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A Comment on *Abu Salem Abdul Qayyum Ansari v. CBI & Anr.* – Understanding the Law of Extradition and the Rule of Specialty

Ria Khanna

INTRODUCTION

Abu Salem Abdul Qayyum Ansari, the appellant herein, played an active role in the serial bomb blasts of March 1993 in Mumbai, as a result of which 257 people died, 713 were injured and property worth Rs. 27 Crores was destructed. A criminal conspiracy had been hatched between the appellant and the other accused persons with intent to commit the abovementioned terrorist acts. The appellant was shown to be an absconding accused. A proclamation by the court and a Red Corner Notice through the Interpol were issued for the arrest of the appellant herein. The appellant had fled the Country and took refuge in Portugal under the assumption of a new identity on a Pakistani Passport, as a consequence of which he was detained by Portugese Police at Lisbon on September, 2002. In December, 2002 a request for the extradition of Abu Salem was submitted by the Government of India to the Government of Portugal by placing reliance upon the International Convention for the Suppression of Terrorist Bombings and the rule of reciprocity. The Government of India assured the Government of Portugal that the appellant would not be tried for any offences other than the ones for which he was extradited and he would not be subjected to death penalty or imprisonment for a term exceeding 25 years. In January, 2005 the Supreme Court of Justice of Portugal granted extradition of the Appellant and subsequently his custody was handed over to the Government of India. However, upon completion of further investigation, the court framed additional charges under the TADA Act, The Explosive Act and the Arms Act against the appellant.

THE ANTITHETICAL VIEWS OF THE SUPREME COURT OF INDIA AND THE COURT OF APPEALS, LISBON

The appellant in the present case moved to the Court of Appeals of Lisbon as well as the Supreme Court of India. The appellant filed a writ petition under Article 32, Constitution of India to declare that the additional charges framed against him were in violation of the Rule of Specialty which was been recognized under Section 21, Extradition Act, 1962. The Apex Court dismissed this writ petition and held that the designated court was not in violation of the Rule of Specialty and the additional charges framed were lesser offences i.e. punishable with lesser punishment than the offences for which the appellant was extradited and were within the ambit of Section 21, Extradition Act, 1962.[1] However, subsequent to the judgment given by the Supreme Court of India in 2010, the Court of Appeals in Lisbon took an antithetical view. It

[1] Abu Salem Abdul Qayoom Ansari v. State of Maharashtra & Anr.,(2011) 11 SCC 214

upheld that a person cannot be tried for an offence other than the one for which he has been extradited as a result of which the Union of India is in violation the principle of specialty. Grieved by the decision of the Apex Court, the appellant preferred an appeal seeking a modification of the judgment dated 10th September 2010, to render the decision given therein as vexatious. The court herein modified its order to the extent of removing the additional charges in view of the interest of justice, comity of courts and the earlier commitment given to the State of Portugal. However, the court held that extradition did not stand annulled and the interpretation of the principle of specialty stands good.[2]

ANALYSIS

In this part of the article, I will be analyzing judgment given by the Supreme Court of India in the case of Abu Salem under two heads which are as follows; 1)Locus Standi to Allege the Violation of the Rule of Specialty; 2)Lesser Offences as an Exception to the Rule of Specialty.

Locus Standi to Allege the Violation of the Rule of Specialty

The judgment given in the case of *United States v. Rauscher*[3] paved way for the development of the rule of specialty. However, Court in *Rauscher's case* failed to address whether an individual had the right to allege the violation of the rule of specialty or was such right only vested in the surrendering state. In the *Rauscher's case*, the defendant's allegation with regards to the violation of the rule of specialty was backed by the surrendering state. To understand whether an individual has a right distinct from that of the surrendering state to allege such a violation, we'll have to understand the theoretical approach in international law with regards to this. According to the realist theory individuals are not a subject of the international law; accordingly there are few rights which may be vested in them. Unless a treaty explicitly provides individuals with enforcement rights, such rights do not exist.[4] In *Rauscher,* the rights under the rule of specialty were not exclusive to the state; the rights were vested in the individual as well. Hence the decision in *Rauscher* indicated that the defendant is not a third party to claim rights under the rule

[2] Abu Salem Abdul Qayoom Ansari v. CBI, (2013) 12 SCC 1
[3] 119 U.S. 407 (1886)
[4] International Extradition,the Principle of Specialty, and Effective Treaty Enforcement, 76 Minn L Rev 1017, 1018-19 n 15 (1992).

of specialty. On the other hand, the fictional theory of international law enumerates that the right to assert the doctrine of specialty, is always vested in the individual, even if such rights have been expressly waived of by the surrendering state under an extradition treaty. It conceptualizes that individuals are subjects of international law who can derive rights directly from the extradition treaty.[5] Accordingly, in order to have a standing to allege that the violation of the treaty, the individual has to assert that he is a beneficiary to it.[6]

In the case of Abu Salem the petitioner approached the Supreme Court of India to assert the violation of the rule of specialty. The Court of Appeals, Lisbon had ruled in his favor and hence backed the view of the petitioner; however, the state was not a party to the suit. Even though the Court of Appeals was not a party to the suit, the Supreme Court of India apprehended that it would have some effect on the relations between the two states. The Supreme Court upheld the values of natural justice and comity of courts and removed the additional charges, which according to the Court of Appeals; Lisbon had violated the rule of specialty. Even though, the State of Portugal was not a party to the suit, the ruling given by the Court of Appeal, Lisbon had influence the decision of the Supreme Court of India. If the Court of Appeals, Lisbon would have not ruled in the favour of the petitioner, the decision given by the Supreme Court of India, in Abu Salem's Case would have been contrasting to that of the Court of Appeals, Lisbon. Therefore, we can safely deduce that even though the cosmopolitan theory gives an individual the locus to allege the violation under the rule of specialty, the state as a subject of international law has a dominant standing the arena of International law as compared to the individual.

Lesser Offences as an Exception to the Rule of Specialty

Section 21, Extradition Act, 1962, has recognized the rule of specialty. It states that an individual shall not be tried for any other offences other than the ones for which he has been extradited. However, a person can be tried for another offence under certain circumstances. In the United Kingdom, a person can be tried for an offence other than the one for which he has been extradited if such an offence can be proved on the grounds of the facts of the surrender.[7] Similarly, in the United States of America, such offences do not violate the rule of specialty if it can be proved that the individual can be indicted for such an offence if the facts relied upon for the accusation are akin to the facts relied upon for the for the extradition proceedings.[8] In India, the scope to try a person for an offence other than the one for which the surrendering state has

[5] Manuel R. Garcia-Mora, International Law and Asylum as a Human Right 13-15 (PublicAffairs, 1956)
[6] Warth v Seldin, 422 US 490, 500 (1975)
[7] Halsbury's laws of England, 4th Ed., Vol. 18, Para 246
[8] American Jurisprudence, 2nd Ed., Vol. 31A, Para 155

extradited him to another state is not as much as the United Kingdom and the United States of America hold as a right to do so. Under the Law of Extradition in India, a person can be indicted for an offence other than the offence for which he has been extradited so long as the punishment for such an offence is lesser than the one for which he has been extradited. This exception has been recognized under Section 21, Extradition Act 1962. Even though this exception to the rule of specialty has been recognized by the Supreme Court of India and other jurisdictions like United Kingdom and United States of America, the Court of Appeals, Lisbon did not recognize this exception to the said rule and held that the Union of India was in violation of the Rule of Specialty, when the petitioner, Abu Salem approached it. The Union of India appealed against this order given by the Court of Appeal, Lisbon, which held that the Union of India had no locus to appeal against the said decision and also stated that there was no violation of the rule of specialty under the India Law however, the rule of specialty under the Portuguese law had been violated due to which the diplomatic relations between the two states may be effected. It is pertinent to note that in the present case, the additional charges that were framed against the petitioner were under Section 5 of the TADA, Section 4(b) and 5 of the Explosives Substances Act and Section 9-B of the Explosives Act. The punishment for these offences was less than that of the offences for which he was extradited and the same was affirmed by the Supreme Court of India.[9] Due to the decision given by the Court of Appeal, Lisbon, the Supreme Court of India removed the charges that were added to the main offence because it was apprehensive that this would affect the relations between the two sovereigns. However, it did not alter the interpretation of the rule of specialty under Section 21, Extradition Act, 1962 and still recognizes lesser offences as an exception to the rule of specialty.

CONCLUSION

This decision of the Supreme Court signifies the importance of extradition treaties since the locus standi to allege the violation of the rule of specialty is an issue yet to be addressed and such treaties set out a legal framework along the lines of which a fugitive can be extradited by the surrendering state to the requested state. At present, the Union of India is a party to 43 extradition treaties which are bilateral in nature and 10 extradition arrangements. These are fewer in number as compared to other countries, for instance US and UK are a party to over 100 treaties. It is pertinent to note that out of the 43 bilateral extradition treaties, none of these are with the neighboring countries such as Pakistan, Afghanistan and Myanmar and due to this India may face difficulties in the near future. However, the inception of the Fugitive Economic

[9] Abu Salem Abdul Qayoom Ansari v. State of Maharashtra & Anr. ,(2011) 11 SCC 214

Offenders Bill, 2018 in India is a step forward to curb international crimes and promoting international co-operation.

