)

8 Santosh Kumar Singh v. State through CBI (Priyadarshini MatooCase) (2010 9 SCC 747)

9 Romila Thapar vs Union Of India on 28 September, (2018 10 SCC 753).

10 Shalushravansingh, Media Trial And Its Impact On Evidence (2018)

The media overstepping its boundaries is also evident in the Noida Double Murder case (2008)[11], serves as another instance. The killing of Aarushi Talwar and Hemraj Banjade piqued public interest as the parents of the girl faced allegations of committing a double homicide. The case was full of assumptions and rumors, and the media capitalized on it to the fullest extent possible. Many individuals blamed the media for conducting a media trial, where the coverage was broadly sensationalized and included scandalous allegations against both Aarushi and the accused.[12]

Media trials primarily focus on high-profile cases due to public fascination with gossip, particularly when prominent individuals are implicated, and the investigation of such cases maintains viewer engagement. Nonetheless, these trials often lack precision, disregarding evidence, fair proceedings, and the judiciary's mandate. Media trials can involve privacy intrusion, defamation, and the presentation of false evidence, which are inappropriate and unjust.

GUIDELINES ISSUED BY THE SUPREME COURT TO REGULATE MEDIA TRIALS IN INDIA

The Supreme Court, in the case of Mr. Nilesh Novolakha and Ors. v. UDI Andors, established certain guidelines to combat the proliferation of media trials. These guidelines are as follows:

> "We hold that any act done or publication mode which is presumed by the appropriate court (having the power to punish for contempt) to cause prejudice to mankind and affect a fair investigation of crime as well as a fair trial of the accused, being essential steps for administration of justice".

As per Supreme Court's landmark judgement in the case of Mr. Nilesh Novolakha and Ors. v. UDI Andors[13], if any act or publication is deemed by the appropriate court, capable of causing damage to the public or influencing a fair investigation or trial of a crime, it may fall under sub-clause (iii) of Section 2(c) of the Contempt of Courts Act, depending on the circumstances, and such an act or publication will be subject to legal action. The press and media should abstain from scrutinizing criminal investigations and limit their coverage to informative reporting for public interest.

It is advised not to publish an accused's confession as admissible evidence without informing the public of its inadmissibility

a) When reporting suicide, it's best to avoid
   i. depicting the deceased as weak character.
   ii. the court stated that investigative agencies are not obligated to divulge information and should keep the ongoing investigation confidential.

11 Dr. Rajesh Talwar And Another V. CBI, (2013 (82) ACC 303)

12 Courts On Its Motion vs State (2008 DLT489)

13 Mr. Nilesh Novolakha and Ors. v. UDI Andors (18 January 2023)

iii. The court provided an indicative but not comprehensive list of reports that could stimulate prejudice, including criticizing the investigative agency based on half-baked information, predicting the proposed/future course of action, recreating a crime scene, and leaking sensitive and confidential information from materials collected by the investigating agency.

b) When reporting on suicide, it is advised to avoid portraying the person who died as having a weak character or violating their privacy in any way

i. This refers to actions that can create bias or harm an ongoing investigation.

ii. Refraining from making reports about the accused or victim's personality and avoiding influencing prejudice towards them.

iii. Engaging in interviews with the victim, eyewitnesses, or their relatives and airing them on television, as well as scrutinizing the accounts of witnesses whose testimony could be critical during the trial.

iv. Disclosing the information provided to a police official by an accused and portraying it as evidence that can be accepted by the court, without disclosing the details of the Evidence Act, 1872, that govern the admissibility of evidence.

v. To print pictures of a suspect and thus make it easier to recognize them, and to criticize the investigative agency without conducting proper research or based on incomplete information.

vi. To make a statement about the strengths or weaknesses of a case, including assumptions about the guilt or innocence of an accused person or an individual who is not yet a suspect in the case.

vii. To reproduce or rebuild a crime scene and portraying the manner in which the accused committed the crime.

viii. To anticipate the future actions that need to be executed in a specific order to finish the investigation.

ix. Disclosing information that is confidential and sensitive obtained by the investigative agency

c) To act in a way that goes against the regulations outlined in the Programme Code, as defined in "Section 5 of the Cable TV Network Act and Rule 6 of the CTVN Rules", which could result in being held in contempt of court.

d) To engage in Defamation of an someone's character and cause harm to their reputation.

It was also noted that if a channel has information that could be helpful to the investigation, it should not be reported as news. Instead, the channel must share the available information with the police, in accordance with sections 37 to 39 of the Cr.PC, to assist in a comprehensive investigation.

EXAMPLE SCENARIO: BRINGING ATTENTION TO LANDMARK JUDGMENT

In M.P. Lohia V. State of West Bengal,the Supreme Court reviewed a trial involving a case of dowry death was under consideration, and an article titled "Doomed by Dowry" was published in the Saga magazine. The article covered an interview with the closed ones of the deceased, who provided their perception of the incidence and extensively quoted the father of the deceased regarding his account of the case. The Supreme Court stated that articles like this in the media would certainly impede the administration of justice. The court criticized this practice and warned the publisher, editor, and journalist responsible for the article, cautioning them against engaging in a trial by media while the case is still under judicial consideration.[14]

In the case of Indrani Mukherjee[15], the media is providing sensational headlines and tidbits of information that are more focused on damaging the reputation of a woman who has been married three times, is ambitious, has lived a luxurious lifestyle, and is rumored to have many secrets to hide. The media's coverage seems to be more about character assassination than factual reporting.

Shortly after the murder of 14-year-old Arushi Talwar[16] in 2008, multiple television crews and reporters entered the Talwar house and potentially contaminated the evidence.[17]

After the tragic murder of Arushi Talwar, a 14-year-old girl, in 2008, the media extensively reported on the alleged sexual relationship between the victim and the Talwar family's male servant. The media also covered the extramarital affair between her father and a co-dentist.The Supreme Court bench, consisting of Justice Altamas Kabir and Markandey Katju, warned the media to be careful in their coverage of the case and warned them not to damage the reputation of the deceased and her father. The court criticized the media reports for being sensationalist and insensitive.[18] "Media has played a huge role in creating a perception about us, and it has damaged our case" Dr. Nupur Talwar voiced in Nov, 2013. "The dignity of my 14-year-old has been shattered: she cannot defend herself. Every day I apologize to her for what people have done to her. I, as a mother and human being, cannot understand. Every night I have to say sorry to her."[19]

Fake sting operations and media intrusion not only have legal implications but also cause significant harm to society. The case of Uma Khurana exemplifies this. She

14 (2005) 2 SCC 686, 688-89, para 10

15 'Trial' by media can affect Indrani's case(August 31, 2015) available at https://asiatimes.com/2015/08 (last visited on April 30 2023)

16 (Dr. Rajesh Talwar and anr v. CBI, 2013 (82) ACC 303.)

17 (Aarushi Talwar: India's 'most talked-about' murder verdict available at https://www.bbc.com/news/world-asia-india-24987305 (last visited on 30 April 20230)

18 Aarushi murder case: SC slams 'sensationalist' media available at https://indianexpress.com (last visited on 1 May 2023)

19 Aarushi Talwar: India's 'most talked-about' murder verdict available at https://www.bbc.com/news/world-asia-india-24987305 (last visited 1 May 2023)

was a schoolteacher in Old Delhi who faced false accusations from Live India, a TV channel that alleged that she forced her students into prostitution during a sting operation. This led to her being beaten by a mob and put in Tihar Jail. However, a thorough investigation led to her release, and the actual culprit was arrested. Despite this, she has lost her reputation, which cannot be fully restored with any amount of monetary compensation, due to the media's verdict.[20]

THE USE OF MEDIA AS A TOOL TO SEEK JUSTICE

In the murder of Jessica Lal involving the perpetrator, Manu Sharma, the son of Haryana Congress Leader Venod Sharma, Manu killed Jessica in a bar on April 29, 1999 when she denied him serving liquor. Nevertheless, all nine accused were exonerated due to insufficient evidence. But with media intervention and public outcry, the case was reopened and ultimately Manu Sharma was found guilty and sentenced to life imprisonment[21].

The case of Priyadarshini Mattoo involved the rape and murder of a 25-year-old law student in New Delhi in 1996 by Santosh Kumar, son of an IPS officer. Despite the evidence against him, Santosh was acquitted by the trial court due to incorrect presentation of facts. However, due to extensive coverage by the media, the case was reopened, and a fresh appeal was submitted by the CBI against the verdict. The Delhi High Court heard the case on a daily basis, and eventually found Santosh guilty and sentenced him to death.[22]

The Supreme Court established guidelines in the Media Guidelines case[23] regarding media coverage of matters that are sub judice. If it is necessary for justice, the court can restrict media reporting. Inherent powers of the High Court can be exercised to issue orders that temporarily prohibit publication during a trial. The court noted that even though these orders would restrict freedom of speech and expression, they would not contravene Article 19(1)(a) of the Constitution. Article 19(2) permits limitations on freedom of speech and expression in contempt of court cases. Conducting a trial by media falls under the category of items that interfere with justice or the proper administration of justice, particularly the media's impact on the accused or the suspect.

At times, the media has the potential to exert pressure on the police, causing them to introduce false information that a suspect has confessed to a crime in order to appease the public. While confessions made to the police are not admissible in court, this misinformation can harm the suspect's future. The media is capable of depicting an accused or a suspect as guilty even prior to the verdict of the court. Even if the

20 Anamika Ray & Ankuran Dutta, Media Glare or Media Trial Ethical Dilemma between two Estates of India Democracy Online Journal of Communication and Media Technologies Volume: 5 – Issue: 2 April - 2015

21 Manu Sharma v. state (NCT of Delhi), (AIR 2010 SC 2352)

22 Santosh Kumar Singh v. State through CBI, (2010 9 SCC 747)

23 Sahara India Real Estate Corporation Ltd. Vs SEBI (2012 10 SCC 603)

accused is eventually acquitted through the proper legal process, their reputation in society may still be damaged beyond repair.[24]

CONCLUSION

The media is a powerful tool that can either make or break the reputation of individuals or institutions. This paper delves into the journey of media in India, from its nascent stage to the modern era of media trials. The paper aims to provide an insightful analysis of the laws pertaining to media trials in India to ensure that the media is functioning appropriately. The paper focuses on the examples of media trials in India, where the media acted as a platform to deliver justice and where it became a hindrance in the delivery of justice by spoiling evidence. This dichotomy in the media's role raises important questions about the ethics and accountability of the media industry.

Moreover, the paper analysed the impact of media trials on the accused, who are often subjected to character assassination and public ridicule. It explored the psychological and emotional toll that media trials take on the accused and their families, as they are left to face a trial by media before even appearing in court.

The paper argues that while media trials can serve as a valuable tool for ensuring transparency and accountability in the justice delivery system, it is essential to maintain a balance between the freedom of expression of the media and the right to a fair trial of the accused. The paper suggests that it is imperative to adhere to the laws and regulations governing media trials in India, to prevent the media from overstepping its boundaries.

PRACTICAL IMPLICATIONS:

This paper provides a comprehensive understanding of the evolution of media in India, its impact on the justice delivery system, and the laws governing media trials. It highlights the ethical and moral responsibilities of the media industry and the need for a balanced approach towards media trials. This paper serves as a valuable resource for policymakers, legal practitioners, and the media industry, aimed at fostering responsible and ethical journalism in India.

24 Mona Mahecha Media Trial: A Threat to Fair Trial, Amity Journal of Media & Communication Studies (ISSN 2231 – 1033) 2016, Vol. 5, No. 3

Green Collar Crimes: National and International Perspective

*Ms. Rekha Goswami**

ABSTRACT

In the research field of socio-economic crimes or criminology there are different categories of crime green-collar crimes (crimes against environment) is one of the neglected and avoided area. In present times, the Green Collar Crimes have become one of the biggest apprehensions for India as well as for all the nations of the world collectively. Green Collar Crimes are considered as the corporate crimes where the corporate world harms the environment for the sake of their huge profits or greed. There has been a lot of brilliant research that indicates a lot of serious environment related crimes which are committed or done over 3 decades. The environmental crime ratio increase after the period of 90s when the development process of the various nations reached its peak. The article is about the conceptualization of the green collar crimes and laws related to the same and how crimes of this nature affect the Human Rights of the general public at large.

INTRODUCTION

Environment and our surroundings play a very vital and crucial role in the existence of human life on our planet which is earth. The environment contains and provides all the vital resources which are important for the comfortable existence of human life. The main and basic resources of the environment are Soil, Water, Air, Living Organisms, and solar energy. All the elements of this earth are depending on the environment. We human beings are considered as the most intelligent creatures or mortals on this planet but being the same have affected and harmed the environment for making our lives more comfortable for our own needs and benefits. With the evolution and growth of the human species, humans become the first and biggest criminals against the environment. Technologies and ideas of the growth of humans generally came into existence with the damage to the environment.

The list of crime against nature is too long and following are the examples: Water Pollution, Air Pollution, Land Degradation, Deforestation, Hazardous dumping of harmful waste into the rivers, and lands etc, Destruction against flora and fauna, trading of animals or animal's body parts illegally, Poaching, Illegal Fishing, etc.[1]

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1 Rupali Baghel, Green Collar Crimes- A crime Against Environment and Wildlife, 2021, Available at: https://www.ijlmh.com/wp-content/uploads/Green-Collar-Crimes-%E2%80%93-A-Crime-against-Environment-and-Wildlife.pdf Last Visited on: 26.10.2022

A survey was held in India in the year 2017, according to the report of this survey it was concluded that the criminal cases against wildlife increased by about 790% from the year 2016 which was a high jump in the crime rate.[2] There are numerous landmark cases in India against nature or wildlife; Salman Khan's black buckcase is one of the best examples of green collar crimes.

HUMAN RIGHTS AND ENVIRONMENT

Environment and Human Rights both are interdependent and intertwined. A Clean and healthy environment is the basic human rights of all human beings to live a dignified life. Polluted, unhealthy, or hazardous environment which violates our basic human rights, more than 100 countries have considered, clean environment a basic human and fundamental right.

"On 28 July 2022, the United Nations General Assembly (UNGA) adopted a resolution declaring that everyone on the planet has a right to a healthy environment. This landmark decision is the result of decades of mobilization of various stakeholders. The resolution, based on a similar text adopted in October 2021 by the Human Rights Council, calls upon States, international organizations, and business enterprises to scale up efforts to ensure a healthy environment for all."

GREEN COLLAR CRIMES AND INTERNATIONAL LAW

International forums through International Law provide a stage or platform for all the nations and states to come up together and make the laws and guidelines for all the centralized issues which are developing like mushrooms throughout the world. In the area of environmental laws, the major steps were taken by the states for the very first time through the Stockholm Conference in the year 1972. The motive of this conference is to create awareness of environment degradation and also encourage the various nations to make proper laws and legislations for the protection of the environment and wildlife. After the Stockholm Conference, the Rio Declaration of 1992 plays a very vital role in the field of environmental laws. The main motive of this declaration is to attain the goal of sustainable development.[3]

The main and important international instrument which deals with the issue of green-collar crimes and related laws are as follows:

- "Convention on International Trade in Endangered Species of Wild Fauna and flora 1973."
- "The convention on protection of migratory species of wild animals 1979."

2 Dr, Arbab Mohammed Rub, JUDICIAL APPROACH TOWARDS GREEN COLLAR CRIMES IN INDIA IN LIGHT OF ENVIRONMENTAL JURISPRUDENCE, September 2021, Available at: https://thelawbrigade.com/wp-content/uploads/2021/09/Dr.-Arbab-Mohammed-Abdul-Rub-JLSR.pdf Last Visited on: 26.10.2022

3 Rupali Baghel, Green Collar Crimes- A crime Against Environment and Wildlife, 2021, Available at: https://www.ijlmh.com/wp-content/uploads/Green-Collar-Crimes-%E2%80%93-A-Crime-against-Environment-and-Wildlife.pdf Last Visited on: 26.10.2022

- "The Basel convention on the control of Trans boundary movements of hazardous wastes and their disposal 1989."
- "The Stockholm Convention."
- "Rotterdam Convention for the Protection of Environment."

LEGAL FRAMEWORK FOR GREEN COLLAR CRIMES IN INDIA

India is counted as of those nations which are very much aware of the environment and wildlife. In India there are multiple laws and legal provisions are enacted for the protection of nature and wildlife which are as follows:

CONSTITUTIONAL PROVISIONS

Article 14- According to this article there must be equality before the law and equal protection of laws under which everyone weather a citizen or non citizens has right to get the clean environment and surroundings which is essential for their lives.

Article 21- Under this article, everyone gets the right to life as it is interpreted by the Hon'ble Supreme Court of India that everyone has the right to get a clean environment. In the very famous judgment of the Dehradun Quarrying Case, it was ruling of the Apex Court that a clean and healthy environment is the natural fundamental right under the ambit of Article 21. Also, in the case of Subhash Kumar v. The State of Bihar[4]it was held that getting clean and healthy water is the fundamental right of everyone under Article 21.

Article 32 and 226- These two articles of the constitution provide for the constitutional and fundamental remedies through the writs in the Supreme Court of India and the High Courts. Most of the environmental concern cases filed under these two articles to the right of a clean and green environment.

PROVISIONS UNDER DIRECTIVE PRINCIPLES OF STATE POLICY UNDER THE INDIAN CONSTITUTION

Article 47- This article talks about how it's the state's responsibility for providing good nutrition and taking care of public health under this provision state is responsible for maintaining the environment for ensuring the good health of the general public.

Article 48-A According to this article "The State shall endeavor to safeguard the country's forests and wildlife, and to maintain and promote the environment." In the case of **Sher Singh v. Himachal Pradesh**[5] it was held that all the people of the country have a basic right to have a clean, and healthy environment.

4 K Singh, Subhash Kumar v The State of Bihar, 9th January 1991, Available at: https://indiankanoon.org/doc/1646284/ Last Visited on: 26.10.2022

5 Mr. Justice U.D Salvi, Sher Singh v State of Himachal Pardesh, 6th February 2014, Available at : https://indiankanoon.org/doc/194586080/ Last Visited on: 26.10.2022

PROVISIONS UNDER FUNDAMENTAL DUTIES OF THE INDIAN CONSTITUTION

Under Article 51-A (g) it is the duty of all the citizens of the nation that every citizen to preserve and enhance the clean environment which includes forests, rivers, lakes, and animals, and also includes all the living organisms on the earth for the environmental balance.

In case of M.C. Mehta v Union of India (1983 1 SCC 471) the Supreme Court held that it is the duty of the center under Article 51-A (g) that they mandate for all educational institutions to conduct one hour lecture a week for the environment-based awareness.

In 186th Law Commission Reportthe suggestions were mentioned for the judicial committees in the discussion on the problems and technical issues which were faced by the judicial authorities while deciding the environment related matters.

ENVIRONMENT BASED LEGISLATIONS

- Indian Penal Code 1960 Section 268-294A,
- Environment Protection Act 1986,
- Wildlife Protection Act 1972,
- Forest Conservation Act 1980,
- Water Prevention and Control of Pollution Act 1974,
- Air Prevention and Control of Pollution Act 1981,
- Public Liability Insurance Act 1991,
- Noise Pollution Regulation and Control Act 2000,
- Hazardous Wastes Rules 2000,
- Biological Diversity Act 2002.

Environment Acts	Offences in 2018	Offences in 2019	Percentage
The Forest Conservation Act	2768	2112	-23.70
The Wildlife Protection Act	782	618	-20.97
The Environment Protection Act	86	487	466.28
The Air and Water Prevention Control of Pollution Act	17	160	841.18
The Cigarette and Other Tobacco Controls Act	23517	22667	-3.61
Noise Pollution Acts	7947	8537	7.42
The National Green Tribunal Act	79	90	13.92

JUDICIAL APPROACH

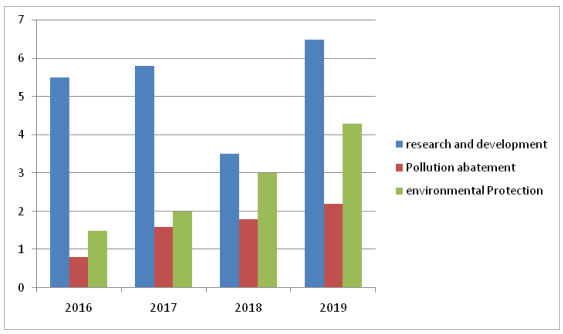
The credit for the development of environment laws in India is goes to the Indian Judiciary or the boundation's free judicial system. Through the writs and PIL, the judiciary interpreted the environmental laws commendably and in a flawless manner.

AlsoM.C Mehta plays a very vital role in the awareness and development of the environment related issues through his PILs. Some of the landmark judgments on the environment are as follows:

In the case of A.P Pollution Control Board v M.V Nayudu, in this case the Supreme court mentioned the importance of special courts for matters related to the environment which consists of judicial bodies and environmental experts.

The case of M.C Mehta v UOI (Oleum Gas Leak Case) was a landmark case and famous for the evolution for the concept of absolute liability. In this case, judges reject the old approach of strict liability and decide the matter based on absolute liability.

In the case of M.C Mehta v UOI (Ganga Case) in this judgment, the Supreme Court ordered the closure of the tanneries which did not follow the norms of the water treatment plant which affects the water of the river Ganga.



International Positon of the Environment during 2016 to 2019

PRINCIPLES BASED ON ENVIRONMENT-[6]

Public Trust Doctrine

This doctrine was evolved by the ancient roman people but in modern times, this doctrine is developed by Joseph L. Sax. The basic idea of this principle is that the resources like water, forest, and air are the easement rights of the general public and the control of these resources should not be given to the private hands. These resources are natural resources and are considered the god made products for the use of all living beings on the earth.

Polluter Pays Principle

According to this principle, the people who directly harm the environment are liable to compensate for their mistake. The principle is based on absolute liability. The

6 Rupali Baghel, Green Collar Crimes- A crime Against Environment and Wildlife, 2021, Available at: https://www.ijlmh.com/wp-content/uploads/Green-Collar-Crimes-%E2%80%93-A-Crime-against-Environment-and-Wildlife.pdf Last Visited on: 26.10.2022

polluters bear the cost of the pollution they caused or compensate the victims of the polluting activities. It is preventive measure and based on the phrase "Prevention is better than cure".

Precautionary Principle

This principle is invented by the Rio Declaration by principle no. 15. According to this principle if there are chances of irreparable environmental damages from any human activity that must be stop unless and until the government finds the antidote for the same. The name of the principle is itself evident that this is something related to precaution or prevention of any activity which is dangerous for the environment.

NATIONAL GREEN TRIBUNAL

The National Green Tribunal popularly known as NGT was established in the year 2010 for dealing with cases related to the pollution so that speedy trials and justice can be done and also divide the overload of High Courts and Supreme Court of India. NGT comprises of various benches and Tribunals and each bench and tribunal has various judicial officers and experts in the field of environment. This tribunal sets certain guidelines and norms for the protection of the environment very systematically.

In the case of DoabaParyavarn Samiti v state of U.P(decided by the NGT) it was held that crime against the environment is not less than any other heinous crime.

CONTRIBUTION OF PUBLIC

Chipkoo Movement

Chipkoo Movement is a historical incident for the environmental protection. This movement was held in the 1970s and was based on the non violent principle of Mahatma Gandhi. This movement was done in the villages of Uttrakhand which is now part of Uttar Pradesh which namely Mandla which is at upper Alakananda valley. This movement was against forest degradation in which ladies of the village stuck with the trees of the forest for their prevention from cultivation.

Swachh Bharat Mission

This Swachh Bharat Mission or Clean India Strike which is popularly known as Swachh Bharat Abhiyan was initiated in the year 2014 by the BJP Government under the leadership of our Prime Minister Mr. Narendera Modi. In which the government motivates the public of the nation for a clean India strike. Therefore, the general public of the nation takes part in the strike in the large amount voluntarily without any pressure from the higher authorities.

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7 Kashishkundlani, International Efforts for protection & Improving the Environment, February 12, 2020, Available at: https://blog.ipleader.in Last Visited on: 18.12.2022.

International Initiatives[7]

For the protection of environment international organization like UN take many initiatives like Ramsar Convention 1971, Stockholm Convention 2001, Montreal Convention, Kyoto Protocol 1997, Rio Summit 1992, COP 21 2016, COP 22 2016,COP 24 2018, COP25 2019, COP 27 2022.

- Ramsar Convention held in 1971 in the city of Iran named Ramsar this convention is also known as "Convention on Wetlands."
- Stockholm Convention plays a vital role in the environment protection it was held in 2001 in Geneva, Switzerland.
- Montreal Protocol 1987 this protocol is all about the protection of Ozone layer and discussion about those substances which are responsible for the depletion of ozone layer. This protocol came into force in 1989.
- Kyoto Protocol 1997 this protocol was focused on reduction in green house gases and it came into force in 2005.
- Rio Summit 1992 it was held in Rio De Janeiro, Brazil it was a conference for the discussion on UNCED.
- COP21 2016 it was the 21st discussion meeting of Conference of Parties (COP) on climate change in which all the party nations participate for the discussion on the UN framework.
- COP 24 2018 it was the 24th discussion meeting for the climate change
- COP 27 2022 it was the most recent conference which was held on 6th to 20th November 2022 in Sharm-El-Sheikh, Egypt on climate change. Under this conference nations discussed about historic decision about funds for vulnerable nations which are affected by the climate change natural activities.

CONCLUSION

It is a very popular phrase that the earth does not belong to man but man belongs to the earth so being part of the earth, it's the responsibility of the man to save the earth from hazardous activities. Degradation or abasement of the environment is not a new activity by a human; it is done for the several years. We humans for our development harm the environment without any consideration. Hazardous activities of human beings irreparably pollute the environment and this harm does not only affect the water, air, and soil but the whole biosphere system of the earth.

Getting a clean and healthy environment is a basic human right for the entire humans on earth through international conventions as well as under Article 21 of the Indian Constitution. Therefore ,it is our fundamental duty under Article 51g to protect the right of others or protect the environment for others. International organizations and our government take various initiatives for the protection of the environment but those initiatives are not enough, or useless unless and until the general public did not get aware of the protection of the environment.

A Comparative Analysis of International Legislation and the Impact of Violence on Children's Psychological Wellbeing: A Managerial Perspective

Shikha Saharawat* & Sumit Mishra**

"*Children are like wet cement. Whatever falls on them makes an impression." Haim Ginott*

ABSTRACT

Domestic violence is a form of abuse that is universally regarded as gender-neutral, violates human rights, and has multiple effects on the well-being and happiness of family members, particularly children. Domestic violence globally causes deviant and delinquent behaviour in children, regardless of their location, ethnicity, or socioeconomic status.When contemplating the concept of domestic violence, individuals often focus solely on the detrimental effects it has on the adult victim, neglecting to acknowledge or discuss the profound impact it has on the vulnerable children who inadvertently become victims themselves due to their role as witnesses to these acts of violence. Children are the future assets of the nation, and hence it is it is everyone's responsibility to protect them. Children are sensitive, tender and impressionable. Therefore, any form of domestic violence can affect their mental health, physical health, and social well-being, which eventually devastates the child psychologically and emotionally. This article provides an overview of what constitutes domestic violence and its harmful impact on young minds. In this article, we examine the psychological effects of domestic violence on children and understand the effects it has on children. This article evaluates international laws and policies on domestic violence and children's mental health. It provides insight on national and international laws on domestic violence against children. The purpose of this paper is to investigate the impact of domestic violence on children and suggest ways to control and improve it.

Keywords: *Children, Mental Health, Child Rights, Domestic Violence, National And International Laws.*

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I. INTRODUCTION

The United Nations General Assembly adopted the Convention on the Rights of the Child (CRC) in the year 1989, after which it became internationally binding in 1990. The CRC delineates the entitlements bestowed upon children and outlines the measures to safeguard and foster these rights by governments. Almost every nation across the globe has ratified this Convention, thereby pledging to acknowledge and uphold all the rights it encompasses. Article 1 of the CRC provides us with the elucidation of the term child[1]. It further elucidates that all actions and determinations that impact minors must be grounded in the paramount interest of the individual child. Governments are obliged to render these entitlements accessible to all juvenile[2] s. Article 6 Says that all children possess the entitlement to exist and prosper optimally. Governments are mandated to ensure survival and healthy growth or development for children[3]. Article 18 of the legislation pertains to the shared obligations of parents. It stipulates that both parents bear the responsibility of nurturing their child and must consistently prioritize the child's best interests. It is imperative that governments furnish support services for parents, particularly in instances where both parents are gainfully employed. Article 19, aptly titled Protection from all forms of violence, abuse and neglect of children, underscores the obligation of governments to ensure that children receive adequate care and are shielded from any form of violence, abuse, or neglect perpetrated by their parents or any other person entrusted with their welfare. The act elucidates the concept of deriving advantages from the realm of social security[4]. Article 27 expounds upon the notion of an adequate standard of living, asserting that it is imperative for every child to reside in propitious circumstances that foster their physical, mental, spiritual, moral, and social growth. In situations where families are unable to afford such circumstances, it is incumbent upon the government to extend support and assistance.

1 The convention on the Rights of child,1989, art.1: It states that for the purposes of the present Convention, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

2 *Ibid,* art.4: It States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. Regarding economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

3 *Ibid*, art.6: It States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.

4 *Ibid*, art. 26: It States (a) Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. (b) The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

The Protection of Women from Domestic Violence Act of 2005defines the term domestic violence[5]. The Act outlines domestic violence as any action, omission, or behaviour that jeopardizes the well-being of the victim. This encompasses physical, sexual, verbal, emotional, and economic mistreatment. Domestic violence further encompasses harassment with the aim of pressuring the victim or their family to fulfil illegal requests for dowry or other assets[6]. Additionally, any conduct that threatens the victim or their relatives is considered domestic violence. Finally, any act that causes harm to the victim, whether physical or mental, is also classified as domestic violence[7].Domestic violence can be defined as a systematic pattern of abusive behaviour in a relationship designed to gain or demonstrate dominance over another person. In most cases, the abuse is caused by the partner or ex-partner, or even a family member or carer; the perpetrators are usually people connected by law, blood or intimacy[8].

According to the "Human Declaration of Human Rights in 1948", it is stipulated that every individual possesses the entitlement to existence, freedom, and a sense of security[9]. Moreover, it is underscored that each person is safeguarded from the shackles of slavery, as no one is permitted to subject another to such subjugation[10]. Additionally, the declaration affirms that individuals are protected from torment and degrading treatment, for it is unjust for anyone to inflict pain, harm, or humiliation upon another[11].