A SHORT NOTE ON THE EVOLUTION OF RIGHT TO PRIVACY AND THE AADHAAR JUDGEMENT

Rhitam Chatterjee

The law of Privacy is a recognition of the individual's right to be let alone and to have his personal space unviolated. The need for privacy and its recognition as a right is a modern phenomenon.[1] "The term 'Privacy' has been described as the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time. It means his right to withdraw or to participate as he has seen fit. It also means the individual's right to control dissemination of information about himself which is in his own personal possession." The Supreme Court[2] has defined "Privacy" as "the state of being free from intrusion or disturbances in one's private life or affairs." The concept is used to describe not only rights purely in the private domain between individuals but also Constitutional rights against the state. The former deals with the extent to which a private citizen (which includes the media and the general public) is entitled to personal information about another individual. The latter is about the extent to which government authorizes can intrude into the life of the private citizen to keep a watch over his movements through devices such as telephone tapping or surveillance. This aspect also concerns the extent to which government authorities can exercise control over personal choice, for instance, by determining whether a pregnant woman has the right to abortion or whether an HIV infected person has the right to marry or have children.

The right to freedom of speech and expression and the right to privacy are two sides of the same coin.[3] One person's right to know and be informed may violate another person's right to be left alone. Just as the freedom of speech and expression is vital for the dissemination of information on matters of public interest, it is equally important to safeguard the private life of an individual to the extent that it is unrelated to public duties or matters of public interest. The law of privacy endeavours to balance these competing freedoms. "The exponential growth of the media, particularly the electronic media in recent years has brought into focus issues of privacy." The media has made it possible to bring the private life of an individual into the public domain, exposing him to the risk of invasion into his or her space and privacy. The risk of invasion into the right to privacy was quite remote when such information was not so easily accessible to the public. In India, newspapers were for many years, the primary source of information to masses. Since the vast majority of the population was mainly illiterate, so the newspaper had a very limited affect.

[1] "Constitutional and Statutory safeguards for Right to Privacy"
[2] Sharda v. Dharamapal, 2003 (4) SCC 493
[3] "Media freedom and Right to Privacy"

Although the right to privacy is not a particular fundamental right but has, nevertheless, it has gained constitutional recognition. Privacy is not enumerated amongst the various "reasonable restriction" to the right of freedom of Speech and expression existed under Article 19(2). However, this lacuna has not prevented the courts from carving out a constitutional right to privacy by creative interpretation of the Right to life under Article 21. The right to privacy in India has derived itself from the sources of common law on Law of Torts - a private action for damages for unlawful invasion of privacy is maintainable. The printer and the publisher of magazines were liable for the damages if they publish any matter concerning the private life of an individual which would include his family, education, procreation, parenthood, childbearing, etc. without his consent[4]. There are two exceptions to this rule, first, once the publication is a matter of public record, this right to privacy does not survive anymore and second, when the publication relates to the discharge of the official duties of a public servant, an action is not maintainable unless the publication is proved to be false, malicious or is untruthful. Under the Constitutional Law, the right to privacy is implicit in the fundamental right of life and liberty guaranteed by Article 21. This would include the right to be let alone. This right should, however, be balanced with the right of media flowing from Article 19(1), in publishing any matter of public interest.

Technology has been a blessing for this century but it has also directly affected the right of one's privacy. Private videos uploaded over the social media has created a deep impact in the minds of many which has forced people to even commit suicide. There are numerous cases of intercepting of telephonic communication and electronic mails of political rivals and those seeking jobs in companies. Now, there are two legislations which gives power to Governments to trap postal and telegraphic communication in case of emergency. The Apex court[5] had observed that the protection of the citizens cannot be imperilled by permitting the law agency to proceed by unlawful methods. Telephonic trapping is direct invasion into the right of privacy of a citizen. Honourable Justice Kuldip Singh[6] viewed that it is one's right to hold a telephonic conversion at their home or office without interception as matter of right of privacy. It is in this case that the top court laid down certain frameworks for intercepting telephonic conversation and a review to be done by a high level committee regarding such relevance. However in another case[7], Supreme court observed that although phone trapping is against the right to privacy but under certain exceptional conditions it can be done subjected to the procedure established by law. This means that the court will see to it that the procedure has been just, fair and reasonable and not oppressive,

[4] R Rajagopal v. State of Tamil Nadu (1994)
[5] R.M. Malkani v. State of Maharashtra, AIR 1973 SC 157
[6] People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568
[7] State of Maharashtra v. Bharat Shanti Lal Shah (2008) 13 SCC 5

arbitrary or fanciful. In the famous Neera Fadia Tapes Case[8], it was a gross violation of democratic principles to trap phone calls of so many politicians, journalists, etc which was used as a method of investigation in a case related to tax evasion.

The right to privacy implies the right not merely to prevent the incorrect portrayal of private life but the right to prevent it being depicted at all. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes.[9] The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless etc.,[10] The basic right of female is to be treated with decency and proper dignity. But if a person does not like marriage and lives with another the society should be able to permit it. Sense of dignity is a trait not belonging to society ladies only, but also to prostitutes. Rape is not only a crime against the person of a woman, it is a crime against the society. As a victim of sex crime she would now blame anyone but the culprit. Rapist not only violates the victim's privacy and personal integrity, but inevitable causes serious psychological as well as physical harm in the process. Rape is not merely assault but it is often destructive of the whole personally of the victim.[11] Right to privacy is an essential requisite of human personality embracing within it the high sense of morality, dignity, decency and value orientation.

The question of relation of privacy and conjugal right rights arose for the first time in Sareetha v. Venkta Subbaih in 1983. In Saroj Rani v.Sudarshan Kumar Chandha, the Apex Court viewed that the right to marry does to automatically give the right to violate the other person's privacy. These are two distinct rights and must not be confused. Health sector is another important concern in privacy. Your health information includes any information collected about your health or disability, and any information collected in relation to a health service you have received. Some people consider their health information to be very sensitive. The right to privacy is superseded by the right to life. Under medical ethics, a doctor is required not to disclose the secret information about the patient as the disclosure will adversely affect or put in danger the life of other people.

It is in this context that the controversy aroused on the Aadhaar (Targeted Delivery of Financial and other subsidiaries, benefits and services) Act, 2016, popularly known as the "Aadhaar Act". There were controversies regarding many issues in the act, which ultimately got some direction when the Supreme Court in September 2018 in ***Justice Puttaswamy (Retd) and Anr. V. Union of India and Ors.*** upheld the validity of the Act.The Aadhaar Act was held to be

[8] Reported by The Times of India, Allahabad Times, 2010
[9] State of Maharashtra v. Madhuker Narayan Markikar, AIR 1991 SC 207
[10] Neera Mathur v. LIC of India, AIR 1992 SC 392
[11] Rajinder v. State of H.P (2009) 16 SCC 69

constitutional to the extent it allowed for Aadhaar number-based authentication for establishing the identity of an individual for receipt of a subsidy, benefit or service given by the Central or State Government funded from the Consolidated Fund of India.

However, the Supreme Court disallowed the use of individual Aadhaar numbers by any private entities for establishing the identity of the individual concerned for any purpose pursuant to a contract, on the basis that it was contrary to the fundamental right to privacy. The Supreme Court gave direction on various rules, laws, and other circulars that required compulsory linking of aadhaar for getting some basic services.. The Aadhaar Act entitles resident individuals to obtain an Aadhaar number by submitting certain biometric information and demographic information as part of the enrolment process. Subsequently, each time the identity of the individual is required to be verified by the Government or private entities, the Aadhaar number and biometric information, in some cases, was requested as part of the individual identification process, for authentication. As part of the authentication process, certain transaction details are recorded at a central database, arguably creating the framework for a surveillance state.[12]

The Supreme Court was primarily required to assess if the provisions of the Aadhaar Act were contrary to the right to privacy, which has been established as a fundamental right by the Supreme Court in 2017. In this regard, it is relevant to note that a number of services provided by both private entities and Government, was contingent on an individual linking their Aadhaar number for authentication, which indirectly made it mandatory for most individuals to obtain an Aadhaar number. Therefore, the question was not so much whether this was an infringement on the right to privacy, but whether it was a reasonable exception to it.

The Supreme Court held that the right to privacy cannot be impinged without a just, fair and reasonable law. This required existence of a law, which serves a legitimate state aim and is *proportionate* to the objective sought to be achieved. The Supreme Court further clarified that the *proportionality test* includes the following four aspects

1. **Legitimate goal**

   The measure restricting the right must have a legitimate goal.
2. **Rational connection**

   It must be a suitable means of furthering the goal.
3. **Necessity**

   There must not be any less but equally effective alternative.

[12] https://www.scribd.com/document/392684310/Cyber-Nishank

4. Balancing

The measure must not have a disproportionate impact on the right holder.[13]

The Supreme Court struck or read down certain portions of the Aadhaar Act, which did not fulfil the above *proportionality test*. "However, aside from these provisions, the Supreme Court held that the Aadhaar Act, on the whole, as a law, serves a legitimate state aim and is *proportionate*, thereby being a reasonable exception to the right to privacy. However, the most relevant provision which was read down by the Court was **Section 57** of the Aadhaar Act." This provision allowed Government entities, body corporates and individuals to use the Aadhaar number for establishing the identity of an individual for any purpose, pursuant to any law or contract.

Firstly, the Supreme Court held that the phrase '*any purpose*' is not *proportionate*, too wide and susceptible to misuse. The Supreme Court laid down that the purpose has to be '*backed by law*'.

Secondly, the possibility of collecting and using Aadhaar numbers for authentication pursuant to a contract was disallowed since this may result in individuals being forced to give their consent in the form of a contract for an *unjustified* purpose. The Supreme Court laid down that the contract has to be '*backed by law*'.

Thirdly, private entities are not permitted to use Aadhaar numbers for the purpose of authentication, on the basis of a contract with the concerned individual, since it would enable commercial exploitation of an individual's biometric and demographic information by private entities. This effectively prevents companies from using Aadhaar based e-KYC authentication of an individual's identity, which was primarily the way in which many companies complied with the relevant *know your customer* (KYC) requirements.

The Supreme Court was also tasked with deciding the validity of certain directions from different departments of the Government (*brought in through laws or otherwise*), which mandated the linking of Aadhaar numbers to benefit from certain services. This was specifically analysed in the context of the linking of Aadhaar numbers to Permanent Account Numbers (PAN) (relevant for income tax filings), bank accounts and mobile phone numbers.

[13] https://scroll.in/article/896007/the-aadhaar-judgement-puts-forward-two-completely-different-tests-of-the-right-to-privacy

ABORTION- A MENACING WRATH OR A LIFE SAVING BOON ?

Pragya Jha

LITERATURE REVIEW
ABORTION LAWS PREVALENT IN INDIA
ABORTION AND SEX DETERMINATION
ABORTION LAWS- A FUNDAMENTAL RIGHT OF EVERY WOMAN?
COMPARATIVE ANALYSIS OF ABORTION LAWS OF INDIA AND THE OTHER COUNTRIES

LITERATURE REVIEW

For the present paper, the available research on this subject was reviewed. Several books, law commission reports and research papers were read to discuss and determine the material parameters.

Many research papers, statistical data and news articles were referred to know the exact position of abortion in India as well as the other countries. The data was taken from the central government websites which provided very systematic and reliable statistics. Further, many online sources and databases of different nations were referred to collect the relevant data of different countries relying upon which the analysis was drawn for the present research.

The Article titled 'Abortion Law, Policy and Services in India: A Critical Review"[1] gives a detailed interpretation about the abortion laws prevalent in India. The Article has given a great insight to the researcher and has been of great help in the research.

'Right to Abortion"[2] is another article which has been instrumental in the research of the particular topic. It gives information about the historical perspective of Abortion laws. It also distinctly highlights the debate between the right to life and to die of the unborn child.

'Illegal Abortion in Rural Areas: A Task-Force Study"[3] is another Article which gives detailed information about the condition and Abortion facilities in the rural areas. It has been consolidated by the Indian Council of Medical Research, New Delhi.

[1] Siddhivinayak S. Hirve, 'Abortion Law, Policy and Services in India: A Critical Review'.
[2] Manisha Garg, 'Right to Abortion'.
[3] Indian Council of Medical Research. Illegal Abortion in Rural Areas: A Task Force Study. 1989; ICMR: New Delhi.

As defined by the Webster dictionary abortion can be defined as "The termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus."[4] In simple terms abortion can be defined as ending the life of or killing the fetus due to several circumstances like saving the life of the mother, extreme abnormality in the fetus, unwanted pregnancy, family planning, etc. In the present times, most of the countries have comparatively liberal abortion laws but this is not the reality for all the countries. Few of the countries (mostly Muslim origin countries) till today have very stringent abortion laws.

Abortion Laws were introduced in India in the year 1971. Before this period, abortion was held to be a criminal offence under Section 312 to 316 of the Indian Penal Code and both the woman undergoing abortion and the service provider are liable to be punished. The increasing no. of unlawful abortions led to the establishment of the Shah committee in 1964 headed by Shantilal Shah. The recommendations of the Shah Committee helped in the introduction of the Medical Termination of Pregnancy Bill which was passed in the Parliament in August, 1971. The 2002 amendment bill bought certain changes in the original Act. Even though many measures have been taken to stop illegal abortions the wrath still continues. The abortion laws in India are very different compared to the other countries. There is a vital need to implement laws in this field which has kept pace with the times and is not lost in the era of outdated notions. Abortion laws also force us to think about the right to life of an unborn child and whether it is morally right to take away their life due to one reason or the other? At the same time it prodes us to think if abortion right is a fundamental right of every woman? The Article works on these lines to emphasize a middle ground that will ensure the protection and safety of the mother as well as the unborn child.

ABORTION LAWS PREVALENT IN INDIA

SECTION 312 TO 316 OF THE INDIAN PENAL CODE, 1860 DEALS WITH PROVISIONS RELATED TO ABORTION.

Section 312 of the Indian Penal Code- It punishes a person who voluntarily causes the miscarriage of the foetus with the woman's consent. It also includes in its ambit the woman who has voluntarily caused her miscarriage.

Section 313 of the Indian Penal Code- It punishes a person who voluntarily causes the miscarriage of the foetus without the woman's consent.

Section 314 of the Indian Penal Code- It punishes a person who causes the death of the woman with the intent to cause miscarriage of the foetus.

Section 315 of the Indian Penal Code- It punishes a person who does an act to prevent a child from being born alive or cause it to die after birth.

[4] https://www.merriam-webster.com/dictionary/abortion.

Section 316 of the Indian Penal Code- It punishes a person who does an act which leads to death of a quick unborn child.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

In order to bring a more liberalized abortion law in force, the Medical Termination of Pregnancy(MTP) Act, 1971 was bought into force. It was realized that the provisions given in the Indian Penal Code were too stringent and violated the rights of women under Article 21 of the Constitution of India which gives the right to life and personal liberty to every citizen of India. The Medical Termination of Pregnancy Act contains 8 sections and contains provisions by which women can terminate their pregnancy with the help of trained medical practitioners within a limited period of 20 weeks. Also, the act contains provisions which instructs the government to open clinics with trained medical practitioners in each district so that it can be accessible to all women whether living in villages or cities. This will prevent illegal abortions from taking place and it will ensure that women undergo safe abortions.

However, with the progress of time, the period of 20 weeks seems rather restrictive and a petition to increase the limited time period has been filed time and again and this question has been raised before the courts of India in various cases.

The main objective to end the pregnancy or to undergo abortion should be when there is threat to the woman's life or if the foetus is suffering from extreme disabilities and in no case will be able to live a normal life after its birth. But most of the disabilities come to light only after 20 weeks of pregnancy and the MTP Act only gives the limited permitted period of abortion to be of 20 weeks. This very provision defies the sole objective behind undergoing abortions.

In the case of Nand Kishore Sharma v Union of India the validity of the Medical Termination of Pregnancy Act was challenged. It was contended that "Section 3 of the said Act was unethical and completely violative of Article 21 of the of the Constitution of India."[5]

In the case of Dr. Nikhil Dattar & Ors. v. Union of India[6], the main question of debate raised was whether the time limit given in the statute for abortion must be increased from the presently allowed period of gestation of twenty weeks to gestation period of 24 weeks.

In the prominent case of Suchitra Srivastava v. Chandigarh Administration, the Supreme Court gave the helding that "*Article 21 which gives the right to life and personal liberty includes the right to make reproductive choice (to produce child or not to produce). In view of this woman's right to privacy, dignity and bodily integrity should be respected.*"[7]

Amniocentesis is a chemical used in the sex selective tests in Indian and the introduction of the chemical was the very beginning of this trend. Realising the seriousness of the situation, there was a ban declared on all the government institutions providing such services. This led to the rise of illegal private institution

[5] Nand Kishore Sharma v Union of India, AIR 2006 Raj. 166.

[6] Dr. Nikhil Dattar & Ors. v. Union of India, (2008) 110 BOM. L. R. 3293.

[7] Suchitra Srivastava v. Chandigarh Administration, AIR 2010 SC 235.

conducting cheap sex-selective tests for the public. This resulted in a decrease in the female population in India. As a result of this the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in July 1994 which was a very crucial step taken to prevent the widespread use of pre-natal diagnostic for sex determination of the foetus and consequent sex-selective abortion. This vicious cycle needed to stop. According to the report of Census 2011, "*the sex Ratio of 0-6 years fell from 927 females per 1000 males in 2001 to 919 per 1000 males in 2011.*"[8] This resulted in India having one of the world's lowest ration for women to men.

ABORTION AND SEX DETERMINATION

One of the main hurdles which comes in the way of effectively legalizing and providing efficient abortion provisions in India is the practice of undergoing abortions after sex determination of the foetus. Especially, in a country like India where most families give preference to the male child and where rampant gender discrimination exists, the practice of abortion after sex determination of the foetus is widely prevalent. It is morally and ethically wrong to kill the foetus just because it will be born as a girl child. The most probable reasons for female infanticide in India is the general preference of a son over a daughter in most households and also because of the custom of dowry system which is still practiced in most of the states of India although many stringent laws have been made against this practice. India ranked 4th in a survey conducted by the Asian Centre for Human Rights with the Sex Ratio at Birth being 112 males for every 100 females.[9] Although laws like the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (amended in 2003) prohibits sex-selection or disclosure of the sex of the fetus exist in India but the present Statistics conducted by the organization clearly indicates that there is definitely certain loophole which exists in the implementation of these laws. Since sex-selective abortions cannot be done legally people resort to means of illegal abortions. Hence, a solution needs to be found to stop sex selective abortions from taking place. Only then can we further develop the Abortion Laws of India.