Domestic violence is a widespread social threat. But while its various causes, such as alcoholism and patriarchy, are often reported, less attention is paid to its effects on children. Various forms of direct and indirect violence against children continue to be normalized in India. A UNICEF report (2020) showing 30 different types of abuse by parents in India against children between the ages of 0 and 6 confirms the same. Despite this evidence, the impact of domestic violence on children in the home is less talked about[12]. While the Indian response to this evil phenomenon of domestic violence is undoubtedly a remarkable achievement in terms of its commitment to the preservation, protection and enhancement of women's rights and dignity, it has not yet adequately responded to the plight of another vulnerable section of society,

5 The protection of women from Domestic violence Act,2005 (Act No. 43 of 2005), s.3.

6 *Ibid.*

7 *Ibid.*

8 Parkinson Patrick, Catherine Humphreys, "Children Who Witness Domestic Violence - The Implications for Child Protection" 10(2) Child and Family Law Quarterly, p. 147 (1998).

9 The universal Declaration of Human Rights 1948, art.3: It states that Everyone has the right to life, liberty and security of person.

10 *Ibid*, art. 4: It states that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

11 *Ibid*, art.5: It states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

12 Arushi Aul, "Children are the forgotten victims of domestic violence" The times of India,April 03,2022 available at: https://timesofindia.indiatimes.com/blogs/voices/children-are-the-forgotten-victims-of-domestic-violence/(Last visited on June 20,2023).

namely the children, the innocent and silent victims of domestic violence. This is because domestic violence laws in India treat only women as victims and ignore the plight of innocent and immature children who are always witnesses and often victims of domestic violence. This phenomenon is dangerous, especially to children, is extremely risky, as the mind and conscience of any child are extremely susceptible to being easily influenced by any situation, they encounter[13].

The effects of domestic violence are not limited to the victim, but also affect those around him or her, especially children living in such a household. As a child, one has the need to have a safe and secure home and a loving family to protect one. Early social upbringing and emotional development are largely reflected in later stages of life[14]. Positive parenting helps children become responsible individuals, while negative parenting can have detrimental effects, especially in violent or conflicted households. Children exposed to abuse or violence may suffer long-term consequences and lack a safe and stable home environment[15]. There is a famous quotewhich says that. *"The most important thing that we can do to prevent child abuse and neglect is to support families. We must ensure that all families have the resources they need to raise healthy and happy children in a safe and nurturing environment."*- Marian Wright Edelman.

A vital and crucial part of being healthy is having good mental health. The World Health Organisation (WHO) states that *"health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity"*[16].Domestic violence significantly impacts children's mental health, leading to physical and psychological issues such as depression, anxiety, PTSD, and increased risk for substance abuse. Witnessing domestic violence can cause feelings of guilt and shame, leading to fear and insecurity. The stress of living in a violent environment disrupts parent-child attachment, leading to social isolation and further problems[17]. Exposure to violent behaviour may impair cognitive functioning, affecting concentration span and problem-solving ability. This can result in lower academic performance and increased risk for depression, PTSD, substance abuse issues, eating disorders, and sleep disturbances. Physical threats, such as screaming fights, communicate these scenarios nonverbally, causing maladaptive coping mechanisms within victims. Overall, the long-term effects of domestic violence on children's mental health are significant and require immediate

13 Himanshu Shekhar, "Indian Children: Innocent Victims of Domestic Violence" available at : http://dx.doi.org/10.2139/ssrn.3875074 (Last visited on June 19,2023).

14 Sutapa Maji, "Children and Domestic violence" 5(11) International Journal of Multidisciplinary Research, p. 51 (2015).

15 *Ibid.*

16 A Fact sheet on "Mental Health presented in World Health Organization" available at: https://www.who.int/data/gho/data/major-themes/health-and-well-being (Last visited on June 24,2023).

17 Orapan Khemthong and Thanavutd Chutiphongdech, "Domestic Violence and Its Impacts on Children: A Concise Review of Past Literature" 14(6) Walailak Journal of Social Science, pp.1-3 (2021).

attention[18]. Despite the high occurrence of violence against children, it is frequently concealed, unnoticed, or inadequately documented. Due to the presence of fear, social stigma, and the acceptance of violence in society, only a limited portion of the affected children have the courage to disclose their experiences[19].

According to a report by UNICEF, a considerable number of children, ranging from 133 to 275 million, globally experience the phenomenon of domestic violence. This report, titled "Behind closed doors: The impact of domestic violence on children," was published by UNICEF in 2006.Studies also indicate that exposure to domestic violence extends beyond the confines of the household, encompassing any form of violence within the surrounding environment, such as educational institutions and the broader community, thereby falling within the parameters of domestic violence[20]. It is disconcerting to note that parents are found to be the primary perpetrators in a staggering 70% of domestic violence cases involving children[21]. Furthermore, it is observed that younger children are more susceptible to experiencing domestic violence. The perturbing data from Iran underscores the imperative of not disregarding domestic violence any longer, but rather, enhancing public consciousness regarding this issue.[22]

This study aims to provide a comparative analysis of Indian and foreign laws concerning the impact of domestic violence on children's mental health. The study employs a case study approach to examine the legal frameworks and their effectiveness in protecting children and addressing their mental health issues in the context of domestic violence. The research explores the similarities and differences between the legal provisions, policies, and interventions implemented in India and other countries, highlighting potential areas for improvement in India's legal system. By examining the impact of domestic violence on children's mental health, this research intends to contribute to the development of comprehensive legislation and support systems to safeguard the well-being of children affected by domestic violence. In this case analysis the data is collected through various scholarly database such as, Google scholar, dimensions, and symmetric scholar and through various news articles.

II. TYPES OF VIOLENCE FACED BY CHILDREN

The various forms of violence that children are exposed to be they are physical abuse,

18 Zeynep Turhan, "Child Mental Health and Bullying within the Exposure to Domestic Violence: Literature Review" 2(1) Journal of Happiness and Health, pp. 52-60 (2022).

19 Meinck and Franzisca et al., "Disclosure of Physical, Emotional and Sexual Child Abuse, Help seeking and Access to Abuse Response Services in Three South African Provinces" 22(1) Psychology, Health & Medicine, p.94-106(2017).

20. Edleson JL and Shin et al., "Measuringchildren's exposure to domestic violence: the development and testing of the child exposure to domestic violence (CEDV) scale" 30(5). Child Youth Service Review, p.502–21(2008).

21 A Report on "Behind closed doors: The impact of domestic violence on children" available on United Nations International Children's Emergency Fund, 2006.

22 Fantuzzo and John et al., "Prevalence and Effects of Child Exposure to Domestic Violence." *The Future of Children* 9(3), p.21-32(1999 available at: JSTOR, https://doi.org/10.2307/1602779 (Last visited on June 30,2023).

sexual abuse, emotional abuse, neglect etc. The deliberate application of force towards a child with the potential to inflict physical injury or harm constitutes the act of *physical abuse*[23]. Instances of physical abuse towards a child may encompass acts such as striking, kicking, slapping, burning, or shaking, perpetrated by a parent or any individual occupying a role of authority, accountability, or confidence. Physically assaulting someone can result in various physical harm such as contusions, fractures, and internal injuries. Furthermore, it may lead to persistent health issues such as enduring discomfort, delays in development, and incapacitating impairments[24]. In the case of Childline *India Foundation v. Alan John Waters and Ors.*[25], The Supreme Court has made an observation regarding the constitutional provisions concerning children. The constitution ensures that children have a joyful and healthy upbringing, free from the atrocities of crime and sexual exploitation. Special provisions for women and children have been made under Article 15(3). The JJ Act was enacted to ensure the care and protection of neglected juvenile delinquents and the establishment of special courts to manage juvenile delinquents[26]. Domestic violence can have significant negative impacts on children's mental health, as children who witness or experience domestic violence may feel fear, anxiety, depression, and have a range of emotional and behavioural problems. Some of the specific impacts of domestic violence on children's mental health may include, Children exposed to domestic violence may experience *trauma*, which can cause ongoing anxiety, fear, and other psychological symptoms.Children may exhibit *behavioural problems* like aggression, disobedience, hyperactivity, and other conduct problems.Children may *experience depression, anxiety, and other mood disorders* due to the stress and trauma of witnessing or experiencing domestic violence[27]. Problems with attachment and relationships: Children who have experienced domestic violence may have difficulty forming healthy attachments and relationships with others.Children may experience *academic problems*, including difficulty concentrating, poor performance in school, and absenteeism.Children who have experienced domestic violence may also have *physical health problems*, including headaches, stomach-aches, and other stress-related symptoms. Children who have experienced domestic violence may also be at increased risk of *substance abuse* later in life[28].

23 A fact sheet on "Violence against children" available at: https://www.who.int/news-room/fact-sheets/detail/violence-against-children (Last visited on June 24,2023).

24 Shraddha Chauhan, "Psychological Impact of Domestic Violence on Children and Its Link with Further Victimization and Delinquency" 2 Journal of Law & Legal Studies, p.2-3 (2023).

25 Childline India Foundation and Ors. vs. Allan John Waters and Ors. MANU/SC/0254/2011.

26 *Ibid*.

27 The Impact of Witnessing Domestic Violence on Children: A Systematic Review", Retrieved from Sophia, the St. Catherine University repository website available at: https://sophia.stkate.edu/msw_papers/776. (Last visited at June 19,2023).

28 Jill Astbury, Judy Atkinson, Janet E Duke, Patricia L Easteal, Susan E Kurrle, Paul R Tait and Jane Turner, "The Impact of Domestic Violence on Individuals" 173 (8) Medical journal of Australia, p.427-431(2000).

Sexual abuse includes any sexual act or conduct towards a child without consent. This includes fondling, penetrating, oral sex, or any other sexual activity with a child. Sexual abuse can cause physical injuries such as genital injuries, urinary tract infections, and sexually transmitted infections (STIs)[29]. In the *State of Punjab vs. Gurmit Singh & Ors.*[30], the Hon'ble Supreme Court has laid down that, in all criminal proceedings, it is imperative that the anonymity of the minor victim regarding personal information such as name and address be upheld consistently. It is imperative to maintain the confidentiality of the accused, including their personal information, when furnishing the charge sheet. The proposition is intended to prevent additional distress for individuals who have experienced such an offense. The court emphasized the use of Sec 327 of the Code of Criminal Procedure, which allows for certain trials to be conducted on camera to help victims testify comfortably. The presence of the media or public can make victims uncomfortable and shy. *Emotional abuse* inflicted on children can stunt their emotional growth and destabilize their self-esteem. Emotional abuseusually manifests itself in the form of criticism, rejection, threats, and with holding of love and support. As a result, adolescents may exhibit deficitsin physiological maturity, impaired ability to speak, and in some cases abnormal behaviours such as aggression and stubbornness. Failure to provide a suitable and nurturin genvironment necessary for a child's full growth and development, including the provision of prim ary care givers, may be viewed as an example of emotional abuse. Commissions for conduct aimed at endangering the health and general well-being of minors, including physical, psychological, spiritual, moral or social aspects. Other examples include methods such asisolating or excluding children, imposings tigma, failing to foster a supportive environment, and failing to respond to children's emotional needs[31].

Neglect is a term that denotes the inability or disregard of a parent or caregiver to furnish fundamental necessities for a child, which encompass sustenance, habitation, apparel, or medical attention. The act of neglect can result in various adverse physical outcomes such as malnutrition, illness, and injury, and in severe cases can culminate in mortality. Neglect may give rise to lasting psychological impairments, such as anxiety, depression, and post-traumatic stress disorder (PTSD). Children who endure neglect may face challenges in the development of secure bonds and the regulation of their affective states[32]. Children who *witness the incidents of domestic violence* perpetrated by their parents or caregivers may experience various forms of emotional trauma and enduring psychological harm. The phenomenon of witnessing violence has been found to potentially elicit prominent psychological distress among children, manifesting as anxiety, depression, and post-traumatic stress disorder (PTSD)[33]. Additionally, this phenomenon may result in challenges with the regulation of emotions, inadequacies

29 Ibid

30 State of Punjab vs. Gurmit Singh and Ors.: MANU/SC/0366/1996.

31 *Ibid.*

32 Aparna Aggarwal, "Domestic violence and children" available at: https://blog.ipleaders.in/domestic-violence-and-children/ (Last visited on June 20,2023).

33 *Supra note* at 19, p.503.

in forming positive connections with others, and impairments in both behavioural and academic performance. The observation of violence in childhood could potentially predispose individuals to perpetuate or suffer from violence in their future intimate relationships[34].

III. IMPACT OF VIOLENCE ON CHILDREN.

Children require loving, protective parents as well as a safe, violence-free home.Every year, many children experience domestic violence at home, leading to long-term consequences and future difficulties.The psychological effects that children's exposure to domestic violence has on them are the focus of this article[35]. The psychological impact is spectrum-based and varies depending on the cognitive abilities of the child. The short-term and long-term effects of domestic violence on children are the most common categories used to divide the psychological impact.Children who have been victims of domestic violence may have issues with their emotional well-being. The violence in their home may make them feel anxious, scared, and overwhelmed[36]. They may likewise encounter side effects of despondency, tension, anxiety, sadness, and loss of interest in exercises they once delighted in. Post-traumatic stress disorder (PTSD) symptoms include hyper arousal, flashbacks, and nightmares in children who witness violence between their parents or other caregivers. These profound battles can influence their capacity to shape solid associations with others and may influence their confidence and identity worth[37].When children see abuse, it can change the way they behave. The effect can be different for each child. It can vary from child to child. Children can act in two ways - either by keeping their feelings inside (internalizing) or by acting out what they feel (externalizing)[38]. Behaviour changes can happen where children might become more aggressive, hyper arousal, antisocial behaviour, fearfulness, an increased tendency to withdraw, and avoidant behaviour. Some children face physical challenges such as abdominalpain, headaches, high bloodpressure, stroke, blurred vision, and other similarailments from abuse. Children who have experienced domestic violence may also exhibit behavioural problems such as aggression, rebelliousness, and difficulty following rules[39]. They may be on arampageat school or athome and have trouble processing their emotions. These behavioural problem scan affect academic performance, attendance, and overall social

34 Amanda Hildreth, "Witnessing Domestic Violence: The Effect on Children" available at: https://www.aafp.org/pubs/afp/issues/2002/1201/p2052.html (Last visited on June 20,2023).

35 Holden GW., "Children exposed to domestic violence and child abuse: terminology and taxonomy" 6(3) Clinical Child and Family Psychology Review (2003).

36 A report on "Hidden scars: how violence harms the mental health of children" available on Office of the Special Representative of the Secretary-General on Violence against Children New York, 2020.

37 Lucy Salcido carter and Lois A. Weithorn et al., "Domestic violence and children" 9(3) The future of children, p.6 (1999).

38 *Supra* note at 6, pp.5.

39 Catherine Cook-Cottone, "Childhood Posttraumatic Stress Disorder: Diagnosis, Treatment, and School Reintegration" 33(1) School Psychological Review, p.128 (2003).

functioning[40]. Children who are the victims of domestic violence may experience feelings of isolation from their parents and family and they may have difficulty making friends. They might be afraid of being judged or stigmatized and feel embarrassed or ashamed to talk about what's going on at home. children who are neglected may also experience feelings of isolation because they do not have access to necessities like clean clothing or transportation to social events. Their sense of belonging and emotional difficulties may be impacted by this social isolation[41].

Children exposed to family violence can face immediate and lasting physical harm, including death. They may also encounter emotional, behavioural, and developmental issues, such as post-traumatic stress disorder. In 6 out of 10 cases of abuse, victims face problems like negative peer involvement, depression, and developmental delays. Witnessing family violence is as damaging as experiencing it. Parents may believe they have protected their children, but research shows that children witness a significant amount of it. The impact on these children is like that of direct abuse. Essentially, witnessing spousal violence is a form of child abuse[42].

Children who have been the victims of domestic violence may be more likely to become perpetrators in their own adult relationships. They might pick up unhealthy ways of communicating and resolving conflicts, and they might have trouble forming healthy relationships with other people. Additionally, they may have difficulty controlling their emotions and resort to alcohol or drugs as a means of coping. Their overall quality of life can be impacted by these relationship issues, which may also contribute to mental health issues like anxiety and depression[43]. Witnessing abuse also limits a child's social development. Some people lose the ability to expresse motions, while others become emotionally numb. They experienced if ficulties in current ande venfuturerelationships with colleagues and partners. In creased Risk of Children Being Victims In families with domestic violence, children are also more likely to be abused because the abuse risunable to control their angry behaviour[44]. As a result, the child's feelings and thoughts about the experience become scattered,

40 Yichun Sun, "Long Term Violence in Children's Family Lead to Potential Harm in Children's Early Development: A Family Investigation", Advances in social science, education and humanities Research, Proceedings of International Conference on Science Education and Art Appreciation (SEAA 2022).

40 Akhil Gupta, "Domestic Violence & Patriarchy in the Indian Society" 3(1) International Journal of Law Management & Humanities, p. 389-390 (2020).

41 *Supra note* at 6.

42 *Family Violence in Canada: A Statistical Profile 2006, "The* effects of domestic violence on children-where does it hurts" available at: https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/publications/effects-domestic-violence-children-hurt.html.

43 Anamika Chauhan, "Effect of domestic violence on children-A study" 5(2) International journal of higher education and research, p.32-23(2015).

44 Effects of domestic violence on children available at: https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children (Last visited on June 25,2023).

disorganized, and unintelligible. Children's perspectives on the world and themselves, ideas about life's meaning and purpose, hopes for happiness in the future, and moral development are all impacted by witnessing violence. Children's progress through age-appropriate developmental tasks is disrupted as a result[45]. The issue of domestic violence and its impact on children's mental health is a matter of concern globally[46]. In this case study, we will compare the role of Indian and foreign laws on understanding the impact of domestic violence on children's mental health.

IV. NATIONAL AND INTERNATIONAL LAWS ON VIOLENCE AGAINST CHILDREN

A. Indian Law

The Protection of Women from Domestic Violence Act (PWDVA) was introduced in India in 2005 as a legal measure to safeguard women from domestic violence. The Protection of Women from Domestic Violence Act (PWDVA) acknowledges the fundamental entitlement of women and children to reside in a household free from any form of violence and mistreatment. Notably, the legislation does not present precise provisions for safeguarding children from acts of domestic violence. Specific laws that address domestic violence against children is yet to be enacted. PWDVA, 2005 provides for several remedies to protect the rights of women and children of women who are victims of domestic violence in India. PWDVA, 2005 provides for several remedies to protect the rights of women and children of women who are victims of domestic violence in India. There are some remedies given under the act such as granting of residence orders to the aggrieved person and her child, appointment of a Protection Officer, financial relief, custody orders, and compensation orders for injuries suffered. They are given under sections 18-22 of theabove-mentioned act[47].

Legal Framework in India

The Protection of Women from Domestic Violence Act, 2005 is a comprehensive legal framework in India that acknowledges the existence of domestic violence with a predominantly focus on the protection of women. However, the Act does not specifically address the specific provisions for children[48]. India has enacted multiple legislative measures to safeguard children from diverse forms of cruelty and abuse. However, there is a conspicuous absence of a law that singularly deals with the issue of domestic violence perpetrated against children. The Juvenile Justice (Care and Protection of Children) Act of 2015 embodies a formal directive to guarantee the

45 Ms. Disari Roy, "Domestic violence and its impact on children" 20(2) Journal of Humanities and Social Science, p.2 (2015).

46 Fateme Mohammadi and Khodayar Oshvandi et al., "Child exposure to domestic violence, substance dependence andsuicide resilience in child laborers" 23(467) BMC Public Health, p.4-9(2023).

47 Divyanshi Maheshwari, "Protection of child against domestic violence: Laws in India" 23 Supremo amicus (2021).

48 *Ibid.*

welfare, safeguarding, and recovery of children who have become victims of the affliction of mistreatment, neglect, or exploitation.The legislation provides a comprehensive framework for addressing the needs of children who require care and safeguarding, including those who have encountered domestic violence[49].

The primary objective of the Protection of Children from Sexual Offences Act (POCSO) is to guarantee the safeguarding of underage individuals from the negative effects of sexual abuse and exploitation. The Act encompasses regulations pertaining to child pornography, sexual assault, and various other types of sexual abuse. The act further delineates procedures for reporting, investigating, and prosecuting sexual offenses against children[50]. The Child Labour (Prohibition and Regulation) Act effectively prohibits the employment of minors in certain industrial sectors. The legislation additionally stipulates provisions for safeguarding children against exploitation and abuse[51].

B. Foreign Law

Globally, half of the children between the ages of 2 and 17 endure various types of violence on an annual basis. As indicated by a comprehensive examination, approximately 58% of children in Latin America and 61% in North America encountered physical, sexual, and/or emotional mistreatment within the previous year[52].The 2030 Agenda for Sustainable Development has established a specific objective, namely 16.2, which aims to bring an end to the abuse, exploitation, trafficking, and all other forms of violence against children, as well as their torture[53]. In the year 2021, a notable number of 4.8 juveniles per day succumbed to their demise as a result of maltreatment and disregard within the borders of the United States. This figure exhibits an upward trend when compared to the corresponding statistics from 1998, wherein approximately 3.13 children would perish daily due to abusive and negligent circumstances[54].

It is estimated that annually, a staggering number of over 600,000 children in the United States experience various forms of abuse. In the year 2021, approximately

49 Rachit Singh, "Introduction to domestic violence on children" available at: https://blog.ipleaders.in/introduction-to-domestic-violence-on-children/ (Last visited on June 20,2023).

50 Ajoy Kumar Sardar, "Child abuse in India: Legislative and judicial perspective" 7 South Asian law review journal, p.235 (2021).

51 *Ibid*, p.233.

52 Violence against children on Pan American health organization available at: https://www.paho.org/en/topics/violence-against-children#:~:text=Globally%2C%201%20in%202%20children,abuse%20in%20the%20past%20year (Last visited on July 23,2023).

53 Violence against children on World health organization available at: https://www.who.int/news-room/fact-sheets/detail/violence-against-Children#:~:text=Globally%2C%20it%20is%20estimated%20that,lifelong%20health%20and%20well%2Dbeing (Last visited on July 23,2023).

54 A report on Number of child deaths per day due to child abuse and neglect in the United States from 1998 to 2021 available at: https://www.statista.com/statistics/255206/number-of-child-deaths-per-day-due-to-child-abuse-and-neglect-in-the-us/ (Last visited on July 26,2023).

600,000 children were identified as victims of abuse and neglect. However, it is important to acknowledge that this figure might not fully capture the true extent of child abuse cases, as the ongoing COVID-19 pandemic has likely led to underreporting[55]. A comprehensive investigation into American children revealed that a significant majority, amounting to 60 percent, were exposed to violence or abuse. Furthermore, a distressing 40 percent of American children suffered from multiple instances of violent acts. Shockingly, one out of every ten American children became victims of violence on multiple occasions[56].

Legal Framework in Foreign Countries (e.g., United States and United Kingdom)

The United States has implemented diverse federal and state statutes to address and combat the issues of domestic violence and child protection. Prominent examples of such regulations are the Violence against Women Act (VAWA) and the Child Abuse Prevention and Treatment Act (CAPTA). The regulations prioritize the delivery of comprehensive services, which are inclusive of mental health assistance, to minors who have been subjected to domestic violence[57].The Domestic Abuse Act 2021, implemented within the United Kingdom, exhibits an improved legal safeguard for domestic abuse victims, inclusive of children, through the extension of the definition of domestic abuse and the introduction of novel protective measures[58]. The Children Act 1989 and subsequent amendments ensure the welfare of children and provide a framework for intervention and support.Foreign legal frameworks often include provisions for specialized counselling, therapy, and support services specifically tailored to address the mental health needs of children affected by domestic violence.

In the year 2019, the Australian populace encountered a depletion of 145,703 years of well-being due to suicide and self-inflicted harm. This depletion accounted for approximately 3% of the overall burden of illness and injury in Australia, and 10% of the total burden among individuals aged 15 to 24 years. It is noteworthy that the overwhelming majority, precisely 99%, of the burden associated with suicide and self-harm originated from premature mortality, which is also recognized as the fatal burden[59]. Four modifiable risk factors were considered in the analysis due to sufficient

55 A report on National statistic on child abuse available at: https://www.nationalchildrensalliance.org/media-room/national-statistics-on-child-abuse/. (Last visited on July 28,2023).

56 A report on Children exposed to domestic violence available at US Department of justice of office of justice program available at: ojp.gov/program/programs/cev (Last visited on July 28,2023).

57 The stronger child abuse and prevention and treatment act available at: https://www.futureswithoutviolence.org/stronger-child-abuse-prevention-and-treatment-act/ (Last visited on June 25,2023).

58 Domestic abuse act 2021 available at: https://www.lawsociety.org.uk/topics/family-and-children/domestic-abuse-act-2021 (Last visited on June 25,2023).

59 New insights into suicide and self-harm in Australia, including potentially-modifiable risk factors on Australian institute of health and welfare available at: https://www.aihw.gov.au/news-media/media-releases/2021-1/november/new-insights-into-suicide-and-self-harm-in-austral (Last visited on July 30,2023).

evidence in the literature of a causal association with suicide. These factors include child abuse and neglect, alcohol consumption, illicit drug usage, and intimate partner violence[60]. The study approximated that these four risk factors contribute to nearly half of the burden of suicide and self-inflicted injuries[61]. Child abuse and neglect during childhood consistently emerged as the primary behavioural risk factor that contributed to the burden of suicide and self-inflicted injuries in both males and females aged 5 years and older from 2003 to 2019[62]. In the year 2019, it constituted one third (33%; 12,031 DALY) of the total burden in females and 24% in males (25,690 DALY), as stated by Mr. Juckes. During the year 2019, Australia faced a total of 3,318 fatalities resulting from suicide. In the subsequent year of 2020, the number decreased slightly to 3,139. Additionally, there was a significant quantity of hospital admissions, surpassing 28,600, due to intentional self-harm during the period of 2019-2020[63].

Evaluation of Foreign Laws and Policies concerning Violence and Children's Mental Health

In *United States*, The Violence Against Women Act (VAWA) and the Child Abuse Prevention and Treatment Act (CAPTA) emphasize the provision of comprehensive services, including mental health support, to children exposed to domestic violence. Clear recognition of the mental health impact on children, provision of specialized services, and coordination between domestic violence and child protection agencies.Varied implementation across states, limited resources for mental health support, and potential gaps in addressing cultural and immigrant populations[64].In *United Kingdom*, The Domestic Abuse Act 2021 strengthens legal protection for victims of domestic abuse, including children, and introduces new protective measures[65].The Children Act 1989 and subsequent amendments provide a framework for intervention and support.Focus on the well-being of children, provision of counselling and support services, and multi-agency collaboration. Challenges in resource allocation, potential delays in accessing support, and inconsistencies in implementation across regions[66]. In *Australia*, The Family Law Act 1975 and subsequent amendments address domestic violence and children's well-being in the context of family law proceedings.The National Framework for Protecting Australia's Children aims to improve the safety and well-

60 *Ibid.*

61 *Ibid.*

62 *Infra* note at 62.

63 Australian institute of health and welfare available at: https://www.aihw.gov.au/news-media/media-releases/2021-1/november/new-insights-into-suicide-and-self-harm-in-austral (Last visited on July 28,2023).

64 Violence against women act available at: https://nnedv.org/content/violence-against-women-act/ (Last visited on June 26,2023).

65 Domestic violence, crimes and victims act 2004 available at: https://www.legislation.gov.uk/ukpga/2004/28/contents (Last visited on June 25,2023).

66 Children act 1989 available at : https://www.legislation.gov.uk/ukpga/1989/41/contents (Last visited on June 25,2023).

being of children affected by violence. Integrated approach to child protection and domestic violence, provision of therapeutic services, and focus on prevention and early intervention.Variations in implementation across states, potential gaps in access to services in rural areas, and limited resources for long-term mental health support[67]. In *Canada*, The Divorce Act and various provincial legislation recognize the impact of domestic violence on children and provide measures to address their mental health needs. The Child and Family Services Act focuses on child protection and welfare. Inclusion of child-centred provisions, emphasis on collaboration between legal and social services, and provision of trauma-informed interventions.Potential delays in accessing services, variations in implementation across provinces, and limited resources for mental health support[68].

V. GAPS AND WEAKNESSES IN INDIAN LAWS REGARDING VIOLENCE AND CHILDREN'S MENTAL HEALTH

The legal system in India predominantly emphasizes safeguarding the rights and interests of women, with the limited number of explicit provisions aimed at addressing the psychological health requirements of children impacted by domestic violence. The Protection of Women from Domestic Violence Act (PWDVA) 2005 is a pivotal legislative measure for safeguarding women from any kind of domestic violence. Nonetheless, the Act lacks explicit mention of children in its definition of an "aggrieved person"[69]. It is imperative to amend the Act to encompass children within its definition and establish explicit provisions for safeguarding their welfare. This measure can guarantee the enhancement of the comprehensiveness of the jurisprudential system while effectively augmenting the level of safeguard afforded to children who are victims of domestic violence.There is a need for stronger integration of mental health support services within the legal framework to address the long-term consequences of domestic violence on children's mental well-being for children who are experiencing difficulties, the government must establish helplines at the national and state levels and make it possible for them to access support services like counselling, medical assistance, and legal aid. All children who are victims of domestic violence, regardless of their socioeconomic status, should have access to these services. The helplines ought to be broadly advanced so that the children and their families can get to them without any problem.Coordination and Implementation: The coordination between child protection agencies and domestic violence prevention agencies in India could be enhanced to ensure effective interventions and support systems for children.

To ensure the effective implementation of laws and policies pertaining to domestic violence and the mental health of children, legal professionals, law enforcement agencies, and the general public must be made more aware. People can learn a lot about the

67 Family law act 1975 available at: https://www.legislation.gov.au/Details/C2019C00101 (Last visited on June 26,2023).

68 Justice law website available at: https://laws-lois.justice.gc.ca/eng/acts/d-3.4/ (Last visited on June 25,2023).

69 The protection of women from domestic violence act,2005 act no. 43 of 2005, s.2(a).

effects of domestic violence on children and the need to protect them from it through awareness campaigns. Educational institutions and other public places serve as highly appropriate locations for such campaigns. The focal point of the campaigns should be directed towards enhancing awareness pertaining to the deleterious impacts of domestic violence upon the psychological, emotional, and physical well-being of children. Through the campaigns, people can also learn about the support services and legal protections for children. Children who are the victims of domestic violence need help right away. Child Welfare Committees (CWCs) and Protection Officers ought to be given the authority to act swiftly and decisively in cases of child domestic violence.In order to quickly respond to cases of domestic violence involving children, the CWCs should have access to sufficient resources, including staff that has been trained. The protection Officials ought to have the ability to find prompt ways to safeguard the children, for example, removing the child from the abusive environment. More research and data collection are needed to understand the extent and impact of domestic violence on children. This can help in developing evidence-based policies and interventions for the protection of children. The research can also help in identifying gaps in the legal framework and support services and inform the development of more effective policies and interventions.