ILLEGAL ABORTIONS

"*Every day 13 women die in India due to unsafe abortion-related causes. Nearly 6.4 million pregnancies are terminated every year in India. Unsafe abortion, the third leading cause of maternal deaths in the country, contributes eight per cent of all such deaths annually.*"[10] Thousands of deaths have been reported from unsafe and illegal abortions because of lack of trained abortion medical practitioners, lack of knowledge regarding the legality of abortion and unavailability of safe abortion service. And if this is not enough, the social stigma surrounding abortion further encourages illegal and unsafe abortions.

[8] Census 2011.
[9] Report "Female Infanticide Worldwide: The case for action by the UN Human Rights Council".
[10] https://www.indiatoday.in/india/story/13-women-die-in-india-every-day-due-to-unsafe-abortions-1296850-2018-07-26.

Research shows "*more than 80 per cent of women do not know that abortion is legal in India*"[11] and this further encourages women seeking terminations from unskilled medical practitioners.

There are close to 70 per cent of facilities in the public sector in most states which offer abortion services, but sadly only 30 per cent of primary health-care centres are truly operative.

In Bihar and Jharkhand, studies show that 20 per cent of residents know that abortion is legal, whereas in Madhya Pradesh only 12 per cent are aware of the legality of the abortion. In addition, a recent study in Madhya Pradesh revealed that a woman has to travel an average distance of 20 km to reach an abortion provider.

Also, the stigma and attitudes toward women especially the young and unmarried women who want to undergo an abortion also contribute to the number of unsafe abortions. Most medical practitioners refuse to perform abortions on young women assuming they do not have their parents consent and they are indulging in an immoral and unethical act. This forces the women to resort to illegal and unsafe abortion practices. While the law requires the consent of only the woman if she is over the age of 18 years, in practice, many providers also ask for consent from the spouse or another relative.

Despite the introduction of the Medical Termination of Pregnancy Act which governs abortions in India, the unavailability of trained medical providers, and detailed documentation added with poor knowledge about the legality of abortions contribute to abortion-related deaths.

Estimates indicate that two to four per cent of all abortions in the country are son selective abortions. In India, 80-90 per cent of reported abortions take place in the first trimester, while the sex selection is largely an issue in the second trimester.

The poor, young and unmarried women are more likely to delay their abortion due to several reasons. Most of the times, they do not understand the signs of pregnancy, possibility or legality of obtaining the abortion and the location of safe services.

In order to bring down the overall maternal mortality rate, it is important that access to safe abortion is made available to every woman of the country. There are many ways in which this can be done.

- The access to safe abortion services should be strengthened and trained medical practitioners and equipments should be made available.
- The base of legal abortion providers should be expanded. India basically has a 'physician only' abortion law. This should be amended and more medical practitioners should be included in the ambit.
- The upper gestational limit for abortion should be increased. Whenever there is a diagnosis of substantial foetal abnormalities, the MTP Act should be amended to allow for increased period of terminations, i.e. beyond 20 weeks of gestation period. The MTP Act needs to make a clear provision which clearly communicates that only the consent of women is required for the MTP procedure. This will effectively address the common practice of medical providers insisting that a woman's husband or parents also consent to the abortion.

[11] *Ibid.*

- Access to legal abortion services should be simplified. As per the current law, women must obtain the opinion of one doctor for a first-trimester abortion and the opinion of two doctors for a second-trimester abortion. Amending the MTP Act to simplify and reduce the requirement for a provider's opinion for both first and second-trimester abortions would greatly increase women's access and result in more women opting for safer and legalized abortions.

"56% abortions in India unsafe despite being legal; kill 10 women every day"[12] The 2014 draft bill has proposed to allow abortion for up to 24 weeks' gestation in rape cases, and has also proposed to completely remove the limit in case of specified abnormalities in the foetus. This is the need of the hour with the continuous and rampant growth of population throughout the country. For making abortion services more accessible to the women, the bill has also proposed to allow AYUSH

(Ayurveda, Unani, Siddha, Homoeopathy) doctors, auxiliary nurse midwives (ANMs) and nurses to conduct abortions.

RIGHT TO LIFE OF UNBORN CHILD

Right to life of an unborn child has been a debatable topic right from the time the Abortion laws were implemented in different countries. It is believed that a person's desire for autonomy cannot ever extend to ending another's existence.

The killing of an innocent life is a crime under the Indian Penal Code and the fetus is also considered an innocent life. According to psychological studies many women suffer significant emotional trauma after undergoing an abortion. "*1.5% of the remnant participating in her case series (38% of the 1177 eligible women, after dropouts) had all the symptoms for abortion-specific post-traumatic stress disorder (PTSD).*"[13]

also it is founded that having an abortion may increase a woman's risk of breast cancer in later life. Other complications include damage or infection which can occur in the uterus and the Fallopian tubes having high probability of making a woman infertile. There are also high chances of mmenstrual disturbances. Aborting fetuses just because they may turn out to be disabled sends an indirect and implicit message of rejection to people with disabilities and undermines their capabilities and strength. Also, a foetus is a human being, who is entitled to protection, from the moment of conception and therefore has a right to life that must be respected. Hence going by this argument, it can be concluded that abortion is indeed homicide.

But, International courts and tribunals have another opinion and have held that reference to human beings and persons do not include an unborn foetus.

The Medical Termination of Pregnancy Act prevalent in India for Abortion laws does not provide protection to the unborn child. Any indirect protection which the unborn child gains is due to the protection provided to the pregnant woman. This is violative of Article 14 and 21 of the Constitution of India.

[12]https://www.business-standard.com/article/current-affairs/56-abortions-in-india-unsafe-despite-being-legal-kill-10-women-every-day-117112200168_1.html.

[13]The abortion and mental health controversy: A comprehensive literature review of common ground agreements, disagreements, actionable recommendations, and research opportunities;https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6207970/.

ABORTION LAWS- A FUNDAMENTAL RIGHT OF EVERY WOMAN?

A decision to either undergo Abortion or not should entirely be the decision of the pregnant woman except when the abortion dangerously affects her life. The various other restrictions applied on the abortion laws only put the rights of woman in a doubtful position as her rights then become dependent on those restrictions. Apart from the provisions mentioned in the MTP Act, there are many other reasons for which the women would want to undergo abortion. The woman or her family may not be financially capable of having another child and taking care of it or if the woman is extremely busy and progressing in her career and would not wish to have a child. Also, in many cases the husband and wife may not share a good marital relationship and their marriage is on the verge of breaking down. At such a time if the woman is not allowed abortion it will badly affect the woman as well as the child's future. Apart from these there might be many other reasons due to which a woman might want to undergo an abortion and these provisions are not included anywhere in the Act dealing with Abortion. Thus, limiting the reasons for abortion or the time period for abortion indirectly restricts the rights of woman which are guaranteed to her under Article 14 and 21 of the Constitution of India and hence violates the rights of women guaranteed to her in these articles.

In the case of Roe v Wades[14], the U.S. Supreme Court gave the historic judgement legalising abortion throughout the country and holding anti-abortion laws to be violative of right to privacy and Article 21 of the Constitution of India. The Supreme court held that the right to privacy is implicit in Article 21 of the Constitution of India and the right to abortion is also implicit and can be read from this very right.

In the case of Morgentalor Smoling and Scott vs. R, the Supreme Court of Canada *"focused on the bodily security of the pregnant women. The Criminal Code of the country required a pregnant woman who wanted an abortion to submit an application to a therapeutic committee, which resulted in delays. The Supreme Court found that this procedure infringed the guarantee of security of a person. This subjected the pregnant woman to psychological stress."*[15]

In the case of Paton v. United Kingdom[16], the court held that the unborn does not have an absolute right to life and its right is subjected to limitations where the pregnant woman's life is in danger. The same was held in the case of H Vs. Norway.[17]

Every woman has a right to protect her bodily sovereignty. And this right of hers can be exercised only when she has the freedom to choose what happens with her body i.e. the pregnant woman should have absolute right to carry or terminate the pregnancy. Abortion can also be seeked when there is a danger to the life of the pregnant woman. This does not mean that he foetus' life is less valued to that of the mother, but by undergoing abortion at least the life of one is saved.

[14] Roe v Wades, 410 U.S. 113 (1973).
[15] Morgentalor Smoling and Scott vs. R, (1988) 44 DLR (4th) 385.
[16] Paton v. United Kingdom, (1980) 3 EHRR 408.
[17] H Vs. Norway, (1992) 73 DR 155.

If the woman is forced to carry the child and is not allowed to undergo abortion then there are high chances that the new born will either be abandoned or will not be taken care of properly which will ultimately affect his future and his upbringing.

In the case of D. Rajeswari vs State Of Tamil Nadu And Others,[18] the court granted the permission to terminate the pregnancy of an 18 year old girl, who was raped, since it affected the mental health of the girl. In the case of Dr. Nisha Malviya and Anr. Vs. State of M.P,[19] the court held all the three accused guilty of termination of pregnancy of a minor girl, whom they raped, without the consent of the mother or the girl. In the case of Murari Mohan Koley vs The State,[20] the petitioner who was a medical practitioner, had to prove that the abortion procedure which he had done on a woman, resulting in her death, was done in good faith so that he could get an exception under the MTP Act, 1971. In the case of Shri Bhagwan Katariya And Others vs State of M.P.,[21] the court opined that abortion cannot be done without the mother's consent and hence the doctor will be held liable under Section 3 of the MTP Act,1971.

Through the above case laws it can be shown that a woman has an absolute right to abortion and no one can take away this right from her. The Judiciary has been playing a vital role in this regard and helps in securing these rights to women. Right to abortion is a fundamental right of privacy.

COMPARATIVE ANALYSIS OF ABORTION LAWS OF INDIA AND THE OTHER COUNTRIES

ABORTION LAWS IN THE US

The abortion laws in the US is not centeralized and each State makes its own laws. Though US is a developed country but its abortion laws is not upto its times. Most States have very stringent Abortion Laws and also abortion is not included in the healthcare services i.e. Medicaid (government-assisted health insurance) and hence it is impossible for the low income groups to access this facility.

ABORTION LAWS IN UK

Abortion in England, Wales and Scotland was legalized through the Abortion Act 1967 which was one of the most liberalized abortion laws at that time. Here the time limit of abortion is 24 weeks of gestation period and not 20 weeks as is seen in India and it can extended further in case of emergencies. This makes the law rather sensible and based on the needs of the pregnant women. Also, the statistics of illegal abortion is very less in UK as compared to India. This again proves increasing the gestation period can reduce the no. of illegal abortions in India.

ABORTION LAWS IN SOUTH AFRICA

[18] D. Rajeswari vs State Of Tamil Nadu And Others, Crl.O.P. No. 1862 of 1996.
[19] Dr. Nisha Malviya and Anr. Vs. State of M.P, 2000 CriLJ 671.
[20] Murari Mohan Koley vs The State, (2004) 3 CALLT 609 HC.
[21] Shri Bhagwan Katariya And Others vs State of M.P., 2001 (4) MPHT 20 CG.

The abortion laws in South Africa were liberalized and the concept broadened with the introduction of the Choice on Termination of Pregnancy Act (Act 92 of 1996). Before this Act had come into force, the abortion legislations in South Africa were legal in very limited circumstances.

"In South Africa, a woman of any age can get an abortion on request with no reasons given if she is less than 13 weeks pregnant. If she is between 13 and 20 weeks pregnant, she can get the abortion if (a) her own physical or mental health is at stake, (b) the baby will have severe mental or physical abnormalities, (c) she is pregnant because of incest, (d) she is pregnant because of rape, or (e) she is of the personal opinion that her economic or social situation is sufficient reason for the termination of pregnancy. If she is more than 20 weeks pregnant, she can get the abortion only if her or the fetus' life is in danger or there are likely to be serious birth defects."[22]

If a woman is under the age of 18 years or is married or in a live-in relationship she is adviced to consult her parents or partner repsectively. But this is not a restrictive and compulsory clause and is just optional unlike India. An exception is that if the woman is severely mentally ill or has been unconscious for a long time, then consent of a life-partner, parent or legal guardian is required.

A woman of stable mind can rationally think for herself and doesn't need the consent of anyone in matters of her life decisions. Hence, India should also adopt these particular changes to further develop the abortion laws in India.

ABORTION LAWS IN AUSTRALIA

Abortion laws in Australia is largely governed by the States and territories, just like U.S. and not by the federal government. Hence, the grounds on which you can get abortion vary as well. But unlike the U.S., where many of the States have made Abortion illegal, every State of Australia has legalized Abortion in order to protect the health and life of the woman.

In Australia no Abortion Law has a provision which requires the consent of the husband or the parents of the woman in order for her to get an abortion. This is not the case in India. Here, the parents need to be notified in case an unmarried woman comes to undergo abortion.

Therefore, it can be said that abortion is a fundamental right of every woman and it should be made accessible to them. But at the same time many may question that it violates the right to life of the unborn child. We need to find a middle ground which equally balances both of these rights. It is a very vital question which needs the pondering upon of intellectual brains to come up with a viable solution. According to the research done, it is felt that the one who is living i.e. the pregnant woman should be considered at a higher platform then the one who has still not come in the world and her right to abort or not should be respected. The limited period of 20 weeks should be increased to 24 weeks. There are loopholes in the present MTP Act which gives scope for illegal abortions which proves to be very unsafe for women. This is also a consequence of the limited time period mentioned in the Medical termination of Pregnancy Act. Hence, the loopholes need to be strictly dealt with only after which the menacing wrath of abortion which grasps India can be turned into a life saving boon.

[22] Choice on Termination of Pregnancy Act (Act 92 of 1996), South Africa.

ACID ATTACKS: A CRIME AGAINST HUMANITY

Amrusha Sengupta

INTRODUCTION

Acid Attack is a heinous crime which is usually committed against a woman with an intention to kill her of disfigure her permanently. According to the National Commission of women in India acid attack is " any act of throwing acid or using acid in any form with the knowledge that such person is likely to cause the other person permanent or partial deformity or disfiguration to any part of the body of such person". This attack on women are increasing day by day. The Acid available is very cheap which makes it easier for the attacker to use it against the women. The most common types of acid which are used are sulphuric acid, nitric acid, hydrochloric acid etc. Acid attacks have a great impact on the minds of the victim they are in pain physically and they are often marginalized from the society. With The passing of the Criminal law Amendment 2013 Acid attacks are now specific offences under the Indian Penal Code, 1860. Some medical reforms have been made to help the victims of acid attack. However even today the society does not accept them and they are socially marginalized

EFFECTS OF ACID ATTACK ON THE VICTIM

Acid attack has a devastating effect on the human body. The victim can even turn blind permanently. Apart from that they are effected psychologically. The victims sometime cannot accept this and they take some serious steps. As they are marginalized from the society, no one provides them job they do not have any means to support themselves mostly.

a) **Physical effect:** Acid dissolves the layers of the skin and sometimes it also dissolves the bone underneath. When thrown on face , acid rapidly destroys the eyes , ears , mouth the lips also burn off completely. The immediate danger for the victim is breathing failure. It can cause poisonous reactions to lungs as well. When the burns heal it turns into thick scars which completely disfigures the face of the victim and causes a permanent damage.

b) **Psychological effect:** Acid attack victims have been reported with higher levels of anxiety, depression due to their appearance . The victims have lower self esteem and confidence they feel shy to come in front of everyone,

c) **Social and Economic effect:** Acid attack usually leaves the victim dependent on someone either permanently or temporarily . The society does not accept them back as before . They become unsuitable for work due to their vision and physical disability . Owing to their physical disability as well as for their looks they are not given jobs. No proper steps have been taken by the government to provide them jobs.

STEPS TAKEN BY INDIAN LEGISLATURE

In India before the Criminal law Amendment Act , 2013 the offence of acid attack was registered under Sections 320, 322, 325, 326, 307 of the Indian Penal Code, (1860) . But on 2nd April 2013 Sections 326A and 326B was inserted in the Indian Penal Code, 1860 which specifically deals with acid violence. The 226th Law Commission Report 2009 had also proposed that specific sections dealing with the offence should be introduced.

Section 320- **Grievous hurt.**—The following kinds of hurt only are designated as "grievous"

(Firstly) Emasculation.
(Secondly)—Permanent privation of the sight of either eye.
(Thirdly) — Permanent privation of the hearing of either ear,
(Fourthly) —Privation of any member or joint.
(Fifthly) — Destruction or permanent impairing of the powers of any member or joint.
(Sixthly) — Permanent disfiguration of the head or face.
(Seventhly) —Fracture or dislocation of a bone or tooth.
(Eighthly) —Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.[1]

Section 322-
Voluntarily causing grievous hurt.—Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt." Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

[1] Indian Penal Code, 1860 (Act 45 of 1860)

Section 325-. **Punishment for voluntarily causing grievous hurt**.—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 326- Voluntarily causing grievous hurt by dangerous weapons or means—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 307-Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to 1[imprisonment for life], or to such punishment as is hereinbefore mentioned. Attempts by life convicts.—[When any person offending under this section is under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.]

Section 326 A- Voluntarily causing grievous hurt by use of acid, etc.

Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine; Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim ;Provided further that any fine imposed under this section shall be paid to the victim.

Section 326 B -Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or bums or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

VICTIM COMPENSATION

Section 357 A of the Criminal Procedure Code, 1973 mandated every state to establish a Victim Compensation Fund. The Compensation is to be given in accordance with the scheme which every state adopts. The ministry of Home affairs sees the implementation of Victim Compensation in States and Union Territories. The Central Victim Compensation Scheme was set up in 2015 was set up its main objective is to encourage the states to effectively implement the victim compensation scheme notified under section 357 A of the Criminal Procedure Code, 1973 to financially support the victims of Acid Attack , rape etc. The Central Victim Compensation Scheme, to provide special financial assistance if requires for the medical treatments of the acid attack victims.