VI. DISCUSSION

Domestic violence can have a significant impact on children's mental health. This is due to several factors. Direct exposure to domestic violence. Children who experience or witness domestic violence are more likely to suffer negative psychological and emotional outcomes in the short-term as well as in later life. Stress caused by ongoing uncertainty and insecurity about their safety, parental relationships or care arrangements; this subsequent stress can manifest itself through anxiety or depression at an early age for victims of domestic abuse. Emotional distress associated with witnessing violent behaviour between parents which could lead children into feelings of guilt, embarrassment or helplessness across all age's groups. Indian law has taken steps towards protecting family members from physical harm such as introducing Bandhs Avasthi act 1989 & Domestic Violence Act 2005 seeking punishment for abuser while foreign law related The UN convention on Right Of Child , describes child protection occur when governments take serious measures both preventive and protective against any form victimization targeting minors like stringent punishments & refuge system set up apart Section 79(3) GBH 1981 England suppresses husband right that grants stiffer penalties if offense committed within certain marital settings while others vary substantially rape laws covered under 375&376 IPC where courts approach substantial evidence beyond reasonable doubt via corroborative statement other material obstacles . Similarly foreign laws grant large measure discretion court prosecutors property division ruled based fault no-fault divorce concept endowed stronger respondent position therein empowering relief activities United Nations Framework Convention Climate Change globally seeks intervene hazardous practices led human endangerment supported Government resource factor.

Indian laws primarily focus on protecting women from domestic violence, while foreign legal frameworks place greater emphasis on the well-being and mental health needs of children. Foreign laws often provide specific provisions for mental health support services, counselling, and interventions for children affected by domestic violence. Indian legislation would derive advantages from a greater integration of child-centric provisions, encompassing mental health assistance, within the legal framework. There is a necessity for India to augment coordination between child protection agencies and domestic violence prevention agencies in order to adequately address the mental health ramifications of domestic violence on children. By assimilating the best practices from foreign nations, India can strengthen its legal framework and guarantee comprehensive protection for children who are exposed to domestic violence. By means of conducting a comparative analysis of the legal frameworks, this research accentuates the necessity for India to improve its legal provisions and support systems to effectively address the mental health consequences of domestic violence on children. The inclusion of child-centric provisions and the utilization of insights derived from successful foreign approaches can contribute to the development of more efficacious legal measures in India. Indian and foreign legislation contain comparable provisions designed to safeguard women and children from domestic violence. Both recognize the impact of domestic violence on children and provide for their protection. Indian law authorizes the appointment of a Protection Officer who can deliver counselling services to the woman and her children, while foreign laws stipulate the provision of counselling services for the woman and her children.However, certain distinctions exist between the legal systems of India and foreign nations. To illustrate, the Protection of Women from Domestic Violence Act (PWDVA) in India exclusively safeguards women involved in domestic relationships, whereas foreign laws extend protection to all individuals subjected to domestic violence. Furthermore, the PWDVA fails to encompass a distinct provision for the criminality of domestic violence, a void that foreign laws effectively fill.

VII. CONCLUSION

In conclusion, the influence of domestic violence on children is acknowledged and safeguarded by both Indian and foreign legislations. Although there may exist certain disparities between the two legal frameworks, their fundamental principles remain congruent. Both aim to shield victims of domestic violence and their children, while simultaneously offering therapeutic assistance to aid in the mitigation of psychological ramifications caused by such violence. A case study examining the comprehension of the impact of domestic violence on the mental well-being of children has shed light on several noteworthy observations.Domestic violence can have a significant and long-lasting negative effect upon the developing minds of young children, resulting in psychological problems such as depression and anxiety which may persist into adulthood if not addressed at an early stage, Children exposed to domestic violence are more likely than those without exposure to report issues with concentration, academic performance, social relationships and self-esteem. The effects of prolonged exposure to domestic violence can manifest across multiple domains including physical

symptoms (such as persistent headaches or stomach pain) as well changes in behaviour (including fighting, lying and acting aggressively). Exposure to low levels of witnessing family dysfunction over extended periods increases the risk for experiencing post-traumatic stress disorder-like symptoms, while higher levels increase these risks even further; leading to longer recovery times following trauma incidents due to pre-existing damage suffered before any incident took place. Supportive counselling interventions that emphasize safety planning for victims but also help empower both victim and perpetrator alike shows promise for reducing occurrences rates by making resources easily accessible along with clear communication between parties involved therefore, it is important to recognize the impact of domestic violence on children's mental health and provide them with support and resources to help them cope with the effects of the violence they have experienced. Children who have witnessed or experienced domestic violence may benefit from counselling, therapy, and other mental health services to help them overcome the negative impacts of their experiences.

VII. FUTURE SCOPE

Domestic violence has a significant impact on children's mental health. Recent studies have suggested that experiencing, witnessing, or being exposed to domestic violence can affect a child's ability to develop healthy and secure relationships in adulthood as well as their overall emotional development in childhood. To understand the full extent of this issue, it is important for researchers to analyse both Indian and foreign laws relating to domestic violence and its effects on children's mental health. This will help researchers gain an understanding of how different legal systems approach issues related to family law and aid them in developing effective solutions tailored specifically towards LGBTQIA+ communities, marginalized populations with low employment opportunities due to social stigmas surrounding gender-based disparities (such as male poverty vs female poverty), various religious groups facing loopholes while seeking safety options within courtrooms across India etc. Both Indian and foreign experiences in dealing with such matters should be studied thoroughly so that informed decisions are taken when addressing worries receiving global attention regarding prevention of/and coping with trauma arising out of intimate partner abuse situations.

ARTIFICIAL INTELLIGENCE AND AUTONOMOUS VEHICLES: CONTEMPORARY ISSUES AND CHALLENGES

"Artificial Intelligence is going to change the world more than anything in the history of mankind, more than electricity".[1]

Ms. Smriti Rai* & Prof. (Dr.) Deepak Kumar Chauhan**

INTRODUCTION

Plato famously wrote in his seminal work, 'Republic': "*our need will be the real creator*". This famous quote has proved of essence time and again. Humans can be described as the best example of 'survival of the fittest theory' as they tend to leave no stone unturned to make their lives easier and comfortable. The transportation sector has also seen major developments and advancements which has made conveyance easier.

The first industrial revolution was the catalyst for the development of modern transportation systems.[2] Bicycles, trains, automobiles, trucks, airplanes, and trams were among the many new forms of transportation invented in the 17th and 18th centuries. The fourth industrial revolution can revolutionize not only our perceptions of what is possible but also how society works. In some ways, it will represent the culmination of both the second and third industrial revolutions, which gave us mechanized transportation and the internet in its current form.

Under the present scenario, transportation is the industry that has the most potential for breakthroughs and transformations. Mobility, like medicine, has the shortcoming that if the underlying technology is not well thought out; it can result in multifaceted loss of resources both material as well as human. If we closely monitor the transport industry, we may conclude that on one hand, it has made our lives easier but it is imperative to remember that road accident is one of the leading causes of deaths and loss of limbs and livelihoods in the world.

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1 The Future of AI: How Artificial Intelligence Will Change the World *available at*: https://builtin.com/artificial- intelligence/artificial-intelligence-future/ (Visited on June 2, 2022).

2 How did Transportation Change during the Industrial Revolution? *available at* https://www.ukessays.com/essays/history/how-did-transportation-change-during-the-industrial-revolution.php?vref=1 (Visited on May 15, 2022).

The majority of large cities around the world confront transportation, traffic, and logistics difficulties. This is due to the rapidly increasing human population as well as the expanding number of automobiles on the road.[3] The artificial intelligence enabled technology could be extremely helpful in designing and managing a sustainable transportation system. Artificially intelligent systems can detect patterns in large datasets and simulate complex methods to enhance decision-making efficiency and resource allocation.[4] The deployment and adoption of highly autonomous vehicles and improved traffic management systems will be the most significant changes in the industry.

At this juncture, it is pertinent to note that a strong legal framework is required for any technology to reach its full potential because it serves the dual functions of setting the boundaries for future research as well as directing research in such a way that it acts as a force multiplier without suffocating future research. Therefore, in order to ensure that the Autonomous Vehicles strive and thrive in today's transport market and contribute to a sustainable and safe transportation sector, a robust legal mechanism is needed. India is lacking a legal framework to incorporate such vehicles on our roads. This paper shall enumerate the legal issues & challenges aligned with the Autonomous vehicles in India and try to enlist the possible and plausible solutions.

UNDERSTANDING ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) is a branch of Computer Science, which mainly deals with the automation of intelligent behavior. This concept was considered for the first time by famous English Mathematician Alan Turing in his seminar paper "Computing Machinery and Intelligence"[5], authored in 1950. Artificial intelligence is the capacity of a machine to effortlessly carry out a human's cognitive functions. John McCarthy, a computer scientist, is regarded as the father of artificial intelligence because he coined the term for the 1st time at the Dartmouth Conference in 1956.[6] This six-decade-old idea has only recently garnered attention as a result of the ease of access of tremendous amounts of data produced by numerous devices, as well as effective hardware, software, and network infrastructure. Artificial intelligence has rendered process automation possible, leading to creative business transformation.

Types of Artificial Intelligence

Artificial Intelligence can be distinguished into two types based on the functions and abilities it provides. The first is weak Artificial Intelligence, also referred to as

3 Lakshmi Shankar Iyer, "AI Enabled Applications towards Intelligent Transportation" 5 *TRENG* (2021) *available at* https://doi.org/10.1016/j.treng.2021.100083 (Visited on May 17, 2022).

4 Takeyoshi Imai, "Concepts of Automobiles, Autonomous Driving, Driving, and Drivers" 5 *Kenshu* 822 (2016).

5 A.M. Turing, "Computing Machinery and Intelligence" 236 *Mind* 433 (1950).

6 Yanyan Dong, Jie Hou, *et. al.,*"Research on How Human Intelligence, Consciousness, and Cognitive Computing Affect the Development of Artificial Intelligence" 1680845*Complexity*10 (2020) *available at* https://doi.org/10.1155/2020/1680845(Visited on May 17, 2022).

narrow Artificial Intelligence, which is designed to perform a specific task, such as facial recognition, Internet Siri search. Many current systems that claim to use "Artificial Intelligence" are most likely weak Artificial Intelligence that focuses on a narrowly defined specific function.[7]

A strong Artificial Intelligence, or Artificial General Intelligence (AGI), is the long-term objective of many researchers in the concerned field. AGI is the speculative intelligence of a computer system that can comprehend or learn any cognitive task that a human can, helping humans to resolve the issue at hand. While narrow Artificial Intelligence may outperform humans in tasks such as chess or problem solving, its impact is still limited. The strong AI or Artificial General Intelligence, on the other hand, has the potential to overpower humans in nearly every cognitive task. Strong AI is an alternative interpretation of artificial intelligence whereby the machine can be configured to behave like a human brain, to be intelligent in any task that is thrown at it, and even to possess perceptions, belief systems, and other cognitive abilities typically only attributable to humans.[8]

Artificial Intelligence in Contemporary Scenario

From myths and fables to realistic Humanoid robots like SOPHIA by Hanson Robotics who can express feelings and communicate like a human, the journey of the development of Artificial intelligence has been remarkable. The day is not far when humans will have artificially intelligent friends beyond toys like AIBO or Furby. It's possible that humanity and cognitive computing systems will coexist in the future to the point that it will be very challenging to differentiate humans from humanoids. It was hard to Artificial intelligence is transforming society in ways which could never have been predicted. Technology is firmly entrenched in every facet of our lives, from unlocking our mobile phones to our daily routines, online shopping, smart car dashboards, robotic systems, and so forth. Artificial intelligence is gaining more popularity recently, despite the fact that the idea was first broached back in the early 1950s, paving the way for a great deal of machine learning and intricate decision-making procedures.It is indisputable that the technology sector has seen a wide range of changes over the years.

AUTONOMOUS VEHICLES: AN INTRODUCTION TO THE TECHNOLOGY

Driverless vehicles, also known as autonomous, driverless, self-driving, and robotic vehicles, are automobiles that are capable of perceiving their surroundings and driving without the assistance of a human driver, thereby completing the functions of a regular vehicle.[9] Autonomous Vehicles use a variety of sensors, cameras, radar, and

7 John R Searle, "Minds, brains and programs" 3 *BBS* 417-424 (1980) *available at* https://doi.org/10.1017/S0140525X00005756 (Visited on May 18, 2022).

8 *Ibid.*

9 SAE International, "Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles", January 16, 2014, available *at:* https://www.sae.org/news/press-room/2014/10/sae-international- technical-standard-provides-terminology-for-motor-vehicle-automated-driving-systems (Visited on May 20, 2022).

robotics technologies totravel between destinations without human interference. Various companies across the world like BMW, Ford, Apple, Google, Waymo, etc. are trying to develop Autonomous vehicles for more safe and efficient driving experiences. According to Gartner Glossary[10] *"An autonomous vehicle is one that can drive itself from a starting point to a predetermined destination in "autopilot" mode using various in-vehicle technologies and sensors, including adaptive cruise control, active steering (steer by wire), anti-lock braking systems (brake by wire), GPS navigation technology, lasers, and radar."*

At this juncture, it is essential to understand the difference between 'Automated Driving' and 'Autonomous Driving'. Car manufacturers, suppliers, and technology companies usually mention 'automated driving' but rarely to 'autonomous driving'. The former is the umbrella term that involves several phases of automation starting with driver assistance technologies. The latter refers to the phase of automation where all steering, accelerating, and braking operations are controlled by the device. In this stage, a person is placed out of control of the vehicle, allowing the car to operate independently under all traffic conditions. Automation is a term that refers to a machine's ability to act on its own. Autonomy goes beyond that and means the self-governing ability of an entire system. John McCarthy, who is considered as founding father of artificial intelligence, wrote an essay titled "Computer-Controlled Cars" that quite strongly matches the modern autonomous vehicle. He made reference to automatic limousine services having the same visual information that a human driver does to travel on public roads.[11] He claimed that users would type in the desired location on a keyboard, causing the vehicle to drop them to the desired location.

Levels of Automation

The National Highway Traffic Safety Administration (NHTSA) suggests a five-part continuum for understanding this technology, with different benefits gained at increasing levels of automation:

1. No automation (Level 0): At this level, all components of the driving task are under the sole control of the human driver.
2. Driver Assistance (Level 1): At this level, a driving assistance system executes steering or acceleration/deceleration activities in a certain driving mode, the driver must maintain continual attention.
3. Partial Automation (Level 2): At this level, the execution of both steering and acceleration/deceleration is executed by one or more driving assistance systems in a specific driving mode, with the human driver performing the remaining components of the dynamic driving task.

10 Gartner Glossary, *available at:* https://www.gartner.com/en/information-technology/glossary/autonomous- vehicles (Visited on May 21, 2022).

11 Ronal Glon and Stephen Edelstein, "The History of Self-Driving Cars" *available at:* https://www.digitaltrends.com/cars/history-of-self-driving-cars-milestones/#dt-heading-the-driverless-dream-begins (Visited on June 12, 2022).

4. Conditional Automation (Level 3): At this level, an autonomous vehicle performs all aspects of a driving task in a designated driving mode; the human driver is expected to react appropriately to an intervention request.
5. High Automation (Level 4): At this level, an automated driving system's performs all parts of dynamic driving task, even though a human driver fails to respond effectively to a request to intervene.
6. Full Automation (Level 5): At this level, an automated driving system performs all aspects of the dynamic driving task under all road and environmental situations.

In the present scenario, the vehicles are only semi-autonomous, which means that the human control over it is intact. Therefore, the human making the decisions at the time of driving is accountable for the error or inaccuracy of the vehicle. Under the present legal framework, driver is responsible for vehicle's wrongdoings because autonomous vehicles lack legal personhood.[12]In each scenario, the vehicle needs to perform and takes action in ways that can be traced back to the vehicle's design, programming, and human-encoded knowledge.[13]There is no need to reassess liability standards where human involvement in machine's decision-making is so obvious. As of now, the entities that assist in the development of the machine's cognitive functions are legally responsible for any malfeasance committed by or involving the device, whether negligently or intentionally. [14]

In contrast, one of the primary goals of autonomous vehicles is to reduce the amount of driver oversight required, both to maximize safety and to exploit the potential for increased productivity during long travels. As a result, in the case of completely autonomous vehicles, states should grant these vehicles some official legal status, making them legally responsible for their acts and decisions.[15] To ensure safety and security of users and by-standers on roads, autonomous vehicles must travel through complicated and rapidly changing situations, such as traffic, weather, and detours, and must make key judgments, such as which route to follow, which lane to be in, which exit to take, and so on.[16]

The concept of full autonomy is reduced by artificial intelligence theorists to the paradigm of computers that "sense-think-act" without human input or assistance.[17] Laws governing autonomous vehicles should grant these vehicles some kind of legal personality, recognizing that they are capable of causing harm and being completely liable for it, avoiding the difficulty of determining who is responsible.

12 David C.Vladeck, "Machines without Principals: Liability Rules and Artificial Intelligence" 89 *Washington Law Rev*. 121 (2014).

13 O'Brien v. Intuitive Surgical, Inc., No. 10 C 3005, 2011 WL 304079.

14 *Ibid.*

15 *Ibid.*

16 Dylan Le Valley, "Note, Autonomous Vehicle Liability—Application of Common Carrier Liability" *36 Seattle U.L. Rev.* 5-7 (2013).

INTERNATIONAL LEGAL FRAMEWORK IMPACTING INTRODUCTION OF AUTONOMOUS VEHICLES

The rapid growth of the Autonomous Vehicles (AVs) industry has inspired legislators and regulators around the world to create policy frameworks and regulations to allow for the safe testing and development of the technology. Over the last two decades, the autonomous vehicle industry has progressed a lot and has moved from science fiction to a very plausible reality in present times. The credit for developing this industry at a very rapid phase certainly goes to significant advances in the field of science and technology, especially in the field of Artificial Intelligence. In order to make the journey of Autonomous vehicles smoother digital and legal infrastructure around the world need to be strengthened and major countries around the world have taken initiatives in this direction.

Geneva and Vienna Convention

The Geneva Convention[18] and Vienna Convention[19] are international agreements that provide for the basic rules for road safety including traffic management, vehicular regulations and regulation of a driver. The Geneva Convention states that driver is any person who guides the vehicles that may automobile or driver by any animal. He should be able to change its direction and should be able to control them in physical manner. Similarly, the Vienna Convention requires that any moving vehicle must have a driver[20] and that every driver shall possess the necessary physical and mental ability and be in a fit physical and mental condition to drive[21]. The debates around definition, function and liability of "driver" have been crucial in shaping the debate over whether allowing autonomous vehicles on public roads. However, the Vienna Convention also states that: "*Vehicle systems that influence the way vehicles are driven and are not in conformity with the aforementioned conditions of construction, fitting and utilization, shall be deemed to be in conformity … when such systems can be overridden or switched off by the driver*"[22] This paragraph broadens the definition of "driver" to allow for a high level of autonomous navigation by vehicles as long as the driver has the ability to supersede or turn off the automated system. The Geneva and Vienna Conventions place a high value on the concept of the driver. The concept of a driver serves as a starting point for establishing rules to ensure safe road traffic interaction depending on the situation. This concept seems to be futile in case of Autonomous vehicles which aim at minimizing or nullifying the role of a driver. Thus, it becomes extremely important to revisit the above-mentioned provisions and draft suitable amendments to include autonomous vehicle under its domain. This

17 Ugo Pagallo, *The Law of Robots: Crimes, Contracts and Torts* 2 (Springer, Dordrecht Heidelberg New York London, 2013).

18 The Geneva Convention on Road Traffic, 1994.

19 The Vienna Convention on Road Traffic, 1968.

20 *Id*., art. 8(1).

21 *Id*., art. 8(3).

22 *Id*., art. 8(5).

step is highly necessary so as to set up legal principles at international level that would be of immense significance to establish uniform legal framework national levels with regard to autonomous vehicles.

United Nations regulations of Automated Lane Keeping Systems (ALKS)

The Regulation's objective is to provide consistent requirements for vehicle certification in relation to Automated Lane Keeping Systems. Without additional driver input, ALKS regulates the vehicle's lateral and longitudinal movement over lengthy periods of time. ALKS is a vehicle control system in which the activated system is in primary control. The resolution defines[23] "Automated Lane-Keeping System (ALKS)" as a driver-activated low-speed application that controls vehicle's longitudinal and lateral movement patterns for prolonged periods of time without requiring further driver input, keeping the vehicle within its lane at speeds of 60 km/h or less.

General standards for system safety and fail-safe reaction are also included in this regulation. When the ALKS is activated, it will take over some of the driver's duties, handling all failures and scenarios while not risking the safety of the vehicle's occupants or even other road users. Though, the driver always has the option to overrule the system at any time. ALKS is designed with a physical barrier that segregates traffic travelling in opposite ways and precludes vehicles from traversing across the vehicle's path. It can be induced in specific circumstances on roadways that restrict pedestrians and bicycles. The maximum operating speed for passenger cars under this regulation is 60 km/h.

The European Union

With present technology, the European Union has a comprehensive set of rules that regulate traffic. However, in European Union law, there is no legal definition of 'driver' or 'driving.' Nonetheless, the term "drivers" is mentioned in the Third Driving License Directive.[24]Despite significant efforts in this area, in European Union also there appears lack a regulatory framework for automated driving. The European Commission's study "*On the Road to Automated Mobility: an EU Strategy for Future Mobility*"[25] is crucial in this regard. The Commission presents a methodical strategy of European Union on automated and connected mobility, outlining a distinct, ambitious, and forward-looking European agenda. The legal and policy framework of the European

23 UN Regulation No 157 – Uniform provisions concerning the approval of vehicles with regards to Automated Lane Keeping Systems [2021/389] (OJ L 82 09.03.2021, p. 75, ELI: http://data.europa.eu/eli/reg/2021/389/oj).

24 European Union, "Directive 2006/126/EC of the European Parliament and the Council of 20 December 2006 on Driving Licenses" *Official Journal of the European Union*, 403–418 (2006).

25 European Union, "On the road to Automated Mobility: An EU strategy for mobility of the future" 283 (European Commission, Brussels, May 17, 2018) *available at*http://ec. europa.eu/ transparency/regdoc/rep/1/2018/EN/COM- 2018-283-F1-EN-MAIN-P ART-1.PDF. (last visited on June 18, 2022).

Union aims to be prepared to support the adoption of automated, connected, and secure transportation system.

INDIAN LAWS IMPACTING THE INTRODUCTION OF AUTONOMOUS VEHICLES

For Autonomous vehicles to run on roads it is necessary they should be included in the legal framework of the country. Provisions should be included in the regulatory framework providing and surrounding motor vehicles in India. There is currently no special legislation in India to control Autonomous or self-driving vehicles.

Motor Vehicles Act, 1988 ("MV ACT")

The Motor Vehicles, 1988 specifies the minimum legal age for driving a vehicle, as well as the liability and registration procedures. Section 2(9)[26] defines the term driver as the person who controls the steering of the vehicle. It also provides that no motor vehicle may be driven without a valid driving license.[27] Similarly section 2(10) defines a Driving license which is issued by competent authority to person above the age of eighteen years. Section 2(28)[28] and section 2(30)[29] defines a motor vehicle and motor vehicle owner. It says that vehicle should be registered in the name of owner but in case of Autonomous vehicles one major issue which surfaces is that who will be considered owner that is manufacturer of the supplier if software which operates and controls the vehicles. According to the Act, it is the responsibility of the owner of the vehicle to make sure that the aforementioned rules are followed. Herein a legal dilemma arises with regard to regulation of an autonomous vehicle that whether the obligation of the owner would still be relevant in case of autonomous vehicles. At this juncture, it is important that t he Act must be amended appropriately to allow for either a unique type of licence for autonomous vehicles or none at all. Additionally, it appears that the current age restriction is unnecessary for autonomous vehicle operation, as the vehicle would be driven by artificial intelligence.

Information Technology Act, 2000

One of the most important laws which will play a crucial role in the protection of owners' rights is the Information Technology Act, 2000. As Autonomous vehicles require and process a huge amount of data, concerns have been raised about misuse by various entities at different levels. Presently, provisions related to protection of these data can be found under this act, as currently, India doesn't have specific legislation relating to data protection. Privacy and data protection would primarily come under the Information Technology Act, 2000[30] ('IT Act') and Information

26 The Motor Vehicles Act, 1988 (Act No. 59 of 1988), s. 2(9).
27 *Id.*, s. 3(1).
28 *Id.*, s. 2(28).
29 *Id.*, s. 2(30).
30 The Information Technology Act, 2000 (Act No. 21 of 2000).

Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 ('IT Rules') which provides for the protection of Sensitive Data and Personal Information ("SDPI"). Section 2(k)[31] defines computer resource. Section 66 of the IT Act classifies hacking as the situation where someone who, with the intent to cause wrongful loss or damage, or knowledge of the same – "*destroys, deletes, or alters any information in a computer resource, or diminishes its value, or affects it injuriously*."[32] The scope of such regulations will be needed to be expanded to account for circumstances in which a hacker can take entire control of a vehicle by hacking into a computer or a central processor that controls autonomous cars and traffic coordination. In addition, laws will need to include measures for the security and appropriate use of passenger data, as well as the growing threat of hackers, cyber espionage, and conflict.

Consumer Protection Act, 2019

Damages caused due to negligence, manufacturing errors, defective design, failures to warn, misrepresentation, unfair commercial procedures, and warranty breaches are all covered by the *Consumer Protection Act, 2019*[33]. The issue of liability in an accident involving an autonomous vehicle may give rise to challenging legal problems. In comparison with the present situation wherein driver is held accountable for almost every mishap, manufacturers would be held to a higher standard of accountability with regard to autonomous vehicles. The 'right to consumer education' is also provided under the Consumer Protection Act, 2019.[34]The consumers are required to be educated thoroughly on functioning of self-driving vehicles and measures to be taken in case of emergency. Because driverless technology eliminates the possibility of human mistakes, accountability for a flaw in goods or a deficiency in services would fall on either the manufacturer or the technology supplier, depending on the situation. Given that customer concerns regarding liability could be a stumbling block to the acceptability of self-driving cars, a solution must be found.

The Consumer Protection Act, 2019, under section 2(34) defines productliability. So, if we regard Artificial Intelligence to be a product, the manufacturer is fully responsible for whatever harm it causes. Artificial intelligence is essentially a large piece of programming code, and programming codes loaded in a system is commonly considered to be a service rather than a product. This raises the question of whether AI is a service or a product. Rather than product responsibility, these situations are typically considered a breach of warranty.[35] Furthermore, it is possible that the owner or driver of a fully autonomous vehicle caused the accident, in which case the manufacturer, software developer, or both will be held liable for any damages caused by the autonomous car. As a result, regulations must be made to assign liability and

31 *Id*., s. 2(k).

32 *Id*., s. 66.

33 The Consumer Protection Act, 2019 (Act No. 35 of 2019).

34 *Id*., s. 18.

35 *Hallinan v. Fraternal Order of Police of Chi.* Lodge No. 7, 570 F.3d 811, 820 (7th Cir.2009).

specify the scope of contributory negligence in order to eliminate ambiguity and assign responsibility to the appropriate party which is an arduous task.

The Geospatial Policy, 2021

Since Autonomous Vehicles require to process huge amount of data hence Geospatial policy can play vital role in these vehicles as now data can be freely shared and licensed even to foreign companies.[36]

The Digital Personal Data Protection Bill, 2022

The goal of this Act is to establish guidelines for the processing of 'digital personal data' in a way that recognizes the need to process personal data for legitimate purposes while considering the individual's right to have their data protected. However, this bill is at the consultation stage as of now.[37]

CHALLENGES RELATING TO AUTONOMOUS VEHICLES IN INDIA

In present times the automotive industry is going through a paradigm shift. Vehicles were made by humans to make transport of people and goods easier and convenient.[38]Over the past years purpose has remained the same but vehicles have become more intelligent, comfortable, and secure. All this has been possible due to various technological innovations. At this juncture, it must be noted that Autonomous Vehicle are on the verge of becoming reality from merely being a figment of people's imagination. Challenges relating to Autonomous Vehicles can be multifaceted. In case of any accident, the driver is generally expected to take control of vehicles but in fully autonomous vehicles it would be tackled by the vehicle itself through artificial intelligence. Such situations make people a little awry of these vehicles. Furthermore, absence of a proper legal framework to deal with the situations where driver is absent or dormant creates a feeble scenario. Similarly if we see a driver learns a lot from his past experiences which he utilizes while driving which can come handy in difficult situations. In case of autonomous vehicles similar ethical issues like whom to save in case of vehicles like if accident occurs whom the vehicle is expected to save i.e. to save owner who has invested money or pedestrian[39], all these can be potent challenges for developers which time will witness how they get sorted out.

Particularly in India, autonomous vehicles will face a number of problems, including infrastructural challenges, economic challenges, right based challenges, etc. Road infrastructure is still evolving and far from equivalent to those seen in the Western world. Because the quality of roads and network service in the country is still

36 National Geospatial Policy, 2022.

37 The Digital Personal Data Protection Bill, 2022.

38 Transportation Research Board, "Review of the National Automated Highway System Research Program", TRB Special Report 253, National Academy Press, Washington DC, 1998.

39 A.H Herrmann, W.B Brenner, e*t. al., Autonomous Driving: How the Driverless Revolution Will Change the World* 97 (Emerald Publishing Limited, 2018).

inconsistent and autonomous vehicles require well maintained roads and high-speed connectivity, which are limited to urban areas it will be difficult to incorporate autonomous vehicles in India. In the west, ride-hailing and ride-sharing applications are the key drivers of autonomous car adoption. In some areas, hiring a driver is prohibitively expensive. In India, on the other hand, hiring a driver is still inexpensive. For acceptance in high-growth economies like India, the cost of automobiles incorporating these technologies must be competitive. Autonomous vehicles will only be successful if they are part of a network of autonomous vehicles and an advanced eco-system that works together to drive. Even advanced countries are at least 5 years away from commercializing driverless vehicles in some shape or another, despite numerous testing. While in India, where there is dearth of favorable conditions as well legal framework to govern them, it is even more challenging to incorporate an autonomous vehicle. Autonomous vehicles run on the concept of connected technology[40]. This implies that a huge amount of data will be processed and produced by these vehicles. It is imperative on the part of the Government to provide a robust data protection mechanism so that user's data can be protected and preserved effectively. In India, the focus on autonomous vehicles will be on supporting the driver in order to make roads safer, rather than on replacing them. It is expected that, autonomous vehicles will be available in India by 2025, at least at Level 3, which corresponds to partial automation. When it comes to driverless vehicles, safety is a huge worry. As the number of electronic components in autonomous vehicles has grown, so has the surface of attack.

WAY FORWARD

The World Automobile industry is moving towards automation. Many cars today have assisted driving technology and it won't be long before we see a fleet of cars that don't have anyone in the driver's seat. Almost every company in the world is trying to progress in this direction by assimilating the best available technologies. The ultimate aim is to achieve automation of Level 5[41]. Some of the points which can help in the effective rolling of this technology are as follows –

- Regulatory frameworks around the world today revolve around the notion of the driver. Since Autonomous Vehicles possibly will not have any physical driver in the driver's seat hence it becomes crucial that appropriate legislation should be made or existing ones should be amended. The phase at which technology is changing at the same phase law also needs to be changed else they can prove to be major hurdle.
- Since Autonomous Vehicles are heavily dependent on the use of Artificial Intelligence and if Artificial Intelligent entities are taking such important decisions

40 The Four Problems with Economic Data in India *available at* https://www.bloombergquint.com/opinion/the-four- problems-with-economic-data-in-india (Visited on July 10, 2022).

41 Philip Koopman & Michael Wagner, "Challenges in Autonomous Vehicle Testing and Validation" *SAE International Journal of Transportation Safety* (2016).

which could have a direct effect on our lives, then regulation of A.I. becomes more important through appropriate legislation at the state and global level.

- Since Autonomous vehicles Internet of Things (IoT) effort should be made to provide reliable digital infrastructure as connectivity is one of the major issues even today.
- Apart from connectivity data issue is also an area of concern. As a huge amount of data will be generated by these vehicles protection and sharing of it also raises many issues, hence efforts should be made at the national and international level by means of suitable legislation so that data can be shared without adequate safety and security.
- Efforts should be initiated to incorporate machine-readable signs and symbols.
- Public Perception plays a very important role in the success of any innovation and technology hence adequate steps and programmers should be floored so that people are not hesitant about adopting these vehicles as for year's people are accustomed to seeing the driver in the driver's seat and it can be quite surprising if he disappears all of sudden.
- Different countries have different traffic rules and sign and to code them into a machine learning software is not practically feasible for companies which can prove too costly hence efforts should be made to frame uniform rules.

CONCLUSION

Life nowadays is heavily dependent on technology which has become a very vital part of our lives as it makes our life easier and more comfortable. The automobile industry is one of the sectors which have felt the impact of growing technologies and Artificial Intelligence in recent time. The emergence of concept vehicles is one of the fine examples of this. *Cars are evolving to match the new paradigm. Soon, things like steering wheels, pedals, and rear-view mirrors will seem ancient. More practically, we will all be better able to optimize our time and attention to focus on more important tasks, family, work, and self-care."*[42] This shows the significant progress made in this direction. Autonomous Vehicles as the name suggests refers to vehicles that can drive themselves without any human intervention. They are also sometimes referred to as driverless, self-driving, or robotic vehicles. The desire for autonomous automobiles is not new, despite the fact that the traditional automobile provides individuals with control and power over a vehicle, as well as the feelings of freedom, mobility, pride, and joy. For decades, Autonomous Vehicles have been discussed in great detail, firstly as science fiction and then followed by many scientific articles. The ability of automated vehicles to handle a varied variety of traffic circumstances is critical for their ongoing development. It seems very coherent that suitable momentum for the development of autonomous vehicles has already been set and the world is gearing in this direction at a very adaptive phase. However, it is the need of the hour to prepare a robust legal mechanism to support the technical advancement. For this, it is necessary to establish a comprehensive legal framework at national as well as international level.

42 *Supra*note 39 at 230.

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THE CONUNDRUM OF GENDER AND TYPE OF SCHOOL: ASSESSMENTOF REFLECTION ON TRANSFORMATIONAL LEADERSHIP

Dr. Sarla Nirankari & Ms. Yachana Ranta***

ABSTRACT

Educational organizationsare among one of the sectors where the study of transformational leadership has drawn a lot of interest. The rationale of this study is to assess transformational leadership of secondary school teachers with respect to gender and type of school. In order to collect data, Transformational Leadership Scale by Dr. Surender Nath Dubey (Leader Form) was used to collect the data from randomly chosen sample of 200 secondary school teachers. During analysis of data, mean, standard deviation and t-test were used to arrive at findings.The study reported significant differences in practicing transformational leadership with respect to male and female. Study also investigated transformational leadership with respect to type of school and found significant differences among Private and government schools. Thus, study concluded that male teachers as well as Private school teachers have considerably more transformational leadership qualities, however difference is slightest bit. Therefore, it is recommended that female as well as male teachers and all types of school should adopt transformational leadership since it aids educators in inspiring one another to enhance and innovate in their classrooms and resolving problems .

Keywords: *Leadership, Transformational Leadership, Gender Differences, Type of schools*

1. INTRODUCTION

Leadership is the quality to influence the team members toward the completion of the goal of an organization. Leaders are the one who promotes vision, and creativity and seeks changes in the organization for the accomplishment of a goal. The leadership goal should be to motivate people, encourage them to work independently and motivate them to achieve the goal of the organization with their hard work and dedication. Higher education leaders still apply leadership style that is situational but failure to use model of transformational leadership can spoil efficacious management(Sunaengsih et al. 2021). Transformational leadership refers to a popular notion of leadership

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which has been investigated in both educational and business contexts (Menon,2016).Pounder (2008) analysed that teachers who observed as transformational influenced a variety of outcomes which includes more efforts from student side, students' perception of leader effectiveness will increase and also an rise in students' satisfaction with their instructor (Bolkan&Goodboy ,2009). Slavich (2005,2006a)was the first to use the term " transformational teaching" to explain the credence that teachers can foster meaningful changes in the lives of students if they analyse courses as stages upon which experiences can occur which change lives (Slavich& Zimbardo,2012).Transformational leadership can leads to transformative teaching and transformative teaching can provide intellectually challenging and encouraging students and can promote numerous opportunities for preflection and reflection.

1.1 Transformational Leadership

James MacGregor Burns(1978) defines leadership as either Transformational or Transactional (Bass & Riggio 2006). Transformational leadership has its roots in the Transactional Leadership theory. A transformational leader is one that inspires and motivates their team to achieve their objectives, develops a vision for the Individual as well as organization, and boosts the potential of both their followers and team members to perform at a greater level. Transformative leaders influence their followers by their charismatic actions and activities. By motivating their followers and team members, transformational leaders may change the workplace atmosphere.

The organisation, team, and society are all benefited by transformative leaders' efforts. In the transformational leadership style, leaders inspire, motivate, and encourage staff to make innovations and bring about change that advances an organization's growth, moves it closer to success, and promotes the growth of followers.. They put more attention on realism, cooperation and open interaction. Burns (1978) and Bass (1985, 1998) distinguished between transactional and transformational leadership (Epitropaki et al. 2002).

Due to its emphasis on the intrinsic motivation of followers, the advancement of the organisation, and lack of a sole focus on the social exchange process like transactional leadership, transformational leadership has emerged as the method of choice for researchers and practitioners of leadership theory (Bass & Riggio 2006). In certain ways, Transactional Leadership is expanded upon by Transformational Leadership, which raises the bar for leadership. Although charisma is only one aspect of transformational leadership, it seems very similar to charismatic leadership (Bass & Riggio 2006). Instead of simple exchange and agreements, Transformational Leadership does more with team members, followers and employees.

The "effectiveness among transformational leaders is measured by the effect of leader behaviours on followers; subordinates of transformational leaders verbalise feelings of admiration, respect, trust, and appreciation toward these leaders and are motivated to provide extra effort" (Webb 2007, p.54, Ghasabeh, 2015).

The transformational leader has a future vision to start anything and looks forward to achieving that together by combining all of the potencies, efforts, skills and

whereabouts of his employees and companions. According to Burns (1978), transformational leadership has various characteristics like 1) leaders and followers share a common goal that describes their values, motivations, desires, requirements, aspirations and prospects 2) The potential and motivational level of leaders and followers for achieving a goal will be different, although they share a common goal.3) transformational leadership is striving to develop an ongoing system by proposing a vision that encourages the development of a new society; 4) transformational leadership is that believes in carrying out a change through an active role and teaches the same to their followers. (Wahyuningdiyah, 2015: 33, Andriani et al.2018)

According to Bass (1998) "Transformation leadership motivates followers to do more than they originally expected to do"(Nilwala et al.2017).

Bass (2000) noted that leaders in the educational organization should practice transformational leadership in an effort for providing inspiration, intellectual stimulation and individual consideration toward teachers, students and parents (Supermane et al.2018). His investigation found that teacher graduates who join the education sector and became school leaders, later on, we're able to improve cooperation and commitment among teachers by practising transformational leadership.

1.2 Components of Transformational Leadership

Following are the components of Transformational Leadership :

Idealized Influence: Transformational Leaders are respected, trusted and serve as role models for their team members and followers. A follower wants to imitate them. Idealized influence has two aspects**: Idealized attributes and Idealized Behaviour**. The first one is elements that are accredited to the leader by their team members and followers and about the character of the leaders, who work for the good of the group: the second one is leaders' behaviours where leaders work with integrity. Leaders having a great spirit of Idealized Influence, have the potential to bear a risk and exhibit a high level of ethical and moral conduct. "Transformational leaders in applying idealized influence can see the good in others first and when it is not obvious they work to bring it out through continuous endeavour" (Avolio: 2005, Shibru et al. 2011).

Inspirational Motivation

Leaders who are transformational are always upbeat and enthusiastic. They act in a way that inspires, motivates, and encourages those around them. They foster a sense of unity among their supporters. By instilling passion and posing challenges, the transformational leader inspires followers and team members and advances them. The shared power principle is used, along with the ideas of establishing organisational vision, conveying the vision, challenging and constantly encouraging employees.

Intellectual Stimulation: Innovation and creativity are two important aspects of intellectual stimulation. By reframing problems and making new connections with old situations, transformational leaders encourage their followers to adopt new

approaches and be innovative and creative. They are positively motivated to adopt innovations or new approaches. Individual people and ideas are not criticised at all because they do not match their leader's ideas.

Individualized Consideration: This component of Transformational Leadership is related with those leaders who treats followers according to their needs and abilities(Bolkan& Goodboy,2009). Transformational Leaders act as a coach or mentors and pay attention to the needs of every individual follower for achieving the goals. Individualized consideration is practised with two-way communication; new opportunities are created for learning in a supportive environment. Leaders did not treat followers like just an employee but rather treat them as the whole individual. Transformational Leadership practised individualized consideration by coaching, mentoring and teaching the followers. They treat every individual's contribution as very important for an organization.

Transformational leaders demonstrate acceptance of individual differences and it makes performance beyond expectation.

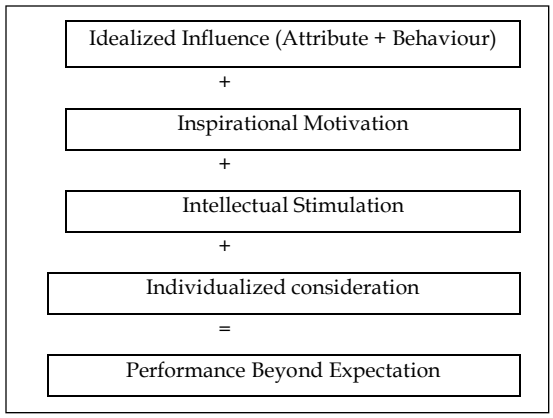

Figure 1.Transformational Leadership's Additive Effect

Source: Fransworth,Clark,Hall,Johnson,Wysocki& Kepner (2002. P.2)

Additionally, Transformational leaders establish a shared and inspiring vision for the future in their capacity as visionary pioneers. This helps organisations move toward developing new administrations and services. These claims tend to establish a favourable relationship between organisational innovations and transformational leadership initiatives. (Ghasabeh et al.,2015 p.1440)

1.3 Transformational Leadership in education

All students remember the one educator or tutor who especially motivated them in their childhood. These motivational figures have the ability to shift the direction of youthful lives. For certain children, one mentor that believes in them and shows them a way to progress is everything and trains them to accept that they have the

ability to excel. This change concerning leadership in education time and again comes from instructors submerged in transformational leadership theory. Transformational leadership is a model that can be used in schools by teachers and principals to lead by example and can inspire students as well as teachers to gain greater achievement levels. A true transformational leader strives to inspire and inspire others to become their best selves. Transformational educators try to work for the improvement of the school and focus on the institution's well-being rather than being self-centred and self-promotional. In order to create an atmosphere where an educational institution may change for the better, transformational leaders must possess a zeal for the mission of educational institutions and the ability to transmit this energy to others.

2. LITERATURE REVIEW

2.1Transformational Leadership reviews

Cobanoglu(2021) conducted a study. The study's objective is to examine the relationship between principals' management of diversity and their transformative leaderships from the perspective of the teachers. A correlation model was used, and 428 primary school teachers from Turkey's Malatya region were selected for study. Scales for transformational leadership, cultural intelligence, and diversity management was employed. Teachers' cultural intelligence, principals' diversity management, and their transformational leadership were found to have a moderately good relationship.

Kositpimanvach et al.(2021)in their study looked at the ideal and existing conditions of private schools in KhonKaen while also constructing a transformational leadership model. 2,482 private school instructors and 128 private school administrators made up the sample. According to the study, private schools were determined to have a moderate level of transformational leadership status. This implies that transformational leadership is insufficient. The level of transformational leadership among private school directors need to be sufficient to stay up with the times.

Mahzan&Nordin (2021) conducted a study to determine the association between the degree of job satisfaction among lecturers and the use of transformational leadership. Using the Multifactor Leadership Questionnaire by Avolio & Bass, transformational leadership practises are evaluated (2004). The sample was chosen using simple random sampling. The level of job satisfaction of lecturers and the director's transformational leadership practise are found to be significantly correlated.

Sulaxono (2020) started an investigation to determine the connection between transformative leadership, employee motivation, workplace discipline, and teacher effectiveness. In North Banjarbaru District, 101 instructors from 6 primary private schools participated in this quantitative explanatory study (Indonesia). 101 teachers made up the study's sample population. It was decided to collect data via a questionnaire, documentation, and observation. Work motivation, discipline, and transformational leadership all have a direct positive impact on teachers' performance. While it was discovered that transformational leadership indirectly affected teacher performance through job motivation and discipline.

Khatib (2020) examined Gender differences in leadership based on transformational and transactional styles in seven private schools in dubai. An explanatory sequential mixed method approach was used to analyse gender differences and its impact on being transformational or transactional leaders. A purposeful sampling was used to collect data from 43 English teachers (23 females and 20 Males). Study revealed that females have more transformational leadership than males

Djourova et al. (2019) analysed self-efficacy and resilience's function as mediators between wellbeing and the four pillars of transformative leadership (Idealized Influence, Inspirational motivation, Intellectual stimulation, Individualized consideration). Spain served as the study's location, and 225 social care workers were included in the investigation. The study's findings indicated that only two dimensions i.e. Idealized Influence and Inspirational Motivation ; have a favourable effect on self-efficacy, whereas the other two are detrimental.

Margana et al.(2019) undertook a study to ascertain the Influence of Transformational Leadership, Organizational Learning on Employees' Innovative Behaviour and Work Engagement. Using random selection, 71 instructors were selected as samples. The data was gathered via the questionnaire. According to the study's findings, transformational leadership has a favourable impact on teachers' innovative behaviour, work attachment, and organisational learning.

Francisco(2019) conducted a study. The study's goal was to look into how principals' transformational leadership approaches affected teachers' sense of self-efficacy. Data was gathered from a sample of 260 secondary school teachers. It was discovered that teachers' self-efficacy is highly impacted by effectiveness and contingent awards, but not by other transformational leadership variables.

Munir (2018). Researcher conducted a study to empirically investigate gender differences of school principal in terms of transformational leadership behaviours and impact upon teachers' academic effectiveness. Multifactor Leadership Questionnaire was used to collect data of 250 school principals and 2300 teachers. Study found that there is no significant differences in transformational leadership behaviours and negative significant relationship among transformational leadership behaviours and teachers' academic effectiveness

Noland et al.(2014) focused on "The relationship between transformational teaching and student motivation and learning," .Researchers look at the connections between motivation, learning, and transformative leadership in teachers. 273 college students make up the sample for the study (90 males and 183 females). Students' motivation was measured using scores on Richmond's (1990) motivation scale, Mottet and Richmond's (1990) revised affective learning scale, and Bass' (1990) Multi-factor Leadership Questionnaire version 6s (MLQ) (1998). According to the study's findings, both student affective learning and student motivation levels were substantially correlated with transformational teaching.

2.2 OBJECTIVES

Objectives of the study are following:

1) To examine the transformational leadership of Secondary School teachers with respect to gender.
2) To analyse the transformational leadership of Secondary School teachers with respect to type of school.

2.3 HYPOTHESIS:

$H_0$1. There is no significant difference between transformational leadership of school teachers with respect to gender.

$H_0$2. There is no significant difference between transformational leadership of school teachers with respect to type of school.

3.METHODOLOGY:

Descriptive survey method was used by researcher in order to collect the data as this study was descriptive in nature. The projected problem was envisioned to find out the transformational leadership among secondary school teachers with respect to gender and type of school. A total of 200 secondary school teachers constitute the study group. The investigator used the Scale of Transformational Leadership ,TLS - L(Leader) form by Dr. Surender Nath Dubey the Indian adaption of Multifactor Leadership Questionnaire by Bass and Avolio (5x) to find the transformational leadership of secondary school teachers. This scale consists of 16 items to measure transformational leadership. Leader form is to measure and rate their transformational leadership qualities themselves.

4. FINDINGS:

$H_0$1: There is no significant difference between transformational leadership of secondary school teachers with respect to gender.

Table 1: Comparison of mean scores between male and females of secondary school teachers for transformational leadership

Gender	N	Mean	Std. Deviation	Std. Error Mean	df	t ratio
Male	100	52.8100	6.80715	.68071	198	2.400
Female	100	50.4600	7.03874	.70387		

It is evident from the table 1 that the estimated t-ratio at the 0.05 level of significance is 2.400, which is higher than the table value. As a result, it is determined to be significant at the 0.05 level. Therefore, it may be argued that there are considerable gender-based differences in the transformative leadership of school teachers.. So, it can be concluded that there exists significant difference between transformational leadership of school teachers with respect to gender. The male school teachers are better transformational leaders than female school teachers as the mean score of

males are more than the mean scores of females. The sane results in mean scores are depicted by the Fig. 2 below:

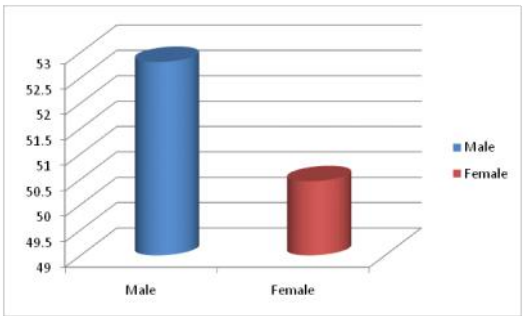

Figure 2

$H_0$2: There is no significant difference between the mean scores of transformational leadership of school teachers with respect to type of school.

Table 2:
Comparison of mean scores between Private and Government secondary school teachers for transformational leadership

Gender	N	Mean	Std. Deviation	Std. Error Mean	df	t ratio
Private	100	52.7700	7.20249	.72025	198	2.316
Government	100	50.5000	6.64770	.66477		

Table 2 makes it clear that the estimated t-ratio value, 2.316, is greater than the value of the table at the 0.05 level of significance. As a result, it is determined to be significant at the 0.05 level. So, it can be stated that there is a sizable difference between the mean scores of teachers' transformative leadership in regard to private and public schools. So, it can be concluded that there exists significant difference between the mean scores of transformational leadership of school teachers with respect to Private and Government school. The Private school teachers are better transformational leaders than Government school teachers as mean score of Private school teachers is more than the Government school teachers. The same results in mean scores are depicted by Fig. 3 below:

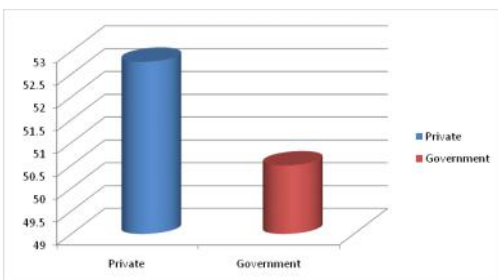

Figure 3

5. DISCUSSION

This study's major goal was to look at the gender differences in secondary school teachers' transformational leadership and transformational leadership in terms of the types of schools. Male teachers were found to be more transformative than female ones. However, empirical data on gender differences and types of schools in transformational leadership of teachers is limited .The findings are similar with researches conducted by (Ismail, Ahmad & Aman,2021) that results reveal significant differences between male and female principals of secondary schools practicing transformational leadership style, (Reuvers et al.,2008) also analysed that Male have more transformational leadership traits then female and likely to be more risk-tolerant (Mueller,2004) however (Silva,2017,Burke & Collins,2001) exhibit that female leaders have more transformational leadership qualities than male leaders. Moreover (Bakare &Oredein, 2021) examined a comparison of secondary public and private school principal leadership styles and discovered that there is a notable variation between the leadership philosophies used by the two school types. Kositpimanvach et al., 2021in their study rated moderate level transformational leadership model of khonkaen private schools .Balasubramanian &krishnan,(2012) demonstrate that masculinity contributes more variation to the explanation of transformative leadership while femininity strengthens it.Transformational leaders can positively change the status quo in their organizations by practicing appropriate behaviour at each transformation process stage (Bass &Steidlmeier, 1999 & Sunaengsih,2021).In order to practise transformational leadership, leaders in higher education are expected to use every indicator and every combination of the different dimensions of transformational leadership (Sunaengsih et al. 2021) .(Waqar & Siddiqui,2008) found private school principals more task oriented then public sector principals.

6. CONCLUSION

The study was directed to explore the gender differences in transformational leadership of secondary school teachers and differences with respect to type of school. The study reported significant differences in mean scores of transformational leadership of secondary school teachers in term of gender and type of school. The research findings reveal that male teachers display more transformational leadership qualities than female teachers .It can be argued that transformational leadership style of male and female differ to some extent since male teachers have obtained higher mean value than female teachers. When these traits of transformational leadership are present in an organization's leaders, it is a clear sign of how successfully the organisation is moving towards its goals, sustaining development, and addressing both internal and external environmental issues. To become cutting-edge organisations that can adjust to shifting surroundings in all dimensions, including social, economic, cultural, political, informational, and technical, both public and private organisations must do this.

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MATERNITY DISCRIMINATION IN THE WORKPLACE: A CRITICAL ANALYSIS OF THE MATERNITY BENEFIT ACT IN DELHI NCR

Chaitali Wadhwa & Dr. Shaharyar Asaf Khan***

ABSTRACT

Gender norms influence women and dictate women's work both inside and outside the home. Women are expected to prove their efficiency in both areas, and as a result of juggling multitude of tasks, they face physical, psychological and emotional disorders, including stress anxiety, and depression. Despite the heights women achieve in their professional lives, patriarchal societies continue to associate childbearing and child-care as their main task in life. Female employees strive to prove their worth at their workplace, while managing the childcare responsibilities in their domestic life. Employers therefore tend to see the mothers in the workplace as less committed to their jobs. Pregnant female employees and new mothers are treated differently compared to non-pregnant workers. This differential treatment is popularly known as maternity discrimination. Through this paper, the authors aim to highlight the maternity discrimination faced by women workers in the organised sector across Delhi NCR. The research presents data collected through a survey. The research is supported with provisions of legislation in India, and the law is critically analysed. The authors then make suggestions to increase equality and make the workplace environment more welcoming for pregnant women workers and new-mothers.

Keywords: *Maternity Discrimination, Pregnancy, Maternity Benefits, Equality, Inclusiveness.*

I. INTRODUCTION

Gender norms influence women and dictate women's work both inside and outside the home. Studies have shown that employers' attitudes about role of women at a workplace are directly associated with the amount of time men and women spend on household work. This means, women are often perceived as lesser effective leaders and problem solvers when compared to their male counterparts. Such stereotypes diminish a woman's opportunities for advancement (Chai et al., 2021).

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Maternity presents employers and employees with challenges that are not traditionally present in a male-dominated workforce (Salihu et al., 2012).Despite the existence of legal rights, pregnancy is a time when a working woman's life changes in many aspects (TUC, 2014). Pregnancy and maternity discrimination is said to occur if there is a *"bias in matters of recruitment, selection, or distribution of opportunities among candidates, who have similar qualifications or skill sets, the point of difference being pregnancy and maternity"*(Kim et al., 2019).The discrimination may impact a woman employee's decision to postpone or refuse childbearing, giving birth to fear that their employer may not have any interest in promoting them(Isaacs, 1995; Kim et al., 2019).Pregnancy discrimination is a significant barrier to achieving equality of genders in the workplace (Russell & Banks, 2011).

The focus of the paper is to highlight the influence of pregnancy and maternity on women's experiences at the workplace, specifically focusing on discrimination. The paper addresses the limitations of the legislation in India. The authors provide suggestions to make the workplace inclusive and employee-friendly for new mothers and pregnant women. To carry out the research, a survey was conducted among working women in Delhi NCR. The results have been discussed in the course of this paper.

II. THE PROBLEM

"It is not easy for women to play the twin roles of a professional and a mother

(Verma & Negi, 2020)."

To prove their efficiency and worth at the workplace and home, women juggle a multitude of tasks, and face fatigue, stress, anxiety, depression, or psychological disorders. The *"long iceberg of guilt*(Verma & Negi, 2020)"lead to anxieties among working mothers, that it is their responsibility to be available for their children at all time. Females have reported higher levels of stress at work, and more family conflicts that cause obstacles in their career development. In addition to the disadvantages associated with gender, pregnant women and new mothers face a plethora of problems at their place of employment(Correll et al., 2007). They are seen as a liability rather than an asset. The employer may believe that the newmother is less-driven and more distracted, as compared to other co-workers(Salihu et al., 2012). Expecting women and new mothers are viewed as more irrational, more emotional, and less competent in the workplace.Research (Correll et al., 2007) shows that mothers at the workplace are penalized for being a parent – evidenced by the discrimination faced in terms of behaviour and salary. Motherhood affects perceptions of competency, whereas fatherhood attracts a bonus, which is termed*"the fatherhood premium"*.

The justification used is that mothers' lack of productivity stems from their dissipated reserves of energy, set aside for caring for their children(Correll et al., 2007). Existing literature lays down four main theories explaining the reasons why working mothers face discrimination in the workplace. Since women are expected to be mothers at some stage during their lifetime, they are given unequal career opportunities in

comparison to men. The *Social Dominance Theory* justifies practices that sustain social inequalities, and the *System Justification Theory* justifies the status quo (Verniers & Vala, 2018). The unavoidable characteristics of motherhood coupled with stigma, stereotype content, social roles, and role congruity, contribute to the discrimination.*Social Theory* suggests that employers view working mothers as less efficient employees who are more likely to leave their jobs to raise their children(Verma & Negi, 2020).

Pregnancy-related discrimination at the workplace is measured on a six-pointer scale, covering the aspects of hiring, promotions(Verniers & Vala, 2018), pay, deployment, training, and lay-offs(Kim et al., 2019). Mothers are also subject to harsher standards of performance and punctuality and are rated as less promotable, or less likely to be recommended for management (Correll et al., 2007).

Women in the workplace may also be victimsof normative discrimination. Employers or other employees may feel that a woman's duty is at home, and she should not be in the workplace. Though the mother may be competent at the tasks assigned, her duty towards her family should act as a prohibition on her involvement at the workplace.

The European Court of Justice, through its rulings, has recognized the harmful effects of unlawful, discriminatory dismissal on the physical and mental state of women. In the case of C.D. v S.T. [2014] EUECJ C-167/12, the question to be determined was what Directive protects to commissioning mother's maternity period. In this judgement, the Grand Chamber of the European Union acknowledged that maternity leave intends to protect the special relationship between mother and child.

III. DATA COLLECTION AND FINDINGS

The authors carried out a survey to analyse whether women faced pregnancy and maternity discrimination at their workplace. The sample comprises 100 respondents working in the organized sector in Delhi NCR. Questions included awareness on maternity laws in India, availability of maternity leaves, types of discrimination faced in the workplace, differential treatment (if any) during pregnancy and maternity, and questions on creche facilities.

When asked about the type of differential treatments exercised by employers, women were given the following options, and were free to choose more than one option –

a. Biasness in incentives/ special projects
b. Change of behaviour of colleagues/ employer
c. Denial or delay in promotions
d. Difficulty in job change/ recruitment
e. Dismissal from job
f. Loss of bonus/ salary or special incentives
g. Not counting maternity as part of work experience
h. Indifference toward special needs

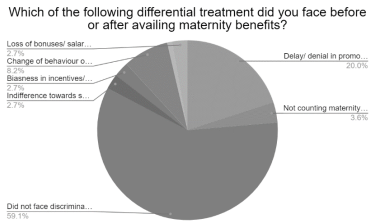

Figure 1

Figure 1 shows that 41% of women faced at least one type of differential treatment by employers and colleagues.

Since the respondents were free to choose more than one option in the previous question, the data was then compiled to see whether women were facing more than one type of discrimination at the workplace. The results have been shown below.

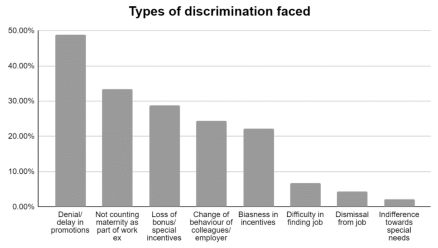

Figure 2

Figure 2 indicates that the most common differential behaviour was delay or denial of promotions. Almost half of the women were denied promotions (timely, or entirely) due to their pregnancy and maternity. Approx. 34% of women expressed their grievance that their maternity leaves were not counted as a part of their total work experience. 29% of women faced a loss of bonus or special incentives, as a result of their pregnancy. 24% of women stated that their colleagues and employers treated them differently upon learning of their pregnancy. A similar percentage of women also said there was bias in incentives, and they were not given equal opportunities to contribute and partake in special projects.

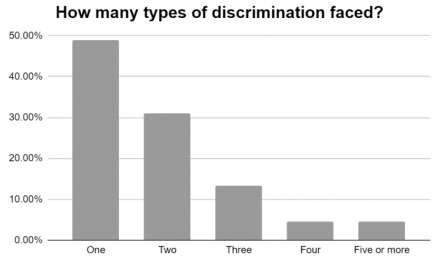

Figure 3

As depicted in Figure 3, almost 50% of the women were victims of one type of discriminatory treatment. 31% of the respondents faced a combination of two types of differential treatments. Around 13% of the women were subjected to discrimination in three ways, and the remaining 2% were victimized in four or five different ways.