SUPREME COURTS GUIDELINES

The Honorable Supreme Court of India in the case of Laxmi v. Union of India,[2] laid down some guidelines regarding the sale of acids. It also held that the victims of Acid attack at least 3 lakhs of Compensation as after care and rehabilitation cost. A sum of 1 lakh has to be paid immediately within 15 days of the attack to facilitate immediate medical attention and the remaining 2 lakhs should be given as soon as within 2 months.

In the case of Parivartan Kendra v. Union Of India[3], it was held that the amount of compensation can exceed the amount of 3lakhs if the victim has suffered serious injuries.

FREE MEDICAL FACILITY

Section 357 C of the Criminal Procedure Code, 1973 says that all hospitals whether public or private whether run by the central or state government or by any other person shall immediately provide first aid or medical treatment free of cost to the victims of any offence under sections 326 A , 376, 376A,376B,376C, 376D or 376E of the Indian Penal Code, 1860 and the police should also be informed about such incident.

[2] (2014) 4 SCC 427
[3] (2016) 3 SCC 571

CASES ON ACID ATTACK

1) **Laxmi v. Union Of India,**[4] In this case 2 men poured acid on Laxmi when she was waiting for a bus on Tughlaq Road. She had refused to marry one of the attackers. This attack had severely disfigured her face, she had to undergo seven surgeries . Laxmi then filed a PIL to the Supreme Court to curb the acid sales. Laxmi had received 3 lakhs as compensation and the entire compensation has been used for her medical treatment.

2) **Sonali Mukherjees Case,** In this case Sonali Mukherjee a woman from Dhanbad was attacked with acid on her face when she was asleep on the roof of her house. She was given compensation and her attackers were sentenced to jail for 9 years, but later they were released on Bail when appealed to the High Court.

3) **Sonia Chaudhurys Case**, Sonia was attacked on 12th May 2004 while she was returning from work. The attacker had poured 5 liters of acid on her face, as she did not get the treatment on time she had lost her right eye. According to to the Doctors she had 55% disfigurement of her body.

4) **Preeti Rathis Case**, Preeti Rathi was selected to the Military Nursing Service , she was supposed to join the naval hospital in Colaba, but just few days before an unidentified man threw acid on her face and fled. This attack apart from giving her unbearable pain infected her kidneys and other body parts. She died later due to these injuries.

5) **Haseena Hussains Case**, Haseena Hussain was an 18 year old B.Com student. She was doing a job in a soft ware centre run by Joseph Rodriguz, when she had quit the job as the company was loss. On April 1999 Haseena was attacked as soon as she reached her new office gate by acid. This attack destroyed her life it took her eyesight she was bed ridden for 10 years her body is totally disfigured and she can't even walk properly.

6) **Annu Mukherjees Case**, In this case the victim was a dancer in a hotel . On 19th December 2004, Annu co worker Meena Khan threw acid on her face as she was earning more than her . She lost her eyes and her body has been disfigured.
7) **Durjan Singhs Case**, Acid attacks are not only restricted to women a male can also be a victim of it. Durjan Singh was attacked by acid when he was returning home after dropping his granddaughter school. He was awarded Compensation by the District legal Services authority Delhi. He was the first male Acid attack victim who was awarded compensation by the Delhi High Court.

[4] (2014) 4 SCC 571

CONCLUSION AND SUGGESTIONS

In my opinion the quantum of punishment under Section 326 A of the Indian Penal Code , which provides up to 10 years punishment extendable up to life and fine. The Imprisonment for 10 years should not be there the minimum punishment of the offender should be life imprisonment and fine. The victim of an acid attack is given a life time scar she suffers immense pain both physically and mentally so the offender should also be punished. The judiciary has adopted strict laws but the government has to be more active . Policies should be adopted by the government to make them self sufficient. The acid attack victims are marginalized from the society if employment facilities are provided to them they will earn for themselves which will boost their self esteem it shall also have ha positive impact in their minds.

The ministry of Home affairs on 30th August 2013 issued certain guidelines regarding sale of acids . Supreme Court has also given similar guidelines

a) Banning over counter sale of acid, unless the seller maintains a register recording the sale of acid , for what purpose it was purchased and details of the buyer should be recorded along with the address.
b) Seller to sell acid to persons only above 18 years, valid id must be produced.
c) Declaration of all stocks of acid by the seller with the Sub Divisional Magistrate within 15 days. In case of undeclared acid stocks fine can be imposed on the buyer.
d) The Educational Institutions, research laboratories, hospitals who are required to keep acid, should also maintain a register recording the reason of its use.

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ADJUDICATING ENVIRONMENTAL DISPUTES: EXPERIENCE OF THE NATIONAL GREEN TRIBUNAL IN INDIA

PRANAV PRAKASH

INTRODUCTION

The National Green Tribunal was established in 2010 and is considered an outstanding example of an environmental court, functioning in the backdrop of a constitutional safeguard provided to the right to healthy environment as a fundamental right to life of all citizens enshrined under Article 21 of the Constitution of India. The genesis of the National Green Tribunal (NGT) is itself what makes it different from the other tribunals in the country. It was established under the weight of a constitutional mandate to implement the international obligations undertaken by India at the United Nations Conference on Environment and Development at Rio de Janeiro in 1992. But as we approach nearly a decade since its inception, the looming question remains – whether the NGT truly been a champion for the environment? As a creature of statute, the NGT derives its jurisdiction and powers squarely from the National Green Tribunal Act, 2010, and is permitted to operate within the confines of the Act only. Of late though, there are winds of change blowing through the Tribunal, which appears to be a hugely regressive step taken in the fight for environmental justice. Further, off late there has been a lot of delegation of essential functions of the NGT to committees headed by retired judges and by doing so they are falling into the same path that the courts in India have long been taking. This has in fact reduced the reputational gap between the Courts and NGT. It can be seen that a visible lack of political will to make appointments to the Tribunal coupled with a wave of new approaches adopted by the NGT for dealing with environmental cases, this research paper seeks to answer the questions on the functioning of the Tribunal, and its efforts to be a champion for the cause of the environment.

INCEPTION AND INITIAL TREND IN THE FUNCTIONING OF NGT

The NGT Act, 2010

The NGT was established through the NGT Act, 2010 initially in Delhi with the principal bench and later followed by establishments in Chennai, Bhopal, Pune and Kolkata with zonal benches. According to the preamble of the Act, the NGT was established for the effective and expeditious disposal of cases related to environmental protection, conservation of forests and natural resources. Further, the

other fundamental purpose of the NGT under the scheme of the Act is to protect and compensate the interests of the persons affected by any environmental exploitation.[1] Another essential purpose for the establishment of the NGT is to carry out the constitutional obligations envisaged under Article 21 of the Indian Constitution.[2] The NGT has more wide-ranging powers as compared to its NEAA counterpart. It has the power to adjudicate on environmental matters involving environmental protection, wildlife and natural resources protection and the legal rights of people affected under various existing environmental laws in the country. Whereas, the NEAA only had powers to examine and question the environmental clearances given by the State and Central Governments. The NGT is a specialized environmental body consisting of both judicial members and experts who have specialized knowledge and the necessary proficiency to understand and deal with issues of environmental importance.

The Independence of NGT

The NGT has a very significant reach with respect to adjudicating matters relating to the environment. The provisions of the Act stipulate that efforts to seek judicial intervention for the protection and improvement of environment will not be rejected on the grounds that the problems concerned involve complex, scientific and technical questions beyond the purview of the court. So, this opens the gates of NGT wide open to Public Interest Litigations filed by advocates. This also means that people willing to file petitions with the NGT can do so at a lower cost.

The NGT has eight expert members with specialized knowledge and proficiency in the fields of physics, chemistry, botany, zoology, engineering, environmental economics, social sciences and forestry. The experts advice the NGT on technical and complex issues thereby aiding the NGT in giving a comprehensive and effective decision with respect to the environmental matters raised in the tribunal. It has the power to adjudicate disputes relating to environmental protection and declare illegal

[1] *See* The Preamble, the National Green Tribunal Act, 2010: "An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto."

[2] *See* The Preamble, the National Green Tribunal Act, 2010: "AND WHEREAS in the judicial pronouncement in India, the right to healthy environment has been construed as a part of the right to life under article 21 of the Constitution."

and invalid any administrative action that is in contravention to environmental laws. It is also empowered to review orders passed under all existing environment protection laws. No other authority in the country can entertain any claims which can be taken up by the NGT. Therefore, the NGT, according to the NGT Act, 2010, was meant to be an independent tribunal free from any sort of interference which affect its proceedings.

Significant Decisions of the NGT

An analysis of the NGT's decisions in its initial years gives a very progressive outlook to the body. Not only has the NGT acted as a crusader of environmental protection, it has also heard the voices of the aggrieved parties on most of the occasions which is a significant step ahead of any of the judicial bodies and its counterpart NEAA. It has effectively stopped industries from exploiting the environment, but most importantly, it has challenged many arbitrary environmental clearances granted by the government. One of such early major instances is the NGT's decision given in the case of *Jeet Singh Kanwar v. Union of India*[3]. In this case, the NGT held that the order of the MoEF granting environmental clearance to a government operated coal-fired power plant was illegal and liable to be quashed because the respondents didn't follow the guidelines in the Public Consultation Process.