IV. LEGISLATION IN INDIA

The idea of maternity benefits arose partially from the concerns around the mother's and child's well-being. Maternity leaves are a health and welfare measure, generally available to mothers only, intending to protect the health – mental and physical – of the mother and new-born child. They are also linked to family functioning and financial security. Maternity leaves may be availed before, during, and immediately after childbirth. Maternity protection laws are necessary for the continued financial independence and self-reliance of women.

The extent to which women employees are covered by maternity protection can be understood by distinguishing between legal and actual coverage. The former, also known as coverage in law, aims to estimate the scope of the legislation. The latter, also known as coverage in practice, or effective coverage, determines the extent to which the law is implemented. It can be measured in terms of actual beneficiaries, and protected persons (Addati et al., 2014).Policies play a significant role in mediating the effects of pregnancy, childbirth, and childcare on a woman's employment(Russell & Banks, 2011).

The primary statute which lays down provisions is the Maternity Benefit Act, 1961 (hereinafter, The 1961 Act) read along with the Maternity Benefit (Amendment) Act, 2017 (hereinafter, The Amendment Act). The 1961 Act received the assent of the President on 12th December 1961. It extends to the whole of India. The Amendment Act became effective on 1st April 2017, except for the provision that required a creche facility to be provided by the employer, which came into effect on 1st July 2017.

The Maternity Benefit Act, 1961 has been enacted in furtherance of Article 42 of the Constitution of India, 1950. It aims to protect the dignity of motherhood, and provide healthcare and monetary benefits to the working woman. The Act applied to all establishments, including factories, mines, plantations, establishments of the Central or State Government, shops, and local bodies, employing 10 or more employees. It provided women with maternity leave for 12 weeks, during which they were entitled to receive full wages, but no additional facilities. To claim benefit under the Act, a woman must have been working as an employee for a period of at least eighty days within the past 12 months.

The provision under the 1961 legislation did not meet the ILO's standard of a minimum of 14 weeks of maternity leave. The World Health Organisation has gone a step further to suggest a minimum period of 24 weeks for maternity leave (Nikore, 2018). The 1961 Act did not extend to women working in the unorganized sector. The Law Commission of India made recommendations in the year 2015, suggesting allowing women working in the unorganized sector to get the relief of maternity leaves and

other maternity benefits. The Commission also recommended an increase in the period of maternity leave to 24 weeks.

The principal act was amended, and the Maternity Benefit (Amendment) Act, 2017 was enacted taking into consideration various issues faced by women before and during childbirth. Gender discriminatory practices exist in the workplace, and have been exacerbated with the amendment of maternity benefit laws in India (Uma & Kamath, 2020). It does not mean that providing a longer duration of maternity leaves has made mothers less employable, but rather that the patriarchal mindset of employers has found a justification for treating women employees differently than their male counterparts.

The 2017 Amendment Act entrusts a duty upon employers to make their employees aware of maternity benefits available to them. It doubled the duration of maternity leaves from twelve weeks to twenty-six weeks. Of this duration, eight weeks' leave can be availed before delivery; the remaining balance availed after delivery. India now qualifies among the top sixteen countries having the longest paid leave for new mothers. The exception to this provision is if a woman has a third child. Then, she may get only twelve weeks of maternity leave, of which six weeks can be taken before delivery and the rest, after.

Another significant change in the Amendment Act is the introduction of leaves for adoptive mothers and surrogate mothers. The commissioning mother (the biological mother who uses her egg to create the embryo planted in another woman), and the adoptive mother (the woman adopting a child) can take maternity leave for twelve weeks if the child is less than 3 months old. A woman using her egg to create an embryo planted in another woman can also take maternity leave for twelve weeks.

The Amendment Act lays down a provision for creche facilities, within a prescribed distance for establishments with over fifty employees. The Amendment also allows mothers to visit the nursery, up to four times a day, and during intervals, to take care of their children. It provides the option of working from home after availing maternity leave, provided the nature of work is such, and there is a mutual agreement between employer and employee.

Respondents were asked whether they are aware about the benefits provided under the 2017 Amendment. 83% of the respondents responded positively, data of which has been provided below in Figure 4.

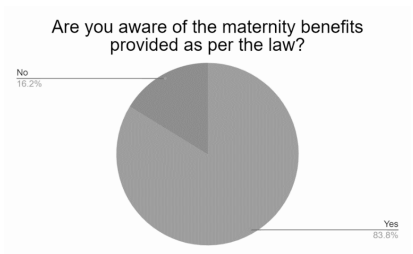

Figure 4

V. CRITICAL ANALYSIS

The journey of maternity protection laws in India indicates that there has been growth and progress to accommodate concerns of working women. Though the government understands the need to address issues of working women's welfare, the implementation of the provisions of the Act is far from ideal. The introduction of the Amendment Act has both positive and negative impacts. Women are getting a longer leave with pay, which consequently improves job security. However, it is not entirely a rosy picture.

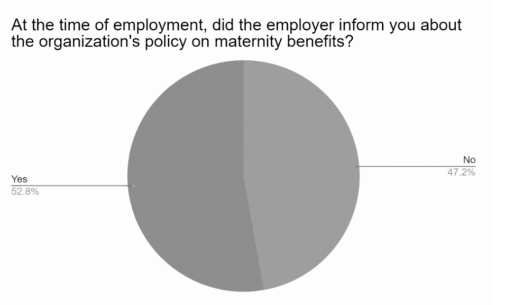

Figure 5

As the above figure indicates, over 47% of employers did not comply with the legal requirement of informing the employee of the organization's policy on maternity benefits.

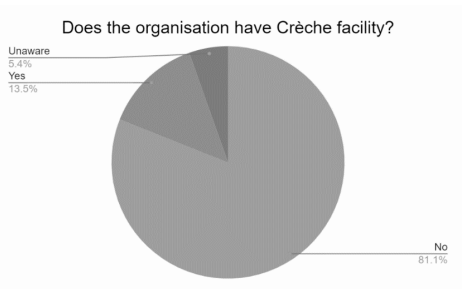

Figure 6

During pregnancy and maternity, women require special accommodations, such as less strenuous work, and the provision of a creche facility. Figure 6 depicts that 81% of the organisations, where the respondents work, do not provide a creche facility.

Further, Figure 7 shown below, highlights that of the 13% where a creche facility was available, only 11% of employers allowed four or more breaks, as mandated by the legislation. The most common response – as given by 72% of women – was that there was not a fixed provision for the number of times they could visit the creche.

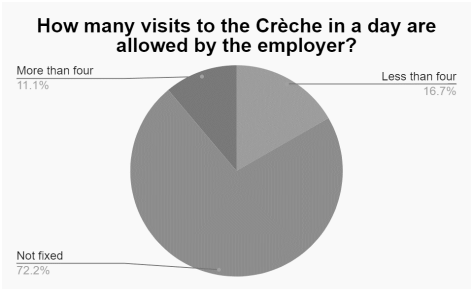

Figure 7

Due to its restrictive applicability, the Maternity Benefit Act, 1961 – read along with the 2017 Amendment – has *"the potential to foster gendered discrimination at the workplace"* (Mathew, 2019). Post the 2017 Amendment, maternity protection is available to all mothers – biological, adoptive, and surrogate. The law, however, does not make a provision for paternity leaves, attracting criticism of the non-recognition of males as the primary caregiver in a family. Legislation that denies leave to men perpetuates gender-based employment discrimination and stereotyping. (Karr, 2017)

The Amendment Act has also increased the duration of maternity leaves from twelve weeks to twenty-six weeks. The provision brings with it a limitation, that it addresses *"merely the manifestation of the discrimination, and not the root cause"* (Uma & Kamath, 2020). Moreover, due to its limited applicability, the law does not prevent pregnancy-based discrimination in private enterprises. (Uma & Kamath, 2020)

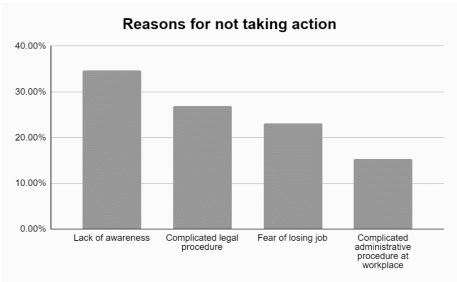

Figure 8

When asked why respondents did not take action against the non-compliance of maternity benefits provided under the law, the most common answer – given by over 30% of respondents – was the lack of awareness. This was followed closely by complicated legal procedures and the fear of losing one's job. About 15% of the women also stated it was due to complicated administrative procedures at the workplace.

VI. SUGGESTIONS FOR INCLUSIVENESS

"Employment in itself does not create dissatisfaction; rather it is the work environment that creates obstacles for a working mother"(Verma & Negi, 2020).

Complete elimination of gender discrimination in the workplace is crucial for the creation of a woman-friendly environment. An increase in working women inthe workplace highlights the need to frame policies that protect women during pregnancy, post-delivery, and during maternity(Salihu et al., 2012). Maternity leaves can have the dual impact of contributing to the mother's well-being, and also proving to be beneficial for business. Not only do maternity leaves improve employee retention in an organization, but they also reinforce company values and motivate female workers to return after their break (Verma & Negi, 2020).

Nestle's Maternity Protection Policy(Nestle, 2015) can provide a guiding framework to support gender equality and provide employment protection in the workplace. The policy rests on five prominent pillars of inclusiveness –

1. Maternity protection
2. Employment protection and non-discrimination
3. Healthy work environment
4. Flexible work arrangements
5. Conducive work environment to breastfeed

For effective implementation, employers should inform their employees of policies for maternity protection. They should provide counselling and support for new mothers, and make arrangements for on-site childcare facilities, or referrals to childcare services. (Nestle, 2015)Employers should make arrangements for childcare facilities like creches. Options of flexible working hours and short-term family-related leaves have the potential to promote gender equality. (Kim et al., 2019; Nestle, 2015; TUC, 2014)

Other good practices that may help include information and training sessions on leave policies; occupational safety and health during pregnancy; maternity planning among workers and employers; coaching and stay-in-touch policies during leaves; updates, counselling, and gradual return to work; temporary part-time arrangements; and family-friendly working timings (Addati et al., 2014). The State's engagement can further act as a course of remedy to tackle pregnancy discrimination(Uma & Kamath, 2020). Non-compliance by employers with provisions for the elimination of pregnancy discrimination could attract punitive punishments. On the other hand, organizations providing maternity benefit policies should be eligible for incentives, whether monetary or otherwise.

From the legal lens, it may be beneficial to build upon reproductive scholarship, identifying maternity laws as a separate legal field requiring detailed exploration and analysis. The judiciary and legislation drafters must introduce reform to recognize, acknowledge, and prevent the discriminatory practices that women workers must constantly endure during pregnancy and post-childbirth. Women's rights before and after giving birth need more attention. Maternity rights would be able to develop more efficiently if the legal framework is expanded to recognise the attached physical, psychological, and emotional obstructions.

The law should be re-worded to allow both male and female employees to visit their children in creches during the day. Increased parity in parental leaves may prevent women from being discriminated against in the workplace. A change in the law could help facilitate a change in the thinking of society, leading to the recognition and acceptance that childcare is not the sole responsibility of a woman.

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EQUALITY RIGHTS VIS A VIS CONCEPT OF RESERVATION

Shivank Sharma & Jhanvi Sharma***

ABSTRACT

*The paper talks about the doctrine of egalitarianism which talks that all people are equal and deserve equal rights and opportunities in every society, these "**EQUALITY RIGHTS**" are covered under Article 14 – Article 18 of the constitution[1]. These equality rights strike down the arbitrariness that is moving way forward in our Indian society, where the arbitration takes place there must necessarily involve a negation of equality in the society. The entire constitutional framework in our nation is based on the principle of rationality and arbitrariness Inequality takes place when equals are treated unequally and when are treated as equals. The paper also talks about the absoluteness of equality rights in our country which further talks about the privileges which are provided to backward classes of the society which are now not as backward as they were at the time of the independence or before that, Reservations are some of the perfect examples which depict that these equality rights are not absolute[2]. Non–citizens of India have the same rights as citizens. Article 14 is brought under the basic structure of the rights which we further called The Fundamental Rights of a citizen. Article 14 of the Indian Constitution, which guarantees the right to equality before the law and equal protection of the law, is a fundamental right that was included in the original Constitution[3].*

INTRODUCTION

Since earlier times, much of human thinking has been roaming around to provide man with certain essential, basic, natural, and inalienable rights and freedoms,the power of providing these rights and freedoms is absolutely in the hands of the sovereign authority of the state. Likewise, the Partb! of the Indian constitution deals with the fundamental rights of citizens of the country. fundamental rights and freedoms are provided for human personality development as well as to hold their dignity

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1 The Constitution of India Part III, ART 14-18

2 The Constitution of India Part III, ART 14-18

3 The Constitution of India Part III, ART 14-18

and respect in society. The main motive behind providing these inalienable rights is that if at any point in time when one human does not have any food to eat, shelter to live or cloth to wear he must have these guaranteed fundamental freedoms and rights which cannot be taken away easily from him, in this form he also gets an opportunity to earn his livelihood. Further, it is also stated that government cannot make any move or take any action either administrative or legislative by which certain fundamental rights are infringed. a law which is curtailing or infringing a fundamental right would be declared to be unconstitutional[4].

Now, what we need to talk about is this while vesting these fundamental freedoms and rights to the citizens of the country there should not be discrimination on any of the grounds either religion, gender, caste, color, etc.for this our constitution has vested us with ***'EQUALITY RIGHGTS'***which what we called it has right to equality comprising Articles 14 to 18 of which Art. 14 is the most important[5].Article 14 of the Indian Constitution is the cornerstone of the Indian legal system and one of the most important fundamental rights enshrined in the Constitution. The article states that all citizens of India are equal before the law and are entitled to equal protection under the law without discrimination based on religion, race, caste, sex, or place of birth[6]. It is a fundamental right that guarantees the right to equality and non-discrimination, which is crucial for a democratic and just society.

RIGHT TO EQUALITY GUARANTEES THE FOLLOWING RIGHTS:

- Article 15 prohibits discrimination against citizens on either of the grounds or specific grounds, includingrace, place of birth, etc.
- Equal opportunity is guaranteed to Indian nationals under Article 16 in situationsinvolving public employment.
- The Indian constitution's Article 17 outlaws untouchability.
- Article 18 also bans titles, other than those conferred by the military or for academic achievement[7].

Also, article 16 has been a great concern in recent times because of the problems of the reservations in public services. articles 14,15 and 16 are supplementary to each other[8].

- ❖ It was also worthwhile to note that Article 7 of the Universal Declaration of Human Rights, 1948 declares that all are equal before the law nobody is above the law, a law of a state or universe is supreme or sovereign, and are entitled without any discrimination to the equal protection of laws[9].

4 The Constitution of India Part III, ART 14-18
5 The Constitution of India Part III, ART 14-18
6 The Constitution of India Part III, ART 14-18
7 The Constitution of India Part III, ART 14-18
8 The Constitution of India Part III, ART 14-18
9 The Constitution of India Part III, ART 14-18

We all very well know that our country i.e., India is one of the most famous democracies of the world and is well known as the largest democracy in the world but still the problems like discrimination and other evils still exist in our country.Article 14 affirms that there should be a total shutdown of the arbitrary actions of the state either administrative or legislative in nature[10].

'EQUALITY BEFORE LAW'AND 'EQUAL PROTECTION OF LAW'

Article 14 talks about the two concepts i.e., 'equality before the law' & 'equal protection of law'. The former is the negative concept that nobody does have special privileges all are equal to the law of the land whatever could be the position of the person[11]. In simple words, equality before the law means that the law must be vested and administered equally in society. The ability to bring a claim and be brought a claim for the same cause of action must be equal for all parties regardless of age, religion, sex, creed, color, caste, etc. basically, article 14 talks about equal treatment and similarity of the treatment towards its citizens by the state[12]. Equality before the law& equal protection of the law is considered the quintessence of the right to equality. The latter is positive in content it postulates that application of the same laws alike and without discrimination to all persons similarly situated i.e., equal treatment in equal circumstances. As all persons are not equal by nature or circumstances, the unique needs of different classes or sections of people require differential treatment. Where persons or groups of persons are not situated equally to treat them as equals would itself be violative of Article 14 and thus could result in arbitrary action. The principle of equality of law thus means not that the same law should apply to everyone but that in a law dealing alike with all-in-one class, there should be equality of treatment under equal circumstances. it means that equals should not be treated that unlike and unlikes should not be treated, this could be explained with the help of an example as under[13]

- Government under public distribution system evolved as a system of distribution of food grains at affordable prices to the economically weaker section of the society or the people living below the poverty line, providing food grains to that section of the society at lower prices due to there low earnings is not at all a move of discrimination or biases. It matches the upper class's level because the higher earning class can afford the regular prices of the food grains but the poorer section of the society cannot[14].

VARIOUS EXCEPTIONS TO 'EQUALITY BEFORE THE LAW'

The concept of equality before the law has some exceptions[15] in it. this certainly

10 The Constitution of India Part III, ART 14-18
11 The Constitution of India Part III, ART 14-18
12 The Constitution of India Part III, ART 14-18
13 Author's own analysis
14 The Constitution of India Part III, ART 14-18
15 The Constitution of India Part III, ART 14

shows that the concept is not absolute in nature, these exceptions are covered under Article 361 of the Indian constitutionwhich is given as under:

I. Protection of President and Governors and Rajpramukhs

a) No court has the authority to hold the state's president, governor, or rajpramukhs accountable for how they handled their official responsibilities or for any actions they took as part of those responsibilities. The president or Governor of the state shall be immune from the criminal proceedings instituted against him during his term of office.

b) No court can issue a process of arrest or imprisonment to the President or the Governor of the state during his term of office.

c) During their terms in office, neither the President nor the Governor of the state may be the subject of a civil process in which relief is sought without first giving them two months' notice[16].

II. Article 361A, Article 105 & Article 194

Article 361A of the Indian constitution states that no member of the Parliament or member of the state legislature is obliged to appear before the court in case of civil or criminal while the session is going on.

Additionally, according to Articles 105 and 194 of the Indian Constitution, no member of the parliament or state legislature is held accountable in court for their statements, votes, or other actions taken in the house[17].

III. Additionally, foreign sovereigns, diplomats, and ambassadors cannot have any criminal or civil proceedings instituted against them[18].

HISTORICAL BACKGROUND ON ARTICLE 14

Article 14 of the Indian Constitution is one of the fundamental rights guaranteed to the citizens of India. It specifies that "The State may not refuse anybody living on Indian territory equality before the law or equal protection under the law." All people are treated equally before the law under this provision, regardless of their race, religion, caste, gender, or place of birth[19].

The historical background of Article 14 can be traced back to the Indian independence movement, where leaders like Mahatma Gandhi, Jawaharlal Nehru, and Dr. B.R. Ambedkar advocated for equality and justice for all citizens. The idea of equality before the law was also inspired by the American Constitution and the French

16 Rajagopal, B. (2005). The judicial protection of Socio-Economic Rights in India: A Comparative Perspective Human Rights Quarterly, 27(3), 913-937

17 Rajagopal, B. (2005). The judicial protection of Socio-Economic Rights in India: A Comparative Perspective Human Rights Quarterly, 27(3), 913-937

18 Constitutional Assembly Debates, Volume VII, 24TH Oct. 1949

19 Constitutional Assembly Debates, Volume VII, 24TH Oct. 1949

Declaration of the Rights of Man and the Citizen.

During the Constituent Assembly debates, the framers of the Indian Constitution debated the concept of equality and its application in Indian society. Dr. B.R. Ambedkar, who was one of the main architects of the Constitution, argued that the principle of equality should be included in the Constitution to counter the discriminatory practices prevalent in Indian society at that time.

Article 14 was finally incorporated into the Constitution on 26th November 1949, along with other fundamental rights, as part of the Constitution of India. Since then, it has been a cornerstone of the Indian Constitution and has been used by the judiciary to strike down laws and policies that violate the principle of equality before the law.

Over the years, Article 14 has been interpreted by the Supreme Court of India in various landmark judgments, including the Kesavananda Bharati case, the Maneka Gandhi case, and the Indra Sawhney case. These judgments have expanded the scope and application of Article 14, and it has been used to protect the rights of marginalized and disadvantaged sections of society[20].

BRITISH COLONIAL ERA

During the British colonial era, Indian people were subject to a discriminatory legal system that provided unequal treatment under the law. The British rulers enacted laws that favored their interests and generally discriminated against Indians [especially the lower class][21].

The historical background of Article 14 reflects the country's long struggle for independence and social justice. It's a reflection of the ideals and values that inspired the freedom fighters and leaders of the Indian independence movement. The provisions ensured that all citizens are equal under the law. It's a testament to India's commitment to Democracy, Equality, and social justice[22].

The struggle for independence from British rule was not only about political freedom but also about social and economic justice. The Indian national congress which was at the forefront of the freedom struggle demanded equality for all irrespective of their caste, religion, or gender.

The principle of equality was enshrined in the constitution as Article 14 after a long and hard-fought battle. Article 14 was inspired by the American constitution which also contains provisions for equal protection of law. However, the Indian constitution goes beyond the American constitution by prohibiting discrimination and adopting positive discrimination[23].

20 Constitutional Assembly Debates, Volume VII, 24TH Oct. 1949

21 Universal Declaration of Human Rights, Article 7.

22 U.S. Constitution, 14TH Amendment.

23 Governmentof India Act, 1935.

THE DRAFTING COMMITTEE

The drafting committee played a significant role in the framing of Article 14 of the Constitution of India, which deals with the Right to Equality. The drafting committee was a committee of the Constituent Assembly of India, which was formed to draft the constitution of India[24].

The committee was chaired by Dr. B.R. Ambedkar and consisted of seven other members, including Alladi Krishnaswamy Ayyar, K.M. Munshi, and N. Gopalaswami Ayyangar. The committee was formed in 1947, soon after India gained independence from Britishers[25].

The drafting committee carefully considered the language and phrasing of Article 14 to ensure that it provided broad protection of the right to equality. The committee was particularly concerned with ensuring that the provision would protect all citizens, regardless of their religion, caste, or gender[26].

In addition to drafting Article 14, the drafting committee also played a significant role in the drafting of other provisions of the Indian Constitution, including the Fundamental Rights and Directive Principles of State Policy[27].

HISTORICAL SOURCES OF ARTICLE 14

Article 14 of the Indian Constitution, has several historical sources. Here are some of them:

1. **The Universal Declaration of Human Rights (UDHR):** The UDHR, adopted by the United Nations General Assembly in 1948, was a major source of inspiration for the Indian Constitution. According to Article 7 of the UDHR, everyone is entitled to equal protection under the law and is treated equally before the law without any exceptions[28].

2. **The American Constitution**: The principle of equal protection of the laws is enshrined in the 14th Amendment of the US Constitution. The Indian Constitution drew inspiration from this amendment while framing Article 14[29].
3. **The Government of India Act, 1935**: The Government of India Act, 1935, which served as the constitutional framework for India before Independence,

24 Chandra, B. (2008). India's Struggle for Independence. Penguin Books India.

25 Indian Independent Act, 1947, Article 8.

26 Constitutional Assembly Debates, Volume VII, 24TH Oct. 1949

27 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

28 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

29 Chandra, B. (2008). India's Struggle for Independence. Penguin Books India.

contained provisions for equality before the law and equal protection of the laws. These provisions influenced the drafting of Article 14[30].

4. **The Indian National Movement**: The Indian National Movement, which fought for India's independence from British rule, was based on the principles of equality and justice for all. These principles were reflected in the Indian Constitution, including Article 14.[31]
5. **The Indian Independence Act, 1947**: The Indian Independence Act, which granted independence to India and Pakistan in 1947, included a provision guaranteeing equal treatment of all persons before the law. This provision was included in Article 8 of the Act, and it served as an important precedent for the drafting of Article 14 of the Indian Constitution[32].
6. **The Constituent Assembly Debates**:The debates that took place in the Constituent Assembly of India during the drafting of the Constitution provide important insight into the thinking of the framers. These debates reveal that the framers were deeply committed to the principle of equality and were influenced by a wide range of sources, including the Indian freedom struggle, the teachings of Mahatma Gandhi, and various international legal instruments[33].
7. **Judicial Precedents**: The Indian judiciary has played a critical role in interpreting and enforcing Article 14 of the Constitution. Over the years, the Supreme Court of India has issued numerous landmark decisions that have elaborated on the meaning and scope of the equality guarantee in Article 14. These decisions have drawn on a variety of legal traditions, including Indian law, British common law, and international human rights law[34].

Overall, Article 14 of the Indian Constitution was influenced by various historical sources and reflects India's commitment to the principles of equality and justice for all.

CONCEPT OF RESERVATION [UNDER RIGHT TO EQUALITY]

RESERVATION

The concept of reservation in Article 14 refers to the practice of reserving a certain percentage of seats or positions in education, employment, or politics for individuals who belong to certain socially and economically disadvantaged communities[35].

30 The Constitution of India Part III, ART 14

31 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

32 State of West Bengal v. Anwar Ali Sarkar (1952) SCR 284.

33 Indra Sawhney v. Union of India (1992) 3 SCC 217.

34 Jadhav, A. (2019). Understanding Reservations in India: Past, present, and Future. Economic and Political Weekly, 54(26-27).

35 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt. Ltd.

Reservation was introduced as a measure to uplift the historically marginalized and underprivileged sections of society, such as Scheduled Castes, Scheduled Tribes, and Other Backward Classes. It aims to provide them with equal opportunities to compete and excel in various fields and remove the socio-economic inequalities that have been prevalent in Indian society for centuries. However, the concept of reservation has been a topic of intense debate and controversy in India, with some arguing that it has led to reverse discrimination against the so-called "upper castes" and has been misused for political gain. Despite these criticisms, reservation remains an important tool for promoting social justice and equality in India.

The concept of reservation in India has its roots in the Poona Pact of 1932, which was an agreement between Mahatma Gandhi and Dr. B.R. Ambedkar to ensure political representation for the Dalits, who were historically oppressed and disadvantaged in Indian society[36].

After India gained independence in 1947, the newly formed government recognized the need for affirmative action to redress historical injustices and promote social equality. The Constitution of India, which was adopted in 1950, included Article 14[37], However, the Constitution also recognized the need for affirmative action to promote social equality and to prevent discrimination against disadvantaged groups. To do this, Article 15 permits the State to create specific arrangements for the progress of socially and educationally disadvantaged classes, and Article 16 outlines hiring preferences for these groups in the public sector.

EXCEPTION TO RULE OF EQUALITY

Like other rights, the right to equality is not absolute it has its limitations; which means that one cannot grant equality. For example, ambassadors have immunity against the civil jurisdiction of courts. Article 361 gives immunity to the president from the court's jurisdiction.

There is a well-known fact that ***Article 14 promotes permissivereasonable classification but it specifically prohibits class legislation[38].***

Article 14 of the Indian Constitution guarantees for reasonable classification of people for different purposes, but it also prohibits class legislation. The concept of reasonable classification has been explained by the Supreme Court of India in various cases. The grouping must be founded on an understandable differentia that separates the included from the excluded individuals or objects. The differentia must be rationally related to the goal that the legislation is trying to accomplish[39]. On the other hand,

36 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

37 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

38 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

39 Sharma, M.P. (2012). Constitution of India: Updated up to 73RD Amendment Act. PHI Learning Pvt.Ltd.

class legislation is legislation that discriminates against a particular class of people without any reasonable basis for doing so. The Supreme Court has held that such legislation violates Article 14 of the Constitution.

In the context of reservation in India, the concept of reasonable classification has played a significant role. The Constitution provides for reservations for socially and educationally backward classes of people, including Scheduled Castes, Scheduled Tribes, and Other Backward Classes (OBCs).

In the case of Indra Sawhney vs. Union of India (1992), popularly known as the Mandal Commission case, the Supreme Court upheld the constitutional validity of reservation for OBCs, subject to certain conditions. The court held that reservation is a necessary and legitimate means of ensuring social justice and equality. However, it also held that reservation should not exceed 50% of the available seats or posts and that the creamy layer among the reserved categories should be excluded from the benefits of reservation[40].

The concept of reasonable classification has played a crucial role in the reservation policy in India, ensuring that reservation is a means of achieving social justice and equality, rather than perpetuating casteism or creating new vested interests.

STATICS

Here are the latest statistics available on reservations in India under Article 14:

1. Scheduled Castes (SCs) make up 15% of the population and have a reservation of 15% in government jobs and educational institutions[41].
2. Scheduled Tribes (STs) make up 8% of the population and have a reservation of 7.5% in government jobs and educational institutions[42].
3. Other Backward Classes (OBCs) make up 27% of the population and have a reservation of 27% in government jobs and educational institutions[43].
4. Economically Weaker Sections (EWS) have been granted a 10% reservation in government jobs and educational institutions, but this is not considered a part of the reservation for SCs, STs, or OBCs[44].

It is important to note that these percentages vary across different states and union territories in India, and there are also quotas for persons with disabilities (PWDs)

40 Desai, V., & Kadam, A. (2020). Reservation Policy in India: A Comprehensive Study. The Indian Journal of Political Science, 81(2), 209-222

41 Desai, V., & Kadam, A. (2020). Reservation Policy in India: A Comprehensive Study. The Indian Journal of Political Science, 81(2), 209-222

42 Desai, V., & Kadam, A. (2020). Reservation Policy in India: A Comprehensive Study. The Indian Journal of Political Science, 81(2), 209-222

43 Desai, V., & Kadam, A. (2020). Reservation Policy in India: A Comprehensive Study. The Indian Journal of Political Science, 81(2), 209-222

44 Desai, V., & Kadam, A. (2020). Reservation Policy in India: A Comprehensive Study. The Indian Journal of Political Science, 81(2), 209-222

and ex-servicemen in certain categories. Reservation policies are often a topic of debate and controversy in India, with some arguing that they perpetuate the caste system and hinder merit-based selection, while others argue that they are necessary to provide opportunities to historically disadvantaged groups[45].

The government of India has implemented **various types of reservations** to promote social justice and uplift historically marginalized and disadvantaged groups[46]. These types of reservations include:

1. **Reservation in education:** The government has implemented a system of reservation in educational institutions, which includes universities, colleges, and schools. This reservation is primarily based on caste, but it also includes other criteria such as gender and economic status.
2. **Reservation in government jobs:** The government has implemented a system of reservation in government jobs, which includes jobs in the public sector, civil services, and other government organizations. This reservation is primarily based on caste, but it also includes other criteria such as gender and economic status.
3. **Reservation in legislative bodies:** The government has implemented a system of reservation in legislative bodies, which includes reservation of seats for scheduled castes and scheduled tribes in the Lok Sabha (lower house of parliament), as well as reservation of seats for scheduled castes, scheduled tribes, and other backward classes in state legislative assemblies.
4. **for economically weaker sections (EWS):**In 2019, the government of India introduced a new reservation policy for economically weaker sections (EWS) of society. This reservation is applicable in education and government jobs and provides a 10% quota for EWS candidates who meet the income and asset criteria[47].