Another such instance is in the case of *Adivasi Majdoor Kisan Ekta Sangthan v. Ministry of Environment and Forest*[4]. In this case, the NGT held that the public hearing conducted in this case, which is one of the most essential parts in the process of deciding whether or not to grant an environmental clearance was invalid. It further went ahead and remarked that this case was not merely a case of an insignificant procedural lapse, but a mockery of the whole proceeding.

While the NGT had been successfully challenging specific points with respect to the practice of giving environmental clearances, the process on the whole was still considered an easy and lenient one by the industrial corporations. This scenario completely changed with the NGT's decision in the case of *M.P. Patil v. Union of India*[5], where it held that setting up of a Rehabilitation and Resettlement Policy that

[3] Jeet Singh Kanwar v. Union of India Appeal No. 10 of 2011 (T) dated 16-4-2013.
[4] Adivasi Majdoor Kisan Ekta Sangthan v. Ministry of Environment and Forest Appeal Number 3 of 2011 (T) (NEAA No. 26 of 2009) dated 20-4-2012.
[5] M.P. Patil v. Union of India Appeal Number 12 of 2012 dated 13-3-2014.

considers the needs of the affected persons is one of the most important steps involved prior to successfully getting an environmental clearance. It also held that there must be an expansive definition in determining who would fall under the ambit of 'affected persons' and it should not be restricted only to the land owners of the region. Further, the NGT stressed on the fact that it is the proposer of the project who needs to prove that the project is not in violation of the goals of sustainable development.

The NGT, having a very robust expert panel in its structure, was making good use of the same while deciding matters that came up before it. One of the most glaring instances was when the tribunal went as far as specifying that proper afforestation to is to be done for at least a 100 metre-long stretch on both sides of the Braj Parikrama route as a 'no development zone' in the case of *Braj Foundation v. Government of U.P.*[6]

The regional benches of NGT were also not far behind the principal bench's environmental heroics. In fact, it was the southern bench of NGT in Chennai that decided on the matter of *locus standi* in environmental disputes in the case of *Samata v. Union of India*[7]. It was held that in matters concerning the ecology and the environment, everybody is directly or indirectly affected and thus the right to initiate action could not be limited to the persons who were actually aggrieved.[8] This decision of the NGT opened the scope for the citizens and advocates in filing petitions relating to environmental matters and is still a celebrated decision of the tribunal.

RECENT TRENDS IN THE FUNCTIONING OF NGT

The NGT, in its initial years, has been a true crusader of environmental protection and a promoter of environmental justice through its judgments and orders. It was a well appreciated tribunal which was very effective in its functioning as it always stayed true to its primary objectives. However, in the recent years, there seems to be a wind of change blowing through the NGT. The recent trends of the NGT do not

[6] Braj Foundation v. Government of U.P Application No. 278 of 2013 and MA No. 110 of 2014 dated 5-8-2014.
[7] Samata v. Union of India Appeal No. 9 of 2011, NEAA Appeal No. 10 of 2010 dated 13-12-2013.
[8] *Ibid* 7.

reflect the same enthusiasm and effectivity in environmental protection as it did in the initial stages of its inception. This change in the trend in NGT's approach is due to a collection of factors such as the change in the chairperson, the increasing role of committees, the increasing amount of vacancies, misleading interpretation of the statutes, etc.

Change in the Chairperson

The current chairperson of NGT, Hon'ble Mr. Justice Adarsh Kumar Goel seems to be taking a different view with regard to the approach of the NGT towards petitions filed in the NGT. The most glaring instance in which this was evident was in the recent case of *Manikesh Chaturvedi v. International Society of Krishna Consciousness*[9]. In this case, the chairperson iterated that only cases which have an "important question relating to environment and ecology" shall be dealt with by the Tribunal. Even though the NGT Act, 2010 intended for the NGT to only take up cases which have an "important question relating to environment and ecology", the manner in which the cases are dismissed and disposed off pose a significant threat to the NGT's effectivity.

In the case of *Federation of Rainbow Warriors, Margao v. Union of India and Ors.*[10], the bench headed by the chairperson disposed off the case of an appeal against the construction of a second airport in Mopa, Goa, the construction of which resulted in the felling of over 55,000 trees, loss of tiger habitats and damage of water resources with mere directions to construct additional rain water harvesting facilities.

Another outrageous instance of the NGT's functioning under the current chairperson is in a matter where an environmental activist filed an appeal against the setting up of a bio-ethanol plant in the 'no-development zone' of the Kaziranga National Park, it was dismissed stating that the appellants were a few days late to file the appeal.[11]

The Increasing Role of Committees under the NGT

The NGT has established numerous external committees to keep a check on various aspects of a case including the compliance and adherence of the parties to the orders

[9] Manikesh Chaturvedi v. International Society of Krishna Consciousness (ISKCON) Application No. 427 of 2018.
[10] Federation of Rainbow Warriors, Margao v. Union of India and Ors. Appeal No. 05 of 2018.
[11] Rohit Chaudhary v. Union of India Application No. 38 of 2011.

passed by the NGT. These committees primarily keep a watch on the parties and report their performance to the tribunal. There are over 90 committees set up by the NGT at present and a majority of them are headed by retired Supreme Court judges, High Court judges and ex-NGT members too.[12] The problem with setting up committees is that they have a similar structure and powers as that of the NGT. So, delegating essential functions to the committees invariably dilute and disregard the powers of the NGT itself. Committees are undoubtedly an essential part of the functioning off tribunals, but such excessive delegation of functions to committees will only render the tribunal ineffective.

Vacancies at the NGT

The NGT Act, 2010 provides that the tribunal shall consist of a full-time chairperson and not less than ten judicial and ten expert members, but subject to a maximum of 20 full-time judicial and expert members.[13] Sadly, the current composition of NGT only consists of one chairperson, three judicial members and two expert members. With the structure of the NGT being underfilled by such a large margin, it is far from being effective in providing environmental justice. One of the dire consequences of the NGT being understaffed to such a large extent is the dilution of its own powers. With more vacancies, the NGT will just look to delegate more of its functions to committees and thereby making the committees more powerful at the cost of the NGT itself.

Further, it is due to the problem of vacancy that the southern bench situated in Chennai, one of the most important benches in providing environmental justice which gave landmark environmental judgments such as the *Samata case*[14] became defunct in 2018. As a result, the principal bench is now overburdened with cases that they have to hear through video conferences.

The Irregularities in the Recent NGT Decisions

The NGT's judgments and orders in the recent years lacks a proper rationale behind it. Seldom has the NGT given a proper rationale and computation behind the compensations ordered in its judgments and orders. It has often resorted to mere

[12] Ramesh, M. (2019). *Nearly a Decade Old, Is the National Green Tribunal Losing its Bite?*. The Wire.
[13] Section 4, National Green Tribunal Act, 2010.
[14] *Ibid 7*.

guesswork when it comes to computation of compensation. The most glaring instance of it was in the case of *Krishankanth Singh v. M/S Triveni Engineering Industries Ltd. And Ors.*[15] The tribunal noted that "At this stage it is not possible to determine with certainty the extent of pollution caused and consequences of the violations committed by the industry and therefore some kind of guesswork has to be applied by the Tribunal to direct payment of environmental compensation." Subsequently, the NGT applied the guesswork principle to many following cases.

The NGT has also been drawing irrelevant parallels in deciding the compensation amount in its judgments. In the case of *The Forward Foundation and Ors. v. State of Karnataka and Ors.*[16], the tribunal took inspiration from a 2014 Supreme Court ruling that said mine lease holders should pay 10% of their "sale proceeds". In this case, the tribunal replaced the words "sale proceeds" with "project cost". Therefore, the penalty for unauthorised constructions in the eco-sensitive area between Agara and Bellandur lakes in Bengaluru was a mere 5% of the project cost as the tribunal felt that 10% would be too much.

Another significant irregularity in the NGT's decisions is the insufficient compensations ordered. In the case of *Pramod Kumar Tyagi v. Art of Living International Center and Ors.*[17], the NGT ordered a penalty of Rs. 5 crores on the Art of Living International Center as restoration cost for damaging the fragile ecosystem of the Yamuna floodplains. However, an expert committee has told the NGT that a cost of 42.2 crores will be required to restore the damage caused to the Yamuna floodplains.

Another fundamental drawback in the NGT's decisions is the lack of proper follow up actions by the NGT to check whether the payments reach the affected community or not. According to a report published by the Centre for Science and Environment, the compensation payments are rarely deposited in the ERF. In majority of the cases, the NGT orders the payments to be made to municipal and executive authorities. Only in 12% of the cases, the NGT has ordered the payments to be made directly to the affected community.[18]

[15] Krishankanth Singh v. M/S Triveni Engineering Industries Ltd. And Ors. Application No. 317 of 2014
[16] The Forward Foundation and Ors. v. State of Karnataka and Ors. Application No. 222 of 2014.
[17] Pramod Kumar Tyagi v. Art of Living International Center and Ors. Application No. 76 of 2016.
[18] Chandra Bhushan, Srestha Banerjee and Ikshaku Bezbaroa, 2018, Green Tribunal, Green Approach: The Need for Better Implementation of the Polluter Pays Principle, Centre for Science and Environment, New Delhi.

CONCLUSION

The NGT, as seen in the first chapter, was a true pioneer in environmental protection as it was truly independent in its functioning and was robust in its functioning due to the members involved in the tribunal. However, in the recent years, in the backdrop of a lot of legislative and political changes, the NGT seems to have lost its essence. It is no longer a warrior and champion of environmental justice. Putting the whole tribunal within the purview of the Ministry of Environment through the Finance Act, 2017 affected the functioning of the NGT gravely. No longer is the NGT as independent as before. It is overpowered with vacancies and overburdened with cases as a result of which there has been an increased amount of delegation of its essential functions to committees and thereby diluting the NGT's own powers. Not only has the structure of the NGT suffered damage, the approach it takes in the environmental petitions also has changed. With improper computations and parallels drawn to determine the compensation amount involved in the cases, the NGT has blatantly failed in achieving its fundamental objective of "enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property" as enshrined in the preamble of the NGT Act, 2010. The only way for the NGT to go back to its golden years is for it to purely function as a judicial body with a filled structure which includes its judicial and expert members as they were fundamental in many of the NGT's landmark decisions in its early years. The power of appointment of the chairperson of the NGT must go back to the Chief Justice of the Supreme Court to ensure that NGT stays a judiciary body and does not fall under the comfortable grasps of the Central Government.

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2. The Preamble, the National Green Tribunal Act, 2010: "AND WHEREAS in the judicial pronouncement in India, the right to healthy environment has been construed as a part of the right to life under article 21 of the Constitution."

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17. Section 184, Finance Act, 2017.

AMENDMENT OF OBJECT CLAUSE OF "MEMORANDUM OF ASSOCIATION"

Ridhi Ranka

INTRODUCTION

'Memorandum of Association' is the main body of rules which acts like a constitution to the companies' actions and rules. It is a framework of rules which acts like the skeleton to the body of the company. Basically, every action and rule of action made by the board of directors, members, employees, etc of the company needs to fall within the framework made such a 'Memorandum of Association' or else, the company and its shareholders cannot be held liable for the same.

The Object clause of the Company is the third clause of the 'Memorandum of Association' of such a company. This clause needs to be added to the Memorandum at the time or incorporation and it describes the limits within which a company is allowed to work, i. e., the company is allowed to deal in only those activities which are allowed by the Object Clause. This is so because, the share holders of a company only invest in such a company after reading the object clause and are willing to take up risk only according to such a clause. Therefore, it is prescribed that any company is only required to work according to the object clause or else the corporate veil will be lifted and the employees or directors will be held personally liable for any loss that was incurred in the name of the company from an action outside the object clause.

It is assumed that a company has perpetual existence, i.e., a company does not come to an end upon the death of its share holders but it goes on living where those shares owned by the deceased is transferred to another person, the legal representative of the deceased and the company is not affected by such a transfer. When a company is incorporated itself it is not always possible to foresee all the types of work that will be done by the company therefore, a procedure to amend the Object clause is provided by the Companies Act, 2013 under section 13. Further, there is always a scope of expansion which is available to the company, for example, Reliance which expanded its scope by amending it object clause.

MEANING OF 'OBJECT CLAUSE' OF 'MEMORANDUM OF ASSOCIATION' AND DOCTRINE OF ULTRA VIRES

During incorporation process, one of the most important documents prepared are called 'Memorandum of Association' and the Articles of Association. While the Articles of Association regulates the internal functioning and affairs of a company, the 'Memorandum of Association' is responsible to regulate the external functioning and affairs of a company.[1] Under the provisions of the Companies act, 2013, for the incorporation or registration of any company, it is essential that a few steps be followed and the same must be registered with the Registrar of Companies. These steps of formation of a company are provided under section 3 of the companies act 2013, which states that every company must be incorporated for a lawful purpose and it was further provided that, there must be at least seven or more people present as members for the incorporation of a public company; at least two or more members for the incorporation of a private company and exactly one person for the incorporation of a One Person Company, these persons or members names must be incorporated as a part of the Memo of association which is presented to the Registrar of Companies, further it states that necessary requirements of the 'Memorandum of Association' which is to be presented to the Registrar of Companies for incorporation of a company according to Section 4 of the Act. Section three further provides that a company incorporated under this Act can be of three types, a company limited by guarantee, or a company limited by shares or it can also be an unlimited company altogether, this clause needs to be provided to the registrar of companies in the Memo of association as this determines the liability of the shareholders of a company, i. e., what would the liability of the company be in the case of liquidation of a company.

Section 4 provides that in the 'Memorandum of Association' which is presented to the registrar of companies, the following information needs to be presented, i.e., Name Clause of the company, then the State Clause in which the company would do its business and in which it is being incorporated, then the 3 rd sub clause provides that the objects of the company needs to enlisted in the memo of Association which would give the power to the members of a company to perform tasks, i. e., it provides the categories under which any company can function or transact, next, the kind of liability as already mentioned in the above paragraph needs to be mention whether it is limited by shares or guarantee or unlimited liability itself. Next, the share capital clause of the company needs to be included too which states the

[1] All Answers ltd, 'Alteration of Memorandum of Association' (Lawteacher.net, September 2019) <https://www.lawteacher.net/free-law-essays/business-law/alteration-of-memorandum-of-association-business- law-essay.php?vref=1> accessed 17 September 2019

maximum capital that the company can take from the public and the process through which additional capital can be issued and collected from the public. A new amendment which allows incorporation of one person companies includes that in the Memo of Association, when a One Person Company needs to be incorporated, the one person who will be the only member of the company needs to explicitly mentioned.

Therefore, the sub section 3 of Section 4 of the Companies Act, 2013 provides that the Object Clause needs to be present in the Memo of Association. This clause provides for a list of things that a company will be allowed to work in, i. e., the list gives the extent of power available with the company, and any act done over and above the object clause by the company will be held as ultra vires. This means that when any act is done over the powers provided by the object clause in the Memo of Association

According to the Doctrine of Ultra Vires, any act of the company cannot depart from the provisions of law and from the provisions of the object clause of the Memo of Association. Here, ultra vires is any act Beyond the Powers of the actor acting on behalf of the company, such an act does not legally bind the company from liability further, it provides that liability so incurred by the company will be paid by the person acting on behalf of the company who did have the power to take up such a liability on behalf of the company. This includes that, even though an act is ratified by the Board of Directors but does not fall within the powers of the company according to it Object clause will be an Ultra Vires Act, i. e., it will remain void and the company cannot be held liable for such an act even if it was allowed by its board of Directors to do so, the Board of Directors in fact will be held liable for such an act personally. Doctrine does not include those acts which are necessary for the completion of the object clause, i. e., if an act not specifically provided for in the object clause but is necessary to attain the object of the company such a company is allowed to be ratified by the company according to the provisions of the Companies Act, 2013.

PROCEDURE FOR AMENDMENT OF THE OBJECT CLAUSE

Section 17 of the Company Act of 2013 provides the limitations for alteration of the Object Clause of the Memo of Association. This alteration or amendment process involves five steps according to the provisions of the Companies Act of 2013. These steps are:

Step 1: Calling of a board Meeting for the Amendment of Object Clause

The first step for alteration of the Object Clause requires that a Board Meeting be called up upon whose. Where if the resolution to amend the Objective clause is put up for approval. For this, a notice it to be given to the Board Members and at least 7 days of time should be given for the same. Next, the bo0ard discusses the proposed change to the Object Clause and then sets out an agenda for the Emergency General Meeting to be called further. Then, the date to call the Emergency General Meeting is set by the Board and the notice is sent out. Here, it is necessary that the provisions of section 13 are complied with.

Step 2: A notice for the Emergency/Extraordinary Meeting is Sent to Shareholders and Auditors and also to Directors of the Company.

The next step includes that a notice should be sent to all the shareholders and even the auditors of the company. The format of the notice includes that the notice must contain the date for the Extra ordinary General Meeting and it must also include the venue of the meeting. Further, it is mandatory that the notice must give at least 21 days of time to the all the shareholders after passing of the resolution by the board. Further, it is also essential that the notice must contain the details of the intention of alteration of object clause. The part of the notice which gives special reasons for holding the meeting is an essential under the provisions of section 13 of the Companies Act, 2013 this must be accompanied by an explanatory statement for the shareholder, auditors and directors alike.[2] Such a notice also needs to be put up on the Website of the company for the Member's use if the company has any such website. This is an essential step.

Step 3: Holding the Meeting according to the Notice sent by the Board:

The third step requires that the company calls a meeting according to the provisions of the notice and at the date, time and venue given in the notice after at least 21 days from sending the notice. This requires that the Emergency/ Extra Ordinary General Meeting should be held exactly at the Venue provided in the notice and on the same date as sent by the notice. Further, it is necessary that the agenda that has been sent by the notice be adhered too. Then in the meeting, the agenda is bought before the share holders, directors and auditors of the company, the clause can finally be altered can be done by passing a special resolution which

[2] Alteration of Memorandum of Association, Lawteacher.net (2019), https://www.lawteacher.net/free-law-essays/business-law/alteration-of-memorandum-of-association-business-law-essay.php#ftn2 (last visited Sep 22, 2019).

means that the 3/4th of the members present and voting should ascent to it or else it will not be amended.

Step 4: Filing of the Amendment Resolution with the Registrar of Companies:

Once the special resolution is passed in the Extra Ordinary General Meeting by the share holders