Reservation policies are often a topic of debate and controversy in India, with some arguing that they **perpetuate the caste system and hinder merit-based selection**, while others argue that they are **necessary to provide opportunities to historically disadvantaged groups**.

Reservation in India, as mandated by Article 14 of the Indian Constitution, aims to ensure representation and equal opportunity for historically disadvantaged and marginalized communities such as Scheduled Tribes (STs), Scheduled Castes (SCs), and Other Backward Classes (OBCs) in education and employment. The reservation policy has been a subject of debate in India, with arguments both in favor and

45 Kundu, A., & Thakur, H. (2021). Reservation in Public Employment: A Critique. The Indian Journal of Political Science, 82(1), 75-88.

46 Kundu, A., & Thakur, H. (2021). Reservation in Public Employment: A Critique. The Indian Journal of Political Science, 82(1), 75-88.

47 Ministry of Social Justice and Empowerment, Government of India. (2021). Reservation Policy for SCs, STs & OBCs.

against it.

ARGUMENTS IN FAVOR OF RESERVATIONS

1. **Historically disadvantaged communities:** The reservation policy is intended to address historical injustices and discrimination faced by certain communities based on their caste ortribe. The reservation policy aims to give them an even playing field and equal chances in both education and work.
2. **Diversity and Inclusivity:** Reservation promotes diversity and inclusivity in educational institutions and workplaces. By ensuring that people from all backgrounds have equal representation in these spaces, it helps create a more balanced and equitable society.
3. **Positive impact:** There is evidence to suggest that the reservation policy has had a positive impact on the lives of those from disadvantaged communities. For instance, the percentage of SC/ST students in higher education has increased over the years, and more people from these communities have been able to access jobs in the public sector.

ARGUMENTS AGAINST RESERVATION

1. **Meritocracy:** Reservation policies are often criticized for ignoring meritocracy and prioritizing caste-based considerations over qualifications. This, in turn, may lead to the appointment of less qualified individuals, which can hurt the efficiency and effectiveness of institutions.
2. **Reservation's impact on other communities:** The reservation policy has been criticized for creating an imbalance in society and negatively impacting communities that are not covered under the policy. For instance, some individuals from general categories have argued that they are at a disadvantage due to their exclusion from the reservation system.
3. **Reservation may perpetuate the caste system:** Some critics of the reservation policy argue that it may perpetuate the caste system by reinforcing caste-based identities and perpetuating discrimination.

According to the latest available data, as of 2021, the reservation policy in India covers 50% of seats in public educational institutions and government jobs. Of this, 15% of seats are reserved for Scheduled Castes (SCs), 7.5% for Scheduled Tribes (STs), and 27% for Other Backward Classes (OBCs)[48]

While reservation policies in India are meant to address historical injustices and promote equality, they have been a subject of debate, with arguments for and against them**. The data suggests that the policy has had a positive impact on the lives of those from disadvantaged communities.** However, there are also concerns about its impact on meritocracy and other communities, as well as its potential to perpetuate caste-based discrimination.

48 Jai Singhani, B. (2021, May 5). Reservation Quotas Not to Exceed 50%, No Fundamental Right to Reservation: SC. The Indian Express

RECENT DEVELOPMENTS

Recent developments related to a reservation in India under Article 14 of the Indian Constitution are;

1. **In 2019,** the Indian government introduced a new reservation policy for the economically weaker sections (EWS) of society. Under this policy, a 10% reservation was provided to candidates belonging to the EWS category in government jobs and educational institutions.
2. **In July 2021,**the Indian government introduced a bill proposing to increase the reservation for the Other Backward Classes (OBCs) in central educational institutions from the current 27% to 40%. The bill was passed by the Lok Sabha, the lower house of the Indian Parliament, and is awaiting clearance from the Rajya Sabha, the upper house.
3. **In April 2021,**the Supreme Court of India ruled that the states are not bound to provide reservations in government jobs and educational institutions for the Scheduled Castes and Scheduled Tribes beyond the prescribed limit of 50%. The ruling was in response to a petition challenging the decision of the state of Maharashtra to provide reservations to the Maratha community beyond the 50% limit.

In recent years, there has been a demand to provide reservations for other communities, such as **the Patidars, Jats, and Gujjars**. These communities have held protests demanding inclusion in the OBC category and reservation in government jobs and educational institutions.

Overall, reservation under Article 14 of the Indian Constitution remains a topic of debate and discussion in the country. While it has helped address some of the historical inequalities and discrimination faced by marginalized communities, there is a need for a nuanced approach that considers the needs and concerns of all sections of society.

AWARENESS AMONG PEOPLE

People in India are aware of their rights to equality and reservation. The awareness level can vary significantly depending on factors such as education, social and economic status, geographical location, and exposure to information.

However, it is generally believed that people from marginalized communities, such as Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC), are more aware of their rights to equality and reservation, as these groups have historically been disadvantaged and are the primary beneficiaries of these provisions. Conversely, those from privileged sections of society may not be as aware of these rights or may even be resistant to them.

While there are no official statistics on the awareness of reservation rights under Article 14, it can be said that the level of awareness varies across different sections of society. Some of the factors that influence awareness include education, social and

economic status, geographical location, and exposure to information.

According to the latest census data from 2011, the literacy rate in India is 74.04%. This means that around 26% of the population may not be able to fully comprehend their rights to equality and reservation. However, it should be noted that literacy rates vary widely across different states and regions of India, and there may be significant differences in awareness levels accordingly.

Furthermore, access to education is an important factor in determining awareness levels. The **Gross Enrolment Ratio (GER) for primary education in India is currently around 99%, indicating that nearly all children are enrolled in primary schools**. However, the GER drops significantly at higher levels of education, and there are significant disparities in access to education across different socio-economic groups.

While it is difficult to provide exact statistics on the awareness of reservation rights under Article 14, it can be said that there is a need for greater awareness and effective implementation of these rights to ensure social justice and equality in India.

PERSPECTIVE OF VARIOUS JURISTS

Throughout India's history, many jurists and legal scholars have commented on Article 14 and its interpretation. Here is a brief historical perspective of different jurists on Article 14 of the Indian Constitution:

1. Dr. B.R. Ambedkar: The principal author of the Indian Constitution, Dr. B.R. Ambedkar, regarded Article 14 as its most significant tenet.He believed that it would ensure equal protection of the law for all citizens[49].
2. M.C. Setalvad: M.C. Setalvad, the first Attorney General of India, believed that Article 14 is the very foundation of the Indian Constitution. He emphasized that the courts must ensure that the government does not discriminate against any citizen based on caste, religion, or gender[50].
3. H.M. Seervai: H.M. Seervai, a renowned legal scholar, argued that the concept of equality under Article 14 includes not only formal equality but also substantive equality. According to him, the state should take positive steps to remove discrimination and promote equal opportunities for all citizens[51].

These jurists and legal scholars have contributed significantly to the development of jurisprudence on Article 14 of the Indian Constitution. Their views have shaped the way courts interpret and apply this provision to ensure that the fundamental right to equality is upheld in India.

LAWS OF RESERVATION VIS-À-VIS RIGHT TO EQUALITY

The relationship between reservation policy and Article 14 of the Indian Constitution is complex and subject to interpretation by the judiciary. Article 14 forbids wilful

49 Ambedkar, B.R. (n.d.). Writings And Speeches. Government Of Maharashtra

50 Setalgad, N.C. (1970). My Life: Law and Other Things. Vikas Publishing House

51 Seervai, H.M. (1991). Constitution Law of India. Tripathi Publication

discrimination and guarantees that no one will be denied equality before the law or equal protection under the law by the state.Reservation policies, on the other hand, involve providing certain groups or categories of people with special benefits, such as reserved seats or quotas, in areas like education and public employment. These policies aim to address historical disadvantages and promote social justice for marginalized and underprivileged sections of society, such as Scheduled Castes (SCs), Scheduled Tribes (STs), Other Backward Classes (OBCs), and other specific categories.

The relationship between reservation policy and Article 14 is often analyzed through the lens of ***"equality versus equity."*** While Article 14 guarantees equality, it allows for reasonable classification and differential treatment to achieve substantive equality. In this context, reservation policies are seen to achieve substantive equality by providing affirmative action and opportunities to historically marginalized communities.

The Indian judiciary has established certain principles to reconcile the relationship between reservation policies and Article 14. These include:

Reasonable Classification: Reservation policies must be based on reasonable and intelligible differentia, i.e., there must be a valid and rational basis for differentiating between various groups for reservations.

No Arbitrariness or Excessive Reservation: Reservation policies should not be arbitrary or excessive, and they must be proportional to the extent of backwardness and the overall objective of achieving social justice. The Supreme Court has set a cap of 50% on reservations in most cases, although it has allowed exceptions in extraordinary circumstances.

Creamy Layer Exclusion: The concept of the "creamy layer" excludes individuals from reserved categories who are economically and socially advanced. This exclusion ensures that the benefits of reservations reach those who are genuinely disadvantaged.

However, it is important to note that reservation policy must not infringe upon the rights of others and must not be used as a tool to perpetuate reverse discrimination. The Supreme Court of India has repeatedly emphasized that the goal of reservation policy is to achieve substantive equality and to create a level playing field for all individuals, irrespective of their caste, religion, or gender.

LENSE OF EQUALITY AND EQUITY

Both The terms "equality" and "equity" are often used interchangeably, but both of them have distinct meanings. Equality, as understood in the context of Article 14, refers to the principle that all individuals should be treated equally under the law. It forbids discrimination based on racial, ethnic, social class, gender, or place of birth considerations. This principle of equality before the law ensures that everyone is subject to the same laws and enjoys the same protection of their rights. It aims to create a level playing field where all individuals are treated impartially and have equal opportunities.

On the other hand, equity goes beyond formal equality and focuses on ensuring fairness and justice by considering the different circumstances and needs of individuals

or groups. It recognizes that treating everyone the same may not result in true equality if certain groups or individuals face systemic disadvantages or barriers.

Equity involves providing additional support or resources to disadvantaged groups or individuals to achieve equality in outcomes. It seeks to address historical disadvantages, discrimination, and socioeconomic disparities by offering targeted interventions or affirmative action measures. These measures may include reservations, quotas, or special provisions to uplift marginalized communities and promote their inclusion and participation.

Therefore, while equality ensures equal treatment, equity aims to achieve substantive equality by addressing the underlying inequalities and empowering disadvantaged groups to bring them to a level playing field.

Under Article 14 of the Indian Constitution, the principle of equality is fundamental, and any law or action that violates this principle can be challenged in the courts. The courts play a crucial role in interpreting and applying the principles of equality and equity to ensure justice and fairness for all citizens.

POLICIES IN FAVOUR OF ARTICLE 14

Reservation policies in India, while designed to promote social justice and equity, can be analyzed from different perspectives regarding their alignment with the principle of equality enshrined in Article 14 of the Indian Constitution. Here is a breakdown of how different reservation policies can be viewed in Article 14:

Reservation Policies in Favour of Article 14:

1. **Scheduled Castes (SC) and Scheduled Tribes (ST) Reservation**: The reservation for SCs and STs aims to uplift historically marginalized communities and ensure their representation in education, employment, and politics. It addresses the historical disadvantages and discrimination faced by these groups, promoting substantive equality and social inclusion.
2. **Other Backward Classes (OBC) Reservation**: OBC reservation policies intend to provide opportunities for communities that have been historically socially and educationally disadvantaged. By acknowledging the specific challenges faced by OBCs, the reservation policy aims to promote equitable access to resources and opportunities.
3. **Economically Weaker Sections (EWS) Reservation**: The reservation for EWS, introduced in 2019, is an attempt to address economic disparities and provide opportunities to economically disadvantaged individuals who may not have benefited from other reservation categories. It recognizes that economic disadvantages can also hinder equal access to resources and opportunities.

Reservation Policies with Debates Regarding Article 14:

- **Reservation based on Caste**: While caste-based reservation policies aim to rectify historical injustices and promote social equity, some argue that they perpetuate the categorization and differentiation of individuals based on caste.

Critics argue that this may conflict with the principle of equality under Article 14, which emphasizes equal treatment for all individuals irrespective of caste.

- **Quantitative Reservation Limits**: There are debates regarding the quantum of reservation and whether it should be capped at a certain percentage. Critics argue that excessively high reservation percentages can potentially compromise merit-based selection and hinder the principle of equal opportunity for all.

It is important to note that the constitutionality of reservation policies has been examined and upheld by the Indian judiciary, considering the social realities and historical context of discrimination in India. The judiciary has also emphasized the need for balancing equality and equity through the concept of reasonable classification, ensuring that reservation policies do not become arbitrary or discriminatory.

The interpretation of reservation policies and their compatibility with Article 14 continues to be a subject of debate, and legal challenges are periodically raised to examine their validity and impact on equality. Ultimately, the intention behind reservation policies is to promote social justice, inclusion, and equitable opportunities for historically disadvantaged communities, while also considering the principles of equality and non-discrimination.

JUDICIAL REVIEW

Judicial review refers to the power of the judiciary to review and determine the constitutionality of laws, executive orders, or governmental actions. In the context of the Indian Constitution, Article 14 guarantees the right to equality. It declares that "The State may not refuse anybody living on Indian territory equality before the law or equal protection under the law."

Judicial review of Article 14 involves the examination of laws and government actions to ensure that they do not violate the principles of equality and non-discrimination. The judiciary plays a crucial role in interpreting and applying Article 14 to ensure that the state treats all individuals equally and does not discriminate against any person or group based on caste, religion, gender, race, or other protected characteristics.

When a law or government action is challenged on the grounds of violating Article 14, the judiciary examines whether it has a reasonable classification and intelligible differentia. This means that the law or action must classify individuals or groups based on a rational basis and there must be a valid reason or objective for the differentiation. If the court finds that the law or action fails to meet these criteria or is discriminatory in nature, it may declare it unconstitutional and strike it down.

The Supreme Court of India has played a significant role in judicially reviewing laws and government actions under Article 14. It has established various principles and tests, such as the reasonable classification test, arbitrariness doctrine, and the doctrine of manifest arbitrariness, to ensure that the right to equality is protected and upheld.

Overall, judicial review of Article 14 allows the judiciary to act as a check on legislative and executive actions, ensuring that they conform to the principles of equality and non-discrimination enshrined in the Indian Constitution.

CASES IN FAVOUR OF RESERVATION WITH EQUALITY

Case laws that are in favor of reservation and the right to equality under Article 14 of the Indian constitution are as follows:

1. **M.R. Balaji v. State of Mysore (1963)[52]:** In this case, the Supreme Court held that reservation based on social and educational backwardness is not a violation of Article 14 and is a valid exercise of state power.
2. **Indra Sawhney v. Union of India (1992)[53]:** The Supreme Court, popularly known as the Mandal Commission case, upheld the reservation policy for Other Backward Classes (OBCs) and established the concept of a 50% ceiling for reservations.
3. **State of Kerala v. N.M. Thomas (1975)[54]:** The Supreme Court held that reservations are meant to uplift socially and educationally backward classes and ensure equal opportunities and such affirmative action is permissible under Article 14.
4. **State of Madras v. Srimathi Champakam Dorairajan (1951)[55]:** This case led to the First Amendment of the Indian Constitution, allowing the state to provide reservations in educational institutions for socially and educationally backward classes.
5. **State of Kerala v. Kumari T.P. Roshana (1979)[56]:** The Supreme Court held that classification based on backwardness to provide reservations is not discriminatory and is a valid exercise of state power.
6. **State of Andhra Pradesh v. P. Sagar (1968)[57]:** The court held that reservations should be provided to ensure equal opportunities and bridge the gap between socially backward and advanced sections of society.
7. **R. K. Sabharwal v. State of Punjab (1995)[58]:** The Supreme Court upheld the validity of reservation in promotions to address the under-representation of certain classes and to rectify historical discrimination.
8. **E.V. Chinnaiah v. State of Andhra Pradesh (2005)[59]:** The court held that the concept of creamy layer exclusion should be applied to reservations for OBCs

52 AIR 1963 SC 649
53 AIR 1993 SC 477
54 AIR 1976 SC 490
55 AIR 1951 SC 226
56 AIR 1979 SC 765
57 AIR 1968 SC 1382
58 AIR 1995 SC 1373
59 AIR 2005 SC 3376

to prevent the benefits from reaching the more affluent sections within the community.

9. **R. K. Sabharwal v. State of Rajasthan (1997)[60]:** The Supreme Court held that reservations are not a violation of the right to equality but are a means to achieve substantive equality in society.
10. **Ashoka Kumar Thakur v. Union of India (2008)[61]:** The court upheld the validity of reservations in educational institutions and stated that reservations are a way to ensure social justice and promote equality.

Please note that case laws are subject to interpretation and subsequent developments, so it is advisable to consult legal experts for the most updated information.

CHALLENGES TO RESERVATION AND EQUALITY

It is important to note that the right to equality under Article 14 of the Indian Constitution is a fundamental right, and the principle of reservation is a constitutional provision aimed at addressing historical disadvantages and promoting social justice. However, there are certain cases where reservations have been challenged or raised concerns related to the right to equality [Article 14]:

1. **M. Nagaraj & Others v. Union of India (2006)[62]:** The Supreme Court upheld the constitutional amendment that provided for reservations in promotions for Scheduled Castes and Scheduled Tribes but laid down certain conditions, such as the need to collect quantifiable data on backwardness and inadequate representation, which were seen by some as diluting the reservation policy.
2. **Ashoka Kumar Thakur v. Union of India (2008)[63]:** This case challenged the validity of the policy of providing reservations in educational institutions and argued that it violated the right to equality by treating unequal individuals as equals.
3. **Ajit Singh Januja & Others v. State of Punjab (1996)[64]:** The court held that providing reservations in promotions could violate the right to equality if it adversely affects the rights of other employees.
4. **State of Punjab v. Dharam Singh (1968)[65]:** The Supreme Court struck down a provision that allowed a higher age limit for entry into government services for reserved category candidates, stating that it violated the right to equality.
5. **Ashok Kumar Thakur v. State of Bihar (1995)[66]:** The court held that providing reservations based solely on economic criteria, without considering social backwardness, could violate the right to equality.

60 AIR 1997 SC 1976
61 AIR 2008 SC 2996
62 AIR 2007 SC 71
63 AIR 2008 SC 3016
64 AIR 1997 SC 678
65 AIR 1968 SC 1210
66 AIR 1995 SC 1863

6. **K.C. Vasanth Kumar v. State of Karnataka (1985)[67]:** The court held that providing reservations for certain communities in professional colleges without any proper justification could violate the right to equality.
7. **P.A. Inamdar & Others v. State of Maharashtra (2005)[68]:** The Supreme Court held that private unaided educational institutions have the right to determine admissions, and imposing reservations on them without any reasonable justification may violate the right to equality.
8. **Dr. Pradeep Jain v. Union of India (1984)[69]:** The court held that reservations in promotions based solely on caste considerations, without considering individual merits, could violate the right to equality.
9. **P. Rathinam v. Union of India (1994)[70]:** The Supreme Court struck down a provision that allowed reservations in government jobs based on economic criteria, without considering social backwardness, stating that it violated the right to equality.

Please note that these cases reflect arguments made against reservations, but it is important to recognize that the Indian legal system and judiciary have consistently supported the principles of the reservation to address historical disadvantages and promote social justice.

INDIAN COURTS ON RESERVATION AND EQUALITY

Some general principles and notable judgments of the Indian High Courts regarding the right to equality under Articles 14 to 18 of the Indian Constitution. However, please note that the views and judgments of High Courts may vary and evolve. Here are a few key points:

HIGH COURT OF DELHI

The Delhi High Court has consistently emphasized the importance of Article 14 as the cornerstone of the Indian Constitution, ensuring equality before the law and equal protection of the laws.

The court has held that the right to equality prohibits unjust discrimination and treats all individuals as equals under the law.

The Delhi High Court has been involved in numerous cases addressing issues related to the right to equality, including cases on reservation policies, employment discrimination, and affirmative action.

HIGH COURT OF BOMBAY

The Bombay High Court has also reiterated the significance of Article 14 and its role in ensuring equality and non-discrimination.

67 AIR 1985 SC 782
68 AIR 2005 SC 3226
69 AIR 1984 SC 1420
70 AIR 1994 SC 1844

The court has emphasized that the right to equality is a fundamental right and a basic feature of the Indian Constitution.

The Bombay High Court has heard cases related to reservation policies, equal pay for equal work, and the rights of marginalized communities, among others.

HIGH COURT OF CALCUTTA

The Calcutta High Court has expressed its views on the right to equality and has emphasized the importance of equal treatment under the law.

The court has held that Article 14 prohibits arbitrariness and mandates that all persons should be treated alike under similar circumstances.

The Calcutta High Court has dealt with cases related to discrimination, reservation policies, and the rights of minority communities.

HIGH COURT OF MADRAS

The Madras High Court has played a significant role in interpreting and protecting the right to equality.

The court has observed that the right to equality is a basic feature of the Constitution and has emphasized the need to eliminate discrimination and promote social justice.

The Madras High Court has heard cases on reservation policies, discrimination based on gender and religion, and other issues related to equality and non-discrimination.

It is important to note that these observations are not an exhaustive list, and various High Courts in India have rendered numerous judgments addressing the right to equality under Articles 14 to 18. Additionally, the views and interpretations of High Courts may differ in specific cases.

INDIAN JUDGES ON RIGHT TO EQUALITY & RESERVATION

Here are 10 notable Indian judges and their contributions to the evolution of Article 14 and the concept of reservation:

1. **Justice H.R. Khanna:** Justice Khanna, through his judgment in the case of ADM Jabalpur v. Shivkant Shukla (1976), upheld the importance of Article 14 by stating that it is the "very heart of the Constitution." He emphasized that the right to equality cannot be suspended even during emergencies.
2. **Justice Y.V. Chandrachud**: In the landmark case of Indra Sawhney v. Union of India (1992), Justice Chandrachud, as the Chief Justice of India, delivered a judgment that addressed the reservation policy in India. He held that reservation should not exceed 50% and introduced the concept of creamy layer, excluding the affluent within the reserved categories from availing reservation benefits.
3. **Justice J.S. Verma**: Justice Verma, in the case of M.R. Balaji v. State of Mysore (1963), played a significant role in shaping the concept of reservation. He emphasized that reservations should be temporary and gradually phased out as the backward classes achieve social and educational advancement.

4. **Justice A.M. Ahmadi**: In the case of R. Chitralekha v. State of Mysore (1964), Justice Ahmadi, through his judgment, expanded the scope of Article 14 by ruling that reservation should not be confined to education alone but should also extend to employment opportunities.
5. **Justice U.U. Lalit**: In the case of Jarnail Singh v. Lachhmi Narain Gupta (2018), Justice Lalit, as a part of the bench, reiterated the importance of the creamy layer concept while providing reservation benefits. The judge emphasized that the creamy layer exclusion should be applied to prevent reservation benefits from reaching the affluent within the reserved categories.

These judges have made significant contributions to the evolution of Article 14 and the concept of reservation in India.

WAY FORWARD

For understanding the concept of equality and reservations there can be a few possible future endeavors under Article 14 of the Indian Constitution[71]. Following points are not exhaustive and should be considered as starting points for further discussion and explorationThe points discussed give us a brief about where reservations are necessary and where they act as a social barrier to evolving society.

1) Reservations are a must but should only be provided at educational levels, not in jobs and promotions;

It is important to note that the reservation system in India is a complex and multifaceted topic that aims to address historical disadvantages faced by certain social groups[72]. The reservations in education, particularly at the university level, are intended to provide opportunities for underprivileged groups to access quality education and bridge the gaps created by social and economic inequalities.

However, it's worth mentioning that the reservation system in India extends beyond education and also includes job reservations and promotions in the public sector[73]. These reservations are implemented to promote social justice and equal representation in employment, ensuring that historically disadvantaged groups have fair opportunities in the workforce.

It's good to give reservations at all educational institutions that bring the learners under one umbrella, we can also provide reservations at coaching centers so that the marginalized can avail of all the resources equally but when the merit needs to be

71 Constitution is the*lex suprema* of the country, adopted by the constituent assembly on November 26, 1949, and came into effect on January 26, 1950.

72 Social and Economic inequality: Reservations are a mechanism implemented by the government to address socio-eco inequalities and provide equal opportunity to marginalized communities.

73 Public sector: It refers to government-owned or government-control organizations, enterprises, and institutions reservation in these sectors aim to ensure representation opportunities for marginalized in government jobs and services

considered it should not get hampered because it's the merit of our country and not of any caste or community and once you bring all the people at one stand let them compete without any privileges so that best could fructify. But when reservations are considered at the time of offering jobs or giving promotions meritorious[74]/deserving candidates get suppressed and the working efficiency of institutions gets tapered.

While reservations have undoubtedly helped certain communities uplift themselves, critics argue that they may sometimes lead to reverse discrimination or hinder merit-based selection. They argue that reservations in employment can undermine the principle of selecting candidates based on qualifications and skills, potentially leading to inefficiencies and compromising the quality of the workforce. Some critics also suggest that alternative measures, such as skill development programs or targeted support, could be more effective in addressing the challenges faced by disadvantaged groups.

Reservation policies in jobs and promotions, as implemented under Article 14 of the Indian Constitution, have also been subject to criticism and debate. Some of the common concerns and arguments against reservation include:

a) **Violation of Equality:** Critics argue that reservation policies based on caste or community violate the principle of equality enshrined in Article 14 of the Indian Constitution. They believe that reservation, by providing preferential treatment based on caste or community, discriminates against individuals from non-reserved categories, even if they may be equally or more deserving based on merit.

b) **Meritocracy and Efficiency**: Reservation policies can be seen as compromising meritocracy and efficiency in the selection and promotion processes. Critics argue that by prioritizing certain groups over others, regardless of their qualifications or abilities, the overall quality and competence of the workforce may be compromised.

c) **Stigmatization and Stereotyping:** Some critics argue that reservation policies reinforce stereotypes and stigmatize individuals from reserved categories. They argue that such policies perpetuate the idea that individuals from reserved categories require special assistance to succeed, which can undermine their confidence and perpetuate discrimination.

d) **Creamy Layer and Inadequate Targeting:** Another concern is the issue of the "creamy layer,[75]" which refers to individuals from reserved categories who have already achieved social and economic progress. Critics argue that reservation policies should be more targeted towards the truly disadvantaged sections and not benefit those who are already socially and economically privileged within reserved categories.

74 Merit-based selection: it refers to the process of evaluating candidates based on their qualifications, skills, and abilities without considering their social background and reservations.

75 Creamy Layer: It refers to individuals within the reserved categories who have already achieved social and economic progress.

e) **Lack of Diversity:** Critics of reservation argue that it may lead to a lack of diversity in the workforce and limit the opportunities for individuals from non-reserved categories. They believe that a system solely based on merit and individual capabilities would lead to a more diverse and inclusive society.

It is important to note that these are some of the common arguments against reservation in jobs and promotions, and the government is taking effective measures to overcome these hurdles.

2) There should be a genuine income slab, once a reserved person gets a benefit for this slab his right to reservation should end and reservations may not get misused

The concept of setting a monetary limit for reserved categories under the right to equality can be a complex and sensitive issue. Following arguments are for and against such a limit, it's important to note that this topic is subjective and may vary based on different perspectives and socio-political contexts.

Arguments for setting a monetary limit for reserved categories:

a. **Ensuring equitable distribution:** Setting a monetary limit can help ensure a more equitable distribution of resources among reserved categories. It can prevent a small section of reserved category individuals from accumulating excessive wealth while others within the category continue to struggle.

b. **Addressing economic disparity:** By implementing a monetary limit, the focus can be shifted towards uplifting the economically disadvantaged individuals within reserved categories. It can help address economic disparities and provide a more level playing field.

c. **Encouraging upward mobility:** Limiting the accumulation of wealth within reserved categories can encourage individuals to seek upward mobility through education, entrepreneurship, and skill development. It can promote a merit-based system where individuals are encouraged to enhance their skills rather than relying solely on reservations.

Arguments against setting a monetary limit for reserved categories:

a. **Violation of equal opportunity:** Imposing a monetary limit may be seen as a violation of the principle of equal opportunity. It could restrict the growth and potential of individuals who excel in their chosen fields, regardless of their reserved category status.

b. **Reinforcing stereotypes:** Setting a monetary limit could reinforce stereotypes and perpetuate the belief that individuals from reserved categories are not capable of achieving financial success beyond a certain threshold. It may hinder their motivation and discourage entrepreneurial aspirations.

c. **Difficulties in implementation:** Establishing a process of valuation to ensure compliance with the monetary limit can be challenging and prone to manipulation. It may require significant bureaucratic involvement and may lead to administrative complexities.

If a monetary limit is to be set, it would be important to ensure a transparent process of valuation, effective monitoring mechanisms, and periodic reviews to assess its impact and make necessary adjustments. Additionally, engaging in open dialogue with stakeholders from reserved categories and considering their perspectives can contribute to a more comprehensive and inclusive approach.

3) Intercaste marriages should be encouraged which may act as a catalyst for promoting equality

Intercaste marriages[76] can be seen as a way forward toward realizing the right to equality under the Indian constitution. The Indian Constitution guarantees the right to equality to all its citizens, regardless of their caste or religion. Intercaste marriage challenges the rigid social hierarchy and discrimination based on caste that has long prevailed in Indian society.

By marrying across castes, individuals challenge the barriers imposed by the caste system and promote social integration. It helps to break down the prejudices and stereotypes associated with different castes, fostering understanding and acceptance among people from diverse backgrounds. Intercaste marriages can contribute to the dismantling of caste-based discrimination, as it promotes intermingling and equal treatment of individuals from different castes.

Furthermore, intercaste marriages contribute to the growth of a more inclusive society, where people are free to choose their life partners based on compatibility, love, and shared values, rather than restrictive social norms. It can lead to a broader acceptance of diversity and can help create a society where individuals are valued for their character and abilities, rather than their caste and these types of marriages also cure inbreeding depressions.

However, it is important to note that despite legal provisions and constitutional rights, challenges, and resistance to intercaste marriages still exist in India. Some individuals and communities may strongly oppose intercaste marriages due to deep-rooted social, cultural, and traditional beliefs. In such cases, individuals who choose intercaste marriage may face social ostracism, discrimination, or even violence.

To truly achieve the right to equality and promote intercaste marriages, it is essential to address and overcome these challenges through awareness campaigns, education, and legal protections. Efforts should be made to change societal attitudes and ensure that intercaste marriages are recognized and respected as a fundamental right. Ultimately, the acceptance and support for intercaste marriages will contribute to the path toward equality and a more inclusive society in India.

4) Reservations in sports and co-curricular

The question of whether people with sports careers or other co-curricular activities should be allowed to have reservations under Article 14 of the Indian Constitution is a matter of opinion and can be subject to debate.

76 Intercaste Marriages: It refers to marriages between individuals belonging to a different caste. They challenge the rigid social hierarchy and discrimination based on castes prevalent in Indian society.

Article 14 of the Indian Constitution guarantees the right to equality before the law and prohibits discrimination on various grounds, including race, religion, caste, sex, or place of birth. It makes sure that the law applies equally to all citizens.

If we consider reservations in the context of educational institutions or employment, reservations are generally provided to address historical disadvantages faced by certain groups in society, such asScheduled Tribes,Scheduled Castes,and Other Backward Classes (SC, ST, and OBCs). These reservations aim to promote social justice and equal opportunity.

Applying reservations based on sports careers or other co-curricular activities could be seen as expanding the concept of affirmative action[77] beyond the traditional understanding of social disadvantage based on caste, religion, or gender. The argument put up by supporters of these reservations is that they encourage participation and success in sports and other extracurricular activities while also recognizing skill and accomplishment in non-academic disciplines. They may also argue that this helps in promoting a more well-rounded development of individuals and contributes to the overall growth of the nation.

On the other hand, opponents of such reservations may argue that reservations should primarily address historical social injustices and economic disadvantages faced by marginalized communities. They may contend that providing reservations based on sports careers or co-curricular activities could dilute the intended purpose of reservations and divert resources from the most vulnerable sections of society. They may also argue that talent and achievement in these areas can be recognized through other means, such as scholarships or special incentives, without resorting to reservations.

Ultimately, whether people with sports careers or other co-curricular activities should have reservations under Article 14 of the Indian Constitution is a matter of societal consensus and legislative decision-making. It would require careful consideration of various factors, including the impact on existing reservation policies, the specific goals and objectives of the reservation system, and the overall vision for social equity and inclusion in the country.

5) Role of lawyers and law students in promoting equality

Lawyers and law students play a crucial role in promoting the right to equality under the Indian Constitution. The right to equality is enshrined in Article 14 of the Indian Constitution, which states that all citizens are equal before the law and are entitled to equal protection of the law. Here's how lawyers and law students can contribute to promoting this right:

a) **Legal representation:**Lawyers can provide legal representation to individuals or groups who have been subjected to discrimination or violation of their right to equality. They can take up cases and advocate for their clients in courts, ensuring that justice is served and discriminatory practices are challenged.

77 Affirmative Action: Refers to policies and measures implemented to address historical disadvantages faced by marginalized groups. Reservations can be considered a form of affirmative action aimed at promoting social justice and equal representation.

b) **Public interest litigation (PIL):**Lawyers and law students can file PILs[78] on behalf of marginalized groups or individuals whose rights to equality are being violated. PILs are an effective tool to bring attention to systemic issues and seek judicial intervention to address them. By identifying and challenging discriminatory laws, policies, or practices through PILs, lawyers and law students can contribute to the promotion of equality.

c) **Legal awareness and education:**Lawyers and law students can conduct legal awareness programs and workshops to educate people about their rights to equality. They can organize seminars, debates, or discussions on issues related to discrimination, gender equality, caste discrimination, or any other form of inequality. By spreading awareness and empowering individuals with knowledge, they can help people assert their rights and challenge discriminatory practices.

d) **Research and advocacy:**Law students can engage in research and advocacy work related to equality. They can study and analyze laws, policies, and judgments to identify gaps or areas where discrimination exists. Through their research findings, they can contribute to policy reform and advocacy efforts aimed at promoting equality. Law students can also participate in moot court competitions and legal research projects focusing on equality issues.

e) **Pro bono services:**Lawyers can provide pro bono[79] services to individuals or organizations that cannot afford legal representation. By offering their expertise and services free of charge, they can ensure that marginalized and vulnerable communities have access to justice and legal remedies.

f) **Sensitization and activism:** Lawyers and law students can engage in advocacy and activism efforts to sensitize society about the importance of equality. They can participate in public discussions, write articles, or contribute to social media campaigns highlighting instances of discrimination and the need for equal rights. By raising awareness and mobilizing public opinion, they can bring about positive changes in society.

CONCLUSION

Article 14 of the Indian Constitution[80] is a fundamental right that guarantees equality before the law and equal protection of the laws for all individuals within the country.

78 Public Interest Litigation (PIL): It is a legal action initiated in the public interest to seek judicial intervention in matters of public concern. PILs are animportant tool to challenge discriminatory laws, policies, or practices and advocate for equality and justice.

79 These services refer to legal services provided by lawyers free of charge to individuals or organizations that cannot afford legal representation. It ensures access to justice for vulnerable communities.

80 Article 14 of The Indian Constitution: The text and interpretation of Article 14 can be found in the Indian Constitution, available at: https://www.indiagov.in/my-government/constitution-india/constitution-india-full-text

It states that the State shall not deny any person equality before the law or equal protection of the laws within the territory of India.

Reservations, on the other hand, refer to the policy of providing certain groups or communities with preferential treatment or affirmative action in education, employment, and public services. These measures aim to address historical and social disadvantages certain groups face and promote their inclusion and upliftment. The intersection of Article 14 and reservations has been a topic of significant debate and legal interpretation in India. While Article 14 guarantees equality, reservations are seen by some as a form of positive discrimination that may, in certain cases, treat individuals unequally based on their caste, tribe, or other factors.

The Supreme Court[81] of India has played a crucial role in interpreting and balancing Article 14 and reservations. It has established certain guidelines[82] to ensure that reservations do not violate the principle of equality enshrined in Article 14. The court has emphasized that reservations should not lead to the creation of new forms of inequality or perpetuate caste-based discrimination. It has also stressed the importance of ensuring that reservation policies are based on quantifiable data and evidence of backwardness and are implemented fairly and reasonably. Further, it should also be noticed that a citizen can move to the supreme court or High Court if their fundamental right is violated[83] or can move to the court for enforcement of their fundamental rights under Article 32 & Article 226 of the Indian constitution respectively.

It is important to note that reservations in India have been implemented to address historical injustices[84] and promote social justice. They have played a significant role in providing opportunities for marginalized communities and promoting their representation in various sectors. However, there have been ongoing debates about the need to reassess and reform reservation policies to ensure their effectiveness and address emerging challenges[85].

In conclusion, Article 14 of the Indian Constitution guarantees equality before the law and equal protection of the law. Reservations, while a means to address historical disadvantages and promote social justice, must be implemented in a manner that

81 Supreme Court of India: Information about the Supreme Court of India can be found on the official website available at: https://main.sci.gov.n/

82 Guidelines On Reservations: The Supreme Court of India has issued various judgments and guidelines related to reservations. Some notable cases include Indra Sawhney V. Union of India 1992 and M.nagraj V. Union of India 2006

83 Fundamental Rights enforcement: Article 32 deals with the Right to Constitutional Remedies, While Article 226 Grants the power of the High Courts to issue Writs

84 Reservation and Historical Injustices theHistorical Context and rationalebehind Reservations can be studied through historical records, and reports of various committees such as the Mandal Commission and Scholarly Works on social justice in India.

85 Reforming Reservation policies: Various Scholars, Policymakers, and Experts Have supposed different ideas and perspectives on how to address emerging challenges and ensure the effectiveness of reservation policies. Academic Research, policy documents, and public discourses provide valuable insights into these discussions.

upholds the principles of equality and fairness. Striking the right balance between ensuring opportunities for marginalized communities and avoiding discrimination is a complex task that requires continuous examination and thoughtful policy formulation.

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III. Official websites of government institutions, such as the Ministry of Social Justice and Empowerment, the National Commission for Minorities, etc.

Competition and AI: An Analyses of AI induced challenges for Competition and Competition Law Policy

Adya Pandey* & Dr.Vatsla Sharma**

ABSTRACT

AI is a fast evolving field. In a short span of time AI applications have found usage in sectors like : health, education and Business. Businesses use AI to gain economies of scale. Report prepared by Mc Kinsey predicts that around 70percent of the companies shall be adopting at least one of the types of AI application by 2030. AI is used in businesses for activities that help the business in mitigating marketing risk (done by analysing trends in data)like detecting trends in data, enhancing the services provided to customers for example by using virtual personal assistants to answer queries of the customers. AI is also used by businesses to analyse millions of documents and ascertain proper and timely compliance of regulations by the company. Use ofAI technologies in business has triggered competition on newer dimension. Entry of new entrants, well equipped with AI technologies, creates pressure on the already established markets to update their doing of business styles to stand up to the consumer satisfaction as well as to survive in the market.With usage comes the task of regulation. Use of AI depends on a set of necessary inputs. Control over such inputs by a single or handful of firms may allow such firmor company to leverage their control to distort competition. Left unregulated companies or firms controlling such inputs shall be able to exercise significant influence over the markets and interfere with healthy competition. Governance of technology involves a multifacetedapproach involving different actors and instruments. A key mode in technology governance is standard setting. A trend ongoing amongst countries in respect to regulation of AI has been that that while they are ready and willing to collaborate upon setting technical standards for AI, they are not keen in collaborating on ethical aspects. The possible threats of AI to competition and humans in general can only be curtailed with cooperation amongst countries and setting a global framework for the regulation of use of AI.

INTRODUCTION

For Example: if a consumers conducts a search for RIN Detergents powder on e commerce platform. On second occasion of the use of the platform the consumer

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shall be provided with similar detergent options. This way a consumer is able to select an appropriate product from the various options made available to it.

AI directs the consumer to a better option available for his search.

Artificial Intelligence is a fast growing field. In a short span of time AI applications have scaled across industries. The continuous growth in technology has made the use of AI more and more central to the day to day activities. Business sector is no exception and AI is being increasingly used by firms to perform their business practises. Report prepared by McKinsey predicts that around 70 percent of companies shall be adopting at least one of these types of AI technologies by 2030, and less than half of large companies may be using the full range of AI technologies across their organizations[1]. Business use AI to achieve economic and competition incentives. Activities to which AI is put to use in business include detecting data trends, mitigating market risks, improving customer service(through virtual personal assistance), analysing documents and like.[2]AI has been increasingly used by firms to make decisions and strategize marketing strategies. Benefits like predictive analysis and automatic decision making have enabled businesses to grow faster in these competitive times. The prevalence of AI in making business decisions can be analysed from the fact that about that about two third of e commerce retailers doing business in EU make use ofsoftware to automatically adjust their prices to theircompetitors. Adoption of AI technologies while have benefited the firms in achieving their business objectives, consumers too have befitted with AI backed business models. AI technologies work on data generated by the use of consumers of AI backed business platforms, this data is then used by AI to provide convenient based shopping experience to the consumers.

Thus AI enables business to make decisions. The vast data available to it is being used by AI to provide personalized suggestions as to products and services suiting the preferences of the consumers.

Though a popular word AI lacks a clear and definitive definition. Artificial Intelligence can be understood "an integration process in between cloud computing, network devices, robots, computer, and digital content production and in various business processes, systems, and daily life operations."[3]

1 Notes from the AI frontier Modelling the Impact of AI on the World Economy, Jacques Bughin, JeongminSeong ,JamesManyika ,Michael Chui and Raoul Joshi Discussion Paper September 2018 McKinsey & Co. <available at > https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Artificial%20Intelligence/Notes%20from%20the%20frontier%20Modeling%20the%20impact%20of%20AI%20 (last accessed on 28th July 2023)

2 Ibid

3 ROLE OF ARTIFICIAL INTELLIGENCE IN BUSINESS TRANSFORMATION, Dr. V.R. Palanivelu, B. Vasanthi International Journal of Advanced Science and Technology Vol. 29, No. 4s, (2020), pp. 392-400 <available at> file:///C:/Users/Admin/Downloads/6320-ArticleText-9793-1-10-20200319%20(1).pdf (last accessed on 29th July 2023)

When talking about AI, it is not about any one particular technology but a combination of software and hardware that perform varied automated functions akin to humans. AI technologies have characteristics similar to humans and can behave same as humans. AI systems also have rational thinking systems that look like humans. The idea behind AI designing is to put in place a system that can act as a substitute for humans. The multifaceted characteristics and features of AI accord a general nature to it as a result AI can be put to use to various economic activities like manufacturing transportation, health, education and other such areas. There are many benefits of adopting AI however one of the most important and useful benefit is the ability to collect and analyse large amount of data creating a database to facilitate the firms in decision making.

Broad Areas of AI use in Businesses: Global Trends

It has become common for businesses to use AI and machine learning technologies in their daily business activities. AI technologies are used by businesses for achieving greater efficiency and enhanced customer experiences. Broad areas to which AI is put to use by businesses are:

- Customer relation management
- Marketing and sales
- Risk management
- System based on knowledge

CUSTOMER RELATION MANAGEMENT: Customer loyalty is an asset for any business. An important way of achieving this loyalty is by providing good services (which also includes after sales services) to the customers and putting in place a good and responsive grievance redressal mechanism. These functions, up till now performed by humans are now being substituted by AI technologies. AI is used for automatic answering of questions and queries of customers. Example answering telephone calls or answering on social media. A practise prevalent by firms is to create a virtual assistant to communicate with the customers.

Marketing and sales

Devising a good market strategy is essential tasks for any firm. To plan out a market strategy firms are required to continuously monitor the changing trends of buying and selling as well as consumer preferences. As a practise firms used to appoint specialist to undertake the task of foreseeability. Today this task of foreseeing and analysing the changing trends is being done with the help of AI. AI increases the speed with which this foreseeability is conducted. Major use of AI in marketing is to undertake predictive analysis which is usually applied by firms when framing a market strategy. This helps the business in decision making. Predictive analysis simulates possible trends and results of implementing a strategy which then helps the firms in decision making.

Risk management:

An effective risk management is quiessential for a good corporate governance. Failure to have an effective risk management system may result in failure of business operations. Risk Management involves identification of risk as well as defining measures for decreasing the risk. AI herein is put to analyse different kinds of risk variables and suggest areas of risk so that management can avoid them.[4]

Finance: AI is being increasing used by financial institutions like banks and insurance companies. AI in financial institutions isbeing used to detect fraudulent activity. AI technologies are put to use to perform other banking activities like processing loan applications. (software are used to check the credit worthiness, credit score and an overall background check)[5] The benefits accruing from the use of AI are not restricted to the supply side but extend to the demand side (consumers) as well. Consumers are benefitted with greater variety of goods and services. Further AI offers varies tools which enable consumers to make decisions. AI has made it easier to detect and respond to changes in consumer preferences. AI technologies can be used to detect products which are unsafe and also to fix then remotely just with the help of software updates.

Based on the use of AI in businesses it is clear that AI has procompetitive potential for both demand and supply side. As AI continues to play a wider role in decision making, particularly pricing, there are concerns that it may also hamper completion in some markets.

AI AND ITS IMPACT ON ECONOMY

AI has large potential to contribute to global economic activity. A report prepared by McKinsey Global Institute predicts that around 70 percent of companies shall be adopting at least one or the other type of AI technology by 2030, and less than half of large companies may be using the full range of AI technologies across their organizations. Considering the effects of netting out competition effects and transition costs, it is predicted that AI could deliver additional economic output of around $13 trillion by 2030, boosting global GDP by about 1.2 percent a year[6] Research launched by consulting company Accenture covering 12 developed economies, which together

4 Kresimir Buntak, Maja Mutavdzija and MatijaKovacic, Application of Artificial Intelligence in the Business, International Journal for Quality Research 403-416 <available at> https://www.researchgate.net/publication/351864191_Application_of_Artificial_ Intelligence_in_The_Business (last accessed on 1st August 2023)

5 Mathew N.O. Sadiku, OmobayodeFagbohungbe and Sarahan M. Musa, Artificial Intelligence in Busienss, International Journal of Engineering Research and Advanced Technology,(2020) Vol 6, Issue 7) <available at> https://www.academia.edu/43789563/Artificial_Intelligence_in_Business (last accessed on 13th August 203)

6 Jacques Bughin ,JeongminSeong, James Manyika, Michael Chui, Raoul Joshi, NOTES FROM THE AI FRONTIER MODELING THE IMPACT OF AI ON THE WORLD ECONOMY DISCUSSION PAPER SEPTEMBER 2018

generate more than 0.5 % of the world's economic output, forecasts that by 2035, AI could double annual global economic growth rates.[7]

Impact over manufacturing:

AI is the cornerstone of digitalization of industries. Use of AI technologies like IoT, 5G, cloud computing, big data analytics, smart sensors shall transform manufacturing into a single cyber physical system merging digital technology, internet and production. AI technologies have tremendous potential of being applied in most industrial activities like multi machine systems and industrial research. AI when deployed in manufacturing shall boost the competition in the manufacturing sector by according efficiency and productivity gains.

Impact on firms and industries

It is predicted that use of AI shall create a divide between firms on the basis of frontrunners and laggards. Firms that shall explore the full potential of AI shall be able to enter new areas of business in addition to their core business areas. The more frequent use of AI shall create a divide between technological leaders and laggards.[8] Use of AI shall also create a divide as amongst countries. Those that shall absorb AI completelyshall benefit disproportionately while those slow at adopting AI shall fall behind. It is predicted that most of the front runner firms shall be those from developed countries and as such there shall occur a deeping divide between the developed and developing countries. The rule of the doing business shall be that winner takes it all.

Impact on labour markets

AI shall have a significant effect on the labour markets. it is predicted that the induction of AI into the industries shall result in job creation and also job deduction due to replacement of humans by machines. A forecast by think-tank Bruegel warns that as many as 54 % of jobs in the EU face the probability or risk of computerisation within 20 years.[9]Replacement of humans with AI technologies may also lead to job polarisation. Jobs that are dependent on manual tasks being performed have a greater chance of being replaced by AI technologies. This may while show a sharp increase in job reduction however hindsight previous experiences show that any industrial revolution while initially leads to reduction in jobs, in the longer run there happens an increase in jobs. Nonetheless labour relation are bound to alter. There may incidences of frequent job changes, increase in self-employments, changes in contractual obligations and more. These changes in the labour markets may effect workers and trade unions rights.

7 Economic impacts of artificial intelligence (AI) <available at> https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637967/EPRS_BRI(2019)637967_ EN.pdf (last accessed on 13th August 2023)

8 Ibid

9 Ibid

AI and competition

As discussed earlier induction of AI into industries shall deepen the divide between firms. Those who shall readily absorb AI shall benefit disproportionately while those who shall be slow shall suffer and accrue losses may even become extinct from the market. This in turn will have a direct effect on the competition levels in the market and if left unchecked and unregulated may lead to unfair trade practises. It is believed that with the use of AI competition dynamics shall change to such extent that prediction of the adverse effect shall be difficult for the competition law authorities.

Adoption of AI technologies into business shall have both positive and negative effects. On the positive side use of AI may instil competitive spirit amongst firms in general. Wise use of AI technologies by business can enable them to predict market changes, forecast future market changes and their consequent effects, interpret data and accordingly act. This shall while save time and other resources of the firms, shall also ensure profit maximization. If the business learns how to harness the benefits of using AI, it may prevent firms from engaging in collusive tactics to earn profits. Associated benefits from the use of AI however do not absolve the risk of it being used to derive gains unfairly by businesses. Concerns are raised that use of AI by Digital Markets may at times transcend the limits of healthy competition and may result in firms engaging in abusive conducts.

Price Transparency feature available owing to the use of AI) consumers can make better decisions, it can have negative effect also businesses may resort to unfair business practises like coordination as amongst the firms leading to a situation where competition is substituted with mutual understanding.

Broadly the effects of AI on competition can be classified into three categories:

1. Market Consolidation
2. Collusion and Price Fixing

The availability of AI technologies by few firms shall lead to a situation of market consolidation. Those few firms having access to AI technologies may then be in a position to dictate the market as well as manipulate it. Another significant threat of AI use by firms is indulgence of firms in collusive behaviour and price fixing. The act of collusion by firms is understood as "any form of co-ordination or agreement among competing firms with the objective of raising profits to a higher level than the non-cooperative equilibrium[10]

Findings of 2017 E commerce Sector Inquiry conducted by the European Commissions reported that around 67 percent of online businesses actively monitored prices of their competitors and utilized AI systems to track and report prices. Many of such entities were found engaged in manipulating prices.

10 Abuse of Dominance in Digital Markets<available at> https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf (last accessed on 12th September 2023)

Collusive behaviour may lead to formation of cartels allowing associated rival firm to dictate the price and supply of goods and services in the market thereby hampering healthy competition. The use of AI has made collusive behaviour more prominent. An important reason for the same has been the transparency accorded as to consumer data and prices of various products owing to the use of AI.[11] AI tools can greatly help in boosting the competitiveness amongst the firms however there is a thin line between being competitive and abusive. Along with the benefits of AI tools there remains a constant threat of abuse of one's prominent position to the disadvantage of the other. For example, this collusive behaviour can be more prominent in markets where interaction amongst firms is possible. Similarly, firms that operate on the conglomerate model can use AI to compete in different markets. competing in different markets makes collusion more prominent.

AI is not just used by firms to make decisions but often they form part of product or service provided to the consumers. For example, where a platform provides search results based on search algorithms. Competition concerns may arise in ways that a dominant firm may use its position to exclude downstream competitors or other competitors in related markets. in conglomerate business models firms may engage in anti-competitive practises like that of tying and bundling.

It is the job of competition law to prohibit and prevent anti-competitive conduct by firms and ensure prevalence of healthy competition. Competition laws prohibit abuse of dominant position by firms. The competition laws provide factors that are taken into consideration to determine dominant position and the abuse of such position by firms. The growth of Digital Markets in the recent years has deepen the concerns of competition authorities as to the possibility of abuse of dominant position by firms operating through online platforms. The Digital Markets use the online platforms to connect with the consumers. These online platforms are often embedded with AI technologies which enable these markets to provide efficient services to the consumers. Often with the help of algorithms associated with the AI technology these Digital firms are able to act as gatekeepers to certain markets. such firms are often seen engaging in anti-competitiveconducts like excluding the other competitors from entering the markets or entering into collusive agreements with the existing firms. Such practises not just affect the markets but also affect the interest of the consumers., who are unaware of the fact that their experienceshavebeen altered.

Lamenting on the abuse of dominance concerns pertaining to Digital Markets the Chairman of the Competition Commission of India stated that though Digital Markets are epicentres of technological innovations they have however become zones of entrenched and unchecked dominance.

What makes the Digital Markets prone to abuse of dominance:?

Certain factors which are unique to Digital Markets make it difficult to detect anti competitive practices:

11 AI technologies work on the bedrock of data accumulated by the use of various AI tools.

1. Size: – Rating on the scale of 10, about 7 out of 10 big companies today provide digital products.
2. Digital Markets are often multi sided i.e. they bring together different consumers through a single online platform. This feature is unique to Digital Markets (not present in traditional markets)
3. Products offered through Digital Markets are either zero priced or offered at subsidized prices.
4. Digital Markets often have Network Effects. Network effects, defined as "the gains enjoyed by consumers of a product when more consumers use that product"[12]

Digital Markets are apprehended to manifest the harm that competition laws (especially the abuse of dominance provisions of such laws) are designed to prevent. Owing to the unique features of these markets, the existing competition law tools fall ineffective in dealing with anti-competitive behaviours of the firms doing business through online platforms. Some concerns identify by authorities while determining anti-competitive conduct by firms on digital platforms are as follows:

Difficult to define market: Digital Markets have multi sided markets. Firms dealing within a particular market are able to come in contact with consumers of other markets. firms having dominant position in one market are often able to influence other markets. under such a design it becomes difficult to identify what shall constitute relevant market for a particular firm.

Market Share not the sole criteria to determine market power: in the Digital Markets market share itself does not remains the sole criteria to determine market power. Innovation, low prices, are some elements that can make a firm dominant even though it may not have a large market share.

Networking effects: many digital markets have networking effects. This further complicates the analysis of effects of anti competitive behaviour of firms in a particular market. This also makes it difficult to alienate the relevant market in which the concerned firm does the major business.

The trigger point for competition laws to come into force is the *anti-competitive effect* caused by unfair business practises of the firms. In the case of Digital Firms analysing the harm caused by anti-competitive conduct is difficult. Apart from the fact that the existing competition law tools prove to be ineffective in dealing with the anti-competitive conduct of firms, there also happens to occur a problem of *over enforcement* and *under enforcement* of the competition law tools. The parameters of analysing harm to healthy competition are different andcomplex as compared to the traditional firms, the error of over or under enforcement may occur. As the dimensions of competition itself have widened, firms may be motivated to compete aggressively (coming up

12 Abuse of Dominance in Digital Markets<available at> https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf (last accessed on 12th September 2023)

with newer ideas like zero prices, cash back etc.). The competition tools under such circumstances will have to be used wisely so as not to kill innovative business practise. There may thus occur two types of enforcement errors:

Type 1 error: occurs when competition tools detect risk to healthy competition whereas in reality no harm has occurred.

Type 2 error: when competition tools do not detect any harm when in reality harm has happened.

The way out: A collaborative approach of Countries towards setting technical and moral standards for the use of AI and consequent upgradation of Competition Laws

Digital Markets shall expand in the near future, and so shall increase the present concerns of anti-competitive behaviour by firms on online platforms. it is clear that the existing competition tools are not sufficient to tackle the anti-competitive conduct of firms while doing business in the Digital Markets. A potent solution to this problem shall to draft a new competition law in context to the changed scenario. However, this shall involve a new and wider approach to understand the competitive phenomenon as occurs in the digital markets.

- It shall be required to have an open approach to the various theories of harm associated with abuse of dominance.
- A detailed and cautious approach in selecting cases that truly fall under the criteria of abuse of dominance.

As competition laws are drafted by countries keeping in mind there historical, philosophical and legislative intent, the procedures to deal with anti-competitive conducts differs from country to country. Today trade is not done in isolation but along with world countries all over the world. To control the menace of anti-competitive conduct in Digital Markets, it shall be necessary that countries frame *standards for a uniform Competition Law. The international Competition Law Network i*s a good step in this regard as countries cooperate with one another to frame competition law standards that may align the completion law protocols around the globe. As the use of technology in only going to increase in the near future cooperation from countries shall also be required to set standards for AI use. The standards for AI may include either technical specification or ethical guidelines. For example, a technical specification may provide as to how the AI be designed and used as to not give biased results. Ethical standards as to the use of AI include ensuring transparency, fairness etc.[13]

Competition will greatly be affected by use of AI. AI has the potential of being misused. As the use of AI has greatly enhanced the chances of success for firms, firms shall be motivated to use more and more of AI into their way of doing business. This shall for sure create a competitive zeal among the firms. However, as AI if misused can be a threat to human rights, it is imperative therefore to set standards

13 Nora Von Ingersleben, Competition and cooperation in artificial intelligence standard setting: Explaining emergent patterns, 25 January 2023 <available at > https://onlinelibrary.wiley.com/doi/full/10.1111/ropr.12538 (last accessed on 15th September 2023)

for the use of AI. Delimitation of trade borders necessitate that global frameworks of cooperation vis a vis competition must be set in place to ensure that businesses are conducted in healthy environments. Cooperation shall be required in sharing relevant know how and data as to the potential abuses of AI and the checks and balances that can be put on them, along side the competitive spirit to score well over the other.

Critical Analysis of 'Technology Protection Measures' in India

The need for reform in The Copyright Act, 1957 in the light of recent techno-digital developments

Sundar Athreya. H* & Konark Pratap Gupta**

ABSTRACT

Given the quick pace of recent technological and digital advances, this study offers a critical analysis of the effectiveness and ramifications of "Technology Protection Measures" (TPMs) in India within the context of the Copyright Act, 1957. TPM, which is a part of the broad umbrella term 'Digital Rights Management' (DRM) technologies, are created to protect copyright holders' rights by limiting who can access and utilize their works. Concerns have been made about TPM in the current age of Technology development. This scenario has created additional challenges and risks demanding a thorough assessment of the current legal system. However, the efficacy and implications of TPMs in India, as governed by the Copyright Act of 1957, require critical analysis and reform in light of recent techno-digital developments. This study will delve into the prevailing state of confusion in Indian copyright law created by the inadequacy of TPM's to curb piracy in India and the future copyright law in light of the recent accession. It will lay down the justification as to why it deserves to be protected in the light of recent techno-digital developments.

***Keywords**: Technology Protection Measures (TPMs), digital rights management, Copyright Act of 1955, WIPO, WCT.*

1. INTRODUCTION

India came into consciousness on 4th July 2018 to accede to the widely publicized World Intellectual Property Organization's Copyright Treaty and World Intellectual Property Rights's Performances and Phonograms Treaty (hereinafter collectively referred to as WIPO Internet Treaties). The WIPO Internet Treaties came into force on 25th December 2018. What is interesting is that prior to the accession, India had already made necessary changes to its copyright law way back in 2012 to impose the Technology

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Protection Measure[1] (hereinafter referred as TPM) within its regime without having any legal obligation to do the same as a signatory to either of the two treaties. India had probably perceived TPM as a necessary evil to protect the rights of the authors in the Internet age or it may have been forced to perceive so by both domestic and international stakeholders. It would not be wrong to state that Internet has massively revolutionized the character of copyright law and has brought changes which were unimaginable prior to that. The increased accessibility to Internet has resulted in an increased responsibility to protect the copyrighted material available on the Internet[2]. Further, in contrast to the physical Copyright world, the digital world proposes plethora of challenges for a copyright holder[3]. The proponents of the technology considered TPM as the most suitable and efficient tool in protecting the rights of the authors. However, it is equally true that no matter how much digital protection is added to the work, it would only take one person skilled in technology to disrupt the existing technology and render the existing regime ineffective[4]. It is about time to analyze the element of truth in this statement.

This study has made an attempt to evaluate the success of TPM in India in light of its recent accession to the WIPO Internet Treaties. The second part of this paper would deal with the philosophical justification behind protecting copyrights in the digital world. The third part of the paper would elucidate on the scope of protection under WIPO Internet treaties and the criticism leveled against it. The Fourth part of the paper would throw light on TPM in India and its success, and the Fifth part would finally conclude the discussion in the light of recent developments in this sector.

2. PHILOSOPHICAL JUSTIFICATION BEHIND PROTECTION OF COPYRIGHTS IN THE DIGITAL WORLD

Copyright law had to undergo sea changes in order to keep up with the advancement in technology. As technology progressed it revolutionized the modes of communication drastically. Consequently, copyrighted material was converted in appropriate formats and was accessible to everyone with great ease and at an unthinkable speed. This shift in technology along with an increased access resulted in myriad issues within the contours of the copyright law itself. Advancement in technologies leading up to unauthorized access, rampant duplication and dissemination was perceived as a threat

1 Technology Protection Measure is an effective tool added by the rights holder to protect the content that is available online. For instance, water marks added to a PDF file is one of the nascent TPM available, the pdf files that do not allow the users to write anything on the file is another version of TPM. Further, the TPMS have grown tremendously in the current Chat GPT. (mention the source in this bracket)

2 Dimple Jodha & Poonam Bera, *Copyright Issues in the Era of Ai- A Critical Analysis*, 13 RESMILITARIS 1737 (2023).

3 *Id.*

4 PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM THE PRINTING PRESS TO THE CLOUD, SECOND EDITION (2019).

by authors, artists, content driven industries, and even to the copyright law itself[5]. Authors worldwide feared that technological advancement was making infringement easy and widespread and extremely difficult to regulate or control[6]. To their dismay the principles of copyright law did not make any explicit distinction between digital and /analog works. However, it was apparent that the degree and manner of protection between the digital and analog/ work was certainly different and demanded separate treatment. Therefore, ever since then, it has been argued by the copyright owners that the ever-evolving technology should not become a threat to their ownership rights or compromise their economic interests and the copyright law should be revised or remodeled to regulate infringement in the virtual world.

Though the demands of authors are well found as they are entitled to reap the benefits of their labor and investment in exclusion to others, it must be noted that there exists a fundamental distinction behind the philosophies of the Internet, and the copyright regime[7].Historically, Intellectual Property ("IP") statutes have been created with the primary objective that original creations must be protected against infringement and unauthorized use because the creator has a title over it. It is believed that the labor has invested his hard labor hence; he has a right to preclude others from claiming title over it[8].The Copyright law protects the rights of the creator by giving exclusive right over the creation of his work. On the other hand, Internet thrives on its ability to provide unlimited access to information to the public at large. While one aims to protect the rights of the creators the other inadvertently results in its dilution. Though, technology and copyright have for long shared an intimate relationship[9], the philosophy behind the copyright regime, and the nature of Internet has turned out to be somewhat paradoxical. Copyright regime originally has been based on fixation; however, by its very nature there is nothing fixed or static about the content in the Internet,[10] digitization of the work transcends the territorial constraints. This general lack of fixation coupled with incredible ease to reproduce and distribute work in the online medium results in infringement on a large scale[11]. These philosophies rival each other. While Internet functions with the objective of free dissemination of Information on the other hand, copyright works with the objective of monopolizing information and concentrate it in the hands of the creator, and Internet has created a unprecedented situation where a creator can no-longer have monopoly over his creation.

5 Paul Goldstein, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*(rev edn Stanford University Press 2003)

6 John A. Rothchild, *Economic Analysis of Technological Protection Measures*, 84 Or. L. Rev. 489 (2005).

7 A Philosophy of Intellectual Property, https://press.anu.edu.au/publications/textbooks/philosophy-intellectual-property (last visited Jan 10, 2023).

8 *Id.*

9 Ruth L.Okedji, 'The Regulation of Creativity Under the WIPO Internet Treaties' (2009) 77 Fordham Law Review 2379, 2383

10 Tanya Woods, *Collective Management of Copyright and related Rights*(Edited by prof. Dr. Daniel Gervais, 2nd edn, Wolters Kluwer Law & Business 2011)110

11 Ibid. 110

This proposition is antithetical to the rationale of any IP statute. It has been argued by scholars that the Copyrighted works in the Internet domain are easily replicated thus, the creator will not be able to reap the benefits out of his work and there is a danger of dilution of his right owing to such availability of the material in public domain[12]. Such dilution of rights of authors has created considerable imbalance within the copyright law.

Further, what may also not be ignored is that technology itself is volatile in nature, and it has been uncanny in uprooting the traditional norms of the copyright laws. As soon as a work is disseminated over the Internet; it becomes almost impossible for the copyright owner to control further dissemination without adequate protection[13]. This makes it imperative to have in-built mechanisms to secure the rights of the authors in the digital world. It is undisputed that in absence of such protection the economic interests of authors in creating new works is substantially affected to an extent that the author may not have the incentive to create more works.

It is also worthy to remember that the legislations have attempted to keep pace with the evolving technologies. However, it has not been successful in its pursuit. It has been argued[14] by the proponents of the Digital Rights Management that the problem with the technology can be addressed only with the aid of the technology. TMP has been mooted as an effective solution to the problem of piracy[15]. How far has technology helped us to resolve the existing conundrum is a point which deserves to critically be analyzed.

3. WIPO INTERNET TREATIES

A. Scope of protection

The biggest concern of the right holders is was to eliminate free-riding on their IP. In order to prevent the same, authors began to employ technical measures (TPM). TPM are essentially technological methods which are intended to promote authorized use of digital works[16]. This function is performed by either controlling access to the digital work or preventing acts such as copying once they have accessed. The former is known as access control TPM and the latter as copy control. TPM thus, is not a

12 Richard Posner, and William Landes.'An Economic Analysis of Copyright Law'(1989) 17 Journal of Legal Studies 326

13 Commission of the European Communities, 'Green Paper on Copyright and Related Rights in the Information Society' COM(95) 382 final

14 Ian R. Kerr, Alana Maurushat& Christian S. Tacit, *Technical Protection Measures: Tilting at Copyright's Windmill*, 34 Ottawa L. Rev. 7 (2002).

15 M. Kretchesmer, 'The failure of property rules in Collective Administration: Rethinking Copyright Society as Regulatory Instruments' (2002) 24European Intellectual property Review 126, 133

16 Carys J Craig, 'Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of Prescriptive Parallelism' (2010) Comparative Research in Law and Political Economy Research Paper 18/2010, <http://digitalcommons.osgoode.yorku.ca/clpe/85> accessed 18 December 2018

newly discovered concept but have been in existence since decades[17]. Naturally, such protection measures met with resistance and new technology which was designed with an objective to circumvent such protective measures. Therefore, it was clear that such protective measures were of no use if they were not backed by legal sanction. This resulted into a need for anti-circumvention laws which was felt across several countries. Prominent among such was the White paper[18] issued by the Information Infrastructure Task Force (IITF), an inter-agency federal working group in USA proposing a new legislation to target TPM used to protect copyrighted works. In USA importance was laid on how technology could be used to maximize the rent from copyrighted works and rights of copyright holders could be expanded. For instance the initial proposals proposed control over reproductions of works even if it was temporary[19] and incorporation of anti-circumvention measures to protect these expanded rights. Similarly, analogous proposals could be traced to other countries and regions such as Japan and European Union (EU)[20].

When the proposal faced resistance at the domestic front, Clinton administration in USA took the issue of TPM to the international stage with the World Intellectual Property Organization (WIPO)[21]. Consequently, a new copyright law to address the challenges imposed by technology was born in the form of WIPO Copyright Treaty[22] and the WIPO Performances and Phonograms Treaty[23] (hereinafter together referred to as WIPO Internet Treaties). The new law was seen by many as the consolidation of the several existent national proposals[24]. Although, it has not been stated explicitly, the WIPO Internet treaties are recognized as "special agreements" pursuant to Article 20 of the Berne Convention[25]. Among other things, the most significant aspect of the WIPO Internet Treaties was the introduction of provisions concerning anti-circumvention measures and rights management information[26].

17 Ibid 8

18 Information Infrastructure Task Force, Intellectual Property And the National Information Infrastructure: The Report of The Working Group On Intellectual Property Rights 230 (1995) *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf

19 Okediji (n 2) 2386

20 Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act 2012: A comment' (2012) 17 Journal of Intellectual Property Rights 521, 521

21 Fred von Lohman, 'Measuring the Digital Millennium Copyright Act Against the Darknet: Implications For the Regulations of Technological Protection Measures' (2004) 24 Loyola of Los Angeles Entertainment Law Review 635, 637

22 World Intellectual Property Organization [WIPO] Copyright Treaty, (adopted 20 December1996) 1997 ILM 36 I.L.M 65

23 World Intellectual Property Organization [WIPO] Performances and Phonograms Treaty (adopted 20 December 1996) 199736 ILM 76

24 Graeme Dinwoodie, 'The WIPO Copyright Treaty: A Transition To The Future OF International Copyright Lawmaking' (2007) 57 Case Western Reserve Law Review 751, 759

25 Okediji (n 2) 2388

26 WIPO World Intellectual Property Organization, 'WIPO Internet Treaties' <https://www.wipo.int/copyright/en/activities/internet_treaties.html> accessed 15 December 2018

National implementation of the WIPO Internet Treaties make it imperative to conclude with precision the level of protection required regarding TPM under them[27]. The World Copyright Treaty under Article 11 provides for the protection of the anti-circumvention measures and Article 12 provides similar rights in case of rights management information. Analogous provisions have been found in WPPT. To determine the level of protection regarding ant circumvention measures, a correct reading of the relevant Article 11 of the WCT and scholarly opinion adduced for interpreting the same is required to be undertaken. Article 11 of WCT provides as follows:

> *"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law*[28]*"*

Before we begin to interpret the Article 11, the question which is required to be answered is if WCT requires a new separate anti-circumvention legislation or the treaty obligations could be sufficiently met by the already existing secondary copyright liability doctrines. The treaty leaves it upon the will of the nations to opt for either of the two. The question assumes significance as the object of WCT is to protect the rights of author of literary and artistic works[29] and find adequate solution to the challenge of piracy posed by the advancement of technology by strengthening the protection of TPM taken by authors to prevent infringement of their copyright material or any other unauthorized use and therefore, it does not demand a separate legislation which may end up shifting the traditional focus of copyright regime from the regulation of reproduction, performance, display and distribution of copyrighted works to entirely the TPM used to control access to and use of copyrighted works as seen in the case of the Digital Millennium Copyright Act 1998 (DMCA) enacted by the United States of America[30].

Moving further, a bare reading of Article 11 implies that countries considering the ratification of WCT have to address certain other concerns in order to comply with it. First such policy decision that is required to be made is concerning what to ban in order to afford adequate protection to anti-circumvention measures employed by authors. The concern is whether ban should be on the act of violation of TPM or an indirect or secondary way of banning the circumvention devices, technologies and tools or offering of circumvention services[31] would constitute the adequate legal remedy.

27 Andrew Yolles, 'In Defence of a Defence- A Demonstrable Legitimate and Non-Infringing Purpose as a Full Defence to Anti-Circumvention Legislation' () 10 Canadian Journal of Law and Technology 76, 78

28 WIPO Copyright Treaty (n 14) Art 11

29 Preamble to WIPO Copyright Treaty (n 14)

30 WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997),

31 Gwen Hinze, 'Brave New World, Ten Years Later: Reviewing the WIPO Internet Treaties' Technology Protection Measure' (2007) 57 Case Western Reserve Law Review 779, 785

As the treaty provides no clarification in this regard, it is up to the ratifying countries to decide which way to take. Second parameter which is required to be taken care of is regarding the nature of the technological protection measures. WCT in this regard merely states that effective technological measures are to be adopted. The treaty however does not clarify the meaning of effective. Therefore, it is not clear if access control technology protection measures would be classified as effective or copy control technology protection measures. Thirdly, a very crucial aspect is pertaining to the scope of legal protection provided to technology protection measures. It is not clear if Article 11 protects only the technological protection measures which if circumvented would lead to copyright infringement or entitles the authors a complete protection of their works even if the TPM do not necessarily lead to any infringement. Though the wordings of Article 11 imply protection of the TPM which are used by authors in connection with the rights covered under the treaty or Berne Convention and restrict acts which are not permitted by law[32]. However, countries like USA have enacted laws which do not require any explicit nexus between the legal protection afforded to the TPM and copyright Infringement[33].

Intricately linked to the adore-said concern pertains the issue relating to the status of the already existing exceptions and limitations to copyright infringement under the copyright regime. WCT does not sufficiently clarify this issue as well. For instance in cases similar to USA enactments such as the DMCA[34] as there is no requirement of an explicit nexus between the circumvention act and copyright infringement therefore, all pre-existing exceptions and limitations stand over-ridden until specifically provided for. Lastly, Article 11 gives complete leeway to nations on how they wish to design the structure of penalties and enforcement mechanisms.

Therefore, it is crystal clear that WCT provides enough flexibility to ratifying countries to draft legislations which suit their domestic needs. Before such a decision in relation to ratification is made, it is not easy to brush aside the prevailing criticisms against WCT and it is fair to state that there is an over reliance on TPM and it has failed to answer the challenges posed by digital technology.

B. Limitations of the Treaties

WCT treaty has faced scathing criticism on account of being premature. To justify this argument, a rationale was put forth stating that relying on TPM as the focus of the regime to curb copyright infringement in general and piracy in particular was inherently a flawed idea doomed to fail[35] as at the time when the Clinton administration took the issue of TPM to international arena[36] under the WIPO format, the technology which the TPM were supposed to counter attack was in its developing stage. The

32 WIPO Copyright Treaty (n 20)
33 Hinze (n 23) 91
34 Digital Millenium Copyright Act 1998
35 Lohman (n 13) 636
36 Ibid 637

draftsmen back then did not anticipate the pace of developments in the digital storage and digital distribution technologies which eventually turned out to be the biggest challenge to the policy of using TPM to protect the copyrighted works in the digital world[37]. What happens is that no matter how technically sound the TPM devised happen to be, they are always vulnerable to an expert attack and once it is compromised, a TPM is entirely ineffective to protect the copyrighted works any further. Therefore, it is imperative to check the solution laid down by the treatise.

Second attack that WCT has constantly faced is that it has failed miserably in establishing a global harmonized baseline for TPM or a model anti-circumvention legislation[38] owing to the lee ways, flexibility and the lack of clarity shown by the treaties , the states are free to model their copyright regime in accordance with their suitability as long as it provides adequate legal protection and effective legal remedies[39]which itself remain to be clarified with precision. This has led to countries like the USA adopting a maximalist approach. To understand the actual meaning of the same, we need to have a closer look at the DMCA. DMCA bans both the act of circumvention of TPM as well as the manufacture, sale, distribution, offering and trafficking in tools, technologies and devices that can be used to circumvent without creating a any differentiation between for tools which are designed to circumvent TPM and the tools which have a purpose other than circumvention. Consequently, it is driving the tools which could be used to make a downstream fair use and other lawful uses out of market[40]. Further, it protects both copy control and pure access control TPM. By way of protecting pure access control measures, DMCA therefore, creates a new legal right of controlling access to the copyrighted material which is alien to the copyright regime itself[41]. Further, on the issue of question of a nexus between the act of circumvention and copyright infringement, it is seen by several scholars that DMCA does not require an explicit nexus between the act of circumvention and copyright infringement. As a result, unless the existing exceptions relating to fair use to copyright infringement are specifically mentioned as exceptions they don't hold any relevance under DMCA.

Not all countries opted for such an overboard interpretation of the treaty but rather a balanced one. One such example which could be discussed is that of Australia. Australia too like the USA adopted a specific TPM anti-circumvention legislation namely the 2000 Copyright (Digital Agenda) Act (DAA). The DAA also prohibited the manufacture and supply of circumvention devices[42]. However, the ban under DAA is narrower than that of DMCA in certain aspects. Firstly, DAA bans devices whose sole purpose was circumvention and enabling circumvention of a TPM. Secondly, DAA does not completely ban the circumvention devices but sets up a process under

37 Ibid 640

38 Okediji (n 2) 2400

39 WIPO Copyright Treaty (n 20)

40 Hinze (n 23) 799

41 Craig (n 8) 11

42 2000 Copyright Amendment Digital Agenda Act (DAA), s 116(A)

which access to circumvention devices has been provided for limited purposes. On the issue of a nexus between the act of circumvention and copyright infringement, DAA requires an explicit connection between the two[43]. Further, DAA incorporated certain existing exemptions by means of limited access to circumvention devices and tools. These are just two examples amongst several others which depict different approaches adopted by different nations in their attempt to comply with the international obligations, therefore did not harmonize various national approaches to a particular issue in the copyright realm but created a framework nations were at liberty to live in disharmony[44].

This disharmony has led to an unintended and unexpected collateral damage. Countries like USA which have adopted a maximal approach are passing on their interpretation of the WCT to other nations by the bilateral trade agreements[45]. In this regard, reference may be paid to the Free Trade Agreement concluded between USA and Australia. Article 17.4(7) of the said FTA requires Australia to revise its legislation in the light of the USA DMCA. This was in conflict with the balanced interpretation of WCT which Australia had made. Subsequently, the 2006 Australian anti-circumvention legislation which was enacted post the FTA largely mirrors the DMCA. Such an after-effect of the disharmony caused by flexibility provided under WCT has led to undermining the sovereignty of other nations.

4. INDIA'S ATTEMPT AT MIMICKING THE WIPO INTERNET TREATIES AND ITS FAILURES

The much-debated Internet treatise came into force in India on 25th December 2018. The decision to accede to WIPO Internet Treaties is considered as a victory for the copyright owners while others have expressed their reservations over the same. . It is pertinent to note that the object of the Copyright (Amendment) Act 2012 ("Amendment Act, 2012") was to bring the Copyright Act in conformity with the Internet treatise[46]. In furtherance of it, it introduced TPM[47](Section 65(A)) was introduced for the first time. The introduction of TPM was considered unnecessary by many scholars, owing to the lack of any obligation to comply with the treaty[48]. However, others saw it as a first step towards the accession of the Treatise and few years later, the Department of Industrial Policy and Promotion (DIPP) issued a memo declaring

43 DAA (n 33), s 10(1)

44 Okediji (n 2) 2401

45 View of Robbery under arms: Copyright law and the Australia-United States Free Trade Agreement | First Monday, https://firstmonday.org/ojs/index.php/fm/article/view/1316/1236 (last visited Jul 13, 2023).

46 Department related ParliamentaryStandingCommittee on Human Rights Development, *Copyright amendment bill 2010*,(Parliment of India Rajyasabha No 227, 2010) para 1.2

47 Copyright Act 1957, s 65 (A)

48 Pranesh Prakash, 'Copyright (Amendment) Act of 2012: A Fair Balance' (NUJS-CUSAT Copyright Conference, NUJS-Kolkata,November 2012)Nujs Conference Report.

that the Copyright Act covers content on the internet as well[49]. This together with the provisions of the Information Technology Protection Act, 2000 ("IT Act") depicted India's commitment towards protection of digitized content., In other words, as early as 2012 India recognized the impact of digitization on copyright and started to make India tech savvy in response to the same[50]. Therefore, the step to accede to WCT merely looks like an obvious consequence in the larger scheme of things. However, what has been entirely over-looked or rather blatantly ignored is how successful have the TPM been in protecting the rights of copyright holders and the work ability of the Amendment Act 2012.

In the following section, the author(s) would attempt to analyze the provisions introduced by the Amendment Act, 2012 to combat piracy and strengthen the rights of the copyright holders. It is pertinent to mention that this amendment was particularly made to demonstrate to the world that India is tech savvy[51].

The reasons for orchestrating the Amendment Act, 2012 are fairly simple; it was to supplant the copyright regime in India to provide authors with additional rights to combat piracy which was on a constant increase. The rationale behind the application has been the authors get additional rights to restrict the access to the copyrighted material[52].

The fundamental criticism levied against anti-circumvention measures domestically was that India had no obligation to comply with the Internet treatise. The criticism is true to a certain extent as India was not a signatory to the either of the treaties at that point of time and hence had no obligation to make any amendment to the Copyright Act. But the criticism fails to appreciate the fact that Indian authors and artists were not the only the stake holders, the advent of internet, had made it possible for an increased availability of foreign material in India. Further, most of the content driven industries in India were badly hit by piracy. A report released in 2007[53](prior to Amendment Act 2012) pointed out that Indian film industry alone lost close to 950 Million US Dollars due to piracy. Piracy has compromised a considerable amount of the economic interests of the authors. Leaving it unchecked would have been tantamount to letting a wild horse free. In that process India took relatively less-stringent measures to tame the wild horse, unlike the USA DMCA. It

49 Department of Industrial Policy and Promotion (DIPP), Office Memorandum No. F .NO of 14-35/ 2015 CRB/LU IPR (VII) dated 5 September 2016 <https://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf> accessed 15 December 2018

50 Prof. Shamnand Basheer, 'Copyright (Amendment) Act of 2012: A Fair Balance' (. (NUJS-CUSAT Copyright Conference, NUJS-Kolkata, November 2012)

51 Basheer (n 40) P

52 Christopher D. Kruger, Comment, Passing the Global Test: DMVICA § 1201 as an International Mliodel for Transitioning Copyright Law Into the Digital Age, 28 Hous. J. INTL'L L. 296

53 Bobby Bedi, 'The socio Economic Implications of Piracy To The Indian Entertainment Industry, As well as current trends related to the criminal enforcement against that kind of piracy'WIPOAdvisory committee on enforcement, WIPO, 1.11.2007

would not be an understatement to call it the 'Least dangerous DRM[54]'. However, it is the excessive admiration of the capabilities of the TPM which has evoked a lot of scholarly writings as argued earlier question the utilities of TPM The proponents of the TPM in India like those in other countries considered it as a one-fit solution to the issues faced by copyright holders in the digital environment and have assumed that the answer to the problem created by the machine lies in another machine. The assumption is in-deed true to certain extent.

However, it is also worthy to consider that it only takes another machine to create fresh set of troubles for the application of the previous one. For instance: TPM allows the authors to create digital locks to protect their works, and the legislation prohibits the act of circumvention of that technology, but they fail to appreciate the fact that it only takes another tech savvy enthusiast to break the lock. If the lock is broken once it can be shared with the Internet users throughout. Once the limitation of breaking the protection is crossed the rights granted to the authors becomes tooth-less. On the flip side the Lock can be applied to a book which has already entered the public domain as-well. It is not the object of this paper to criticize TPM based on amendment alone. It is the contention of the author(s) that India has achieved its object of complying with the treaty by incorporating the provisions of the treaty into the Copyright Act but it has completely over-looked the factor that the treaty is only a guiding light, and the provision must be drafted in the lines of the guiding light and not copy the treatise verbatim. Further, the recent accession to the WIPO Internet Treaties without monitoring the success or failure of TPM could prove to be fatal for India and lead to unintended consequences on freedom of speech and expression, right of people to access information etc.

Despite being a balanced effort, the loose drafting of the TPM provisions namely 65A in the Amendment Act, 2012 has raised fundamental doubts regarding the functioning of TPM in India. The opinion of the scholars has unanimously stated that the provisions have failed to provide enough clarity on the usage of the techniques[55]. It is based on lack of definition for the words like 'effectively[56]'. It has committed a folly of following the treaty as it is and reproducing it verbatim. Neither WCT nor WPPT define the words such as 'effectively.' Further, Section 65A is criticized heavily on the ground that it makes it mandatory for the copyright owner to prove the intention of the infringer[57], this may turn out to be an arduous task for the copyright owner. The success of proving intention could turn out to be detrimental to the functioning of TPM as such. This mires the technology provision within the whirl of

54 It is considered as the least dangerous by the authors because it has fair use exemption present in it. This is not present in the DMCA

55 Alankrita Mathur, *A Reflection upon the Digital Copyright Laws in India*, JIPR VOL.25(1-2) [JANUARY-MARCH 2020] (2020), http://nopr.niscpr.res.in/handle/123456789/54636 (last visited Jul 13, 2023).

56 Swaraj Paul Barooah, 'Disruptive (Technology) Law; Examining TPMS and Anti-Circumvention Laws in the Copyright (Amendment) Act, 2012' (2012) 5 NUJS Law Review. 583

57 Copyright Act (n 37)

criticisms. Not to forget, that it has incorporated fair use provisions within the contours of TPM but the work ability of it could turn out to be a huge issue for the simple reason that in the absence of an exact definition of effective it is up to the court to decide what may be an effective, and what may not be an effective protection measure, which itself does not guarantee a correct examination owing to lack of experts in the in this field. The legislature in its wisdom must have drafted this provision to give enough room for future development of technologies but the possible harm it could cause outweighs the uncertain benefit it might bring to the creators.

The pivotal criticism against TPM is that the amended Copyright Act fails to provide any civil remedies to the rights holder. It has made circumvention of the technology measures a criminal offence. The same folly is reflected in India's recent IP Policy too. This makes it difficult for the author to recoup the cost he would have incurred in filing the suit and the damages he would have incurred. Vesting him with both civil and criminal remedies would have enabled the author in an efficient manner.

Another criticism against the Indian TPM is that it does not prohibit the facilitation of circumvention[58]. It is in one way a flawed approach to not prohibit the act of facilitation. If the act is curbed at the facilitation level itself, the rights of the authors could be protected in a better manner. On the other hand, Indian Copyright's counterpart DMCA vests the authors with additional rights relating to access right protection for the Copyrighted material. The US provision vests the authors with the right to 'effectively control access to work[59]. This has been interpreted as granting additional rights to the authors over the rights that is being granted to them by the Copyright Act[60]. India has not approached this path. India has in-fact striven not to tamper with the existing balance of the copyright Act. The balance is still the cornerstone of the copyright law.

The Second part of section 65 of the Act, has maintained the balance by limiting the applicability of the provision to the Copyright Act in other words, the exceptions provided in the copyright Act has to be adhered while using the TPM technology too. This has contributed to our understanding of Indian TPM as 'Least dangerous of TPM.' The balanced approach and flexible drafting was done by legislature to leave give enough room for the judiciary to interpret it. Pursuant to that, Delhi HC had a chance to interpret the said provision in *the Sony play station* case[61] even prior to its notification. The case is pivotal to Indian TPM regime as it was the first case to recognize the rights that has been granted by the newly incorporated provision. It

58 Tarun Krishnakumar and Kaustav Saha, 'India's New Copyright Law: the good, the bad and the DRM' (Journal of Intellectual Property Law & Practice, December 14 2012 <http://jiplp.blogspot.com/2012/12/indias-new-copyright-law-good-bad-and.html> accessed 22 December 2018December 14, 2012.

59 Digital Millenium Copyright Act 1998 s 1201 ((1))(A)

60 Sahil Chaudry, 'The Indian Copyright (Amendment) Act of 2012 and American Digital Music Exports: Why the United States Should Make Stricter Anti-Circumvention Laws in India an American Diplomatic Priority', (2013) 20 UCLA Entertainment. Law. Review. 175

61 *Sony Computer Entertainment Europe Ltd. v. Harmeet Singh &Ors.* [2013] MIPR (1) 0101

went on to state that the defendants have infringed the rights of the petitioners by circumventing it with the aid of a soft-ware known as the jail-breaking. To our dismay the judgment did not speak on the remedies. It was further held by an order of the Delhi High Court in *Adobe* Case[62] that circumvention of TPM is a proof for infringement of Copyright. These judgment ought to have kick started the necessary debate regarding the TPM in India but there has been no significant improvement in the TPM jurisprudence in India subsequent to these cases. Neither has there been any improvement in India's piracy rating. A recent report released by FICCI[63] instills fear in the minds of any copyright holder that piracy in India has reached a pinnacle of 2.8 Billion Dollars loss. US Chamber of Commerce in its recent report had placed India in the countries to be watched for Poor IP Protection and has ranked it 44th out of 50 Nations[64]. India's accession to the treaty came subsequent to the ranking released by the USA. Now that the treat has come into force, it is in-clear if there will be future amendments to the Copyright Act to provide stringent protection in other words, are we on the path to of enacting another DMCA.

TPM in its current form has been in-efficient in achieving its object of curbing piracy. It is nothing but water on the duck's back. If it is amended any further it would alter the fulcrum of the copyright Act. A thorough economic analysis of TPM is required otherwise, if it is changed without the required analysis it would impose un-reasonable burden on the users without guaranteeing any significant rights to the authors simply bowing down to any pressure from outside may prove to be deadly as seen in other countries.

5. CONCLUSION

It is undisputed that digitized content requires protection. However, TPM have proven to be inefficient in protecting the rights of the authors in most countries. Especially in the age of Chat GPT, when the new age AI platform has revolutionized the way creativity is perceived, in the past the creator was*ipso-facto*a human creator, on the other hand, today, with the advent of advanced AI's this proposition has changed and the machine has even become a sole creator[65], the jail breaking software's which was created for the previous generation of infringement[66] stands nullified against the current AI platforms of today. Further, in the era of Telegram infringements[67] where

62 *Adobe Systems Inc. & Anrv. Arun Jain and Ors*.CS(OS) No. 166 of 2014)

63 The Federation of Indian Chambers of Commerce and Industry (FICCI), 'Re-imagining India's M&E sector' (Delhi, March 2018)<http://ficci.in/spdocument/22949/FICCI-study1-frames-2018.pdf> accessed on: 19 January 2019

64 U.S. Chamber of Commerce, ' Sixth Annual international IP index' (Washington D.C, February 2018)<https://www.uschamber.com/press-release/us-chamber-releases-sixth-annual-international-ip-index> Accessed on: 18 January 2019

65 Simon Stokes, *A Landscape Painting of the AI, Art and Copyright Terrain*, 18 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 554 (2023).

66 Rothchild, *supra* note 6.

67 Abhishek Iyer, *The Telegram Tale: Copyright and Trademark Infringement through Anonymous Piracy*, (2020), https://papers.ssrn.com/abstract=3872447 (last visited Jul 13, 2023).

Copyrighted materials are disseminated in online platforms, the existing jailbreak software and other known TPM remain as a tooth less tiger that is unable to protect the creators from the online infringement. Although, Section 65B of the Copyright Act has been incorporated it gathers dust in the shelves and has not been put to tremendous use since its incorporation. Therefore, it is only wise for countries on the path of ratifying the treaty to carefully consider the adequacy of TPM to protect the rights of authors. It is admitted that the Intellectual property regime in India is still in its nascent days and with India's accession to the WIPO Internet Treaties it is not clear if that will strengthen the regime at all or would it lead to collateral damages as seen in other countries. Accession to the Internet treaties has not largely altered the enforcement mechanism of the Copyright. This article has highlighted the prevailing state of confusion in Indian copyright law created by the inadequacy of TPM to curb piracy in India and the future copyright law in light of the recent accession. It has laid down the justification as to why it deserves to be protected. The passage of time coupled with pragmatic steps is sure to achieve the objective of the treaty not only in letters but also in spirit.

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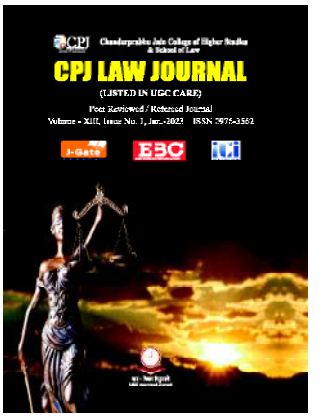

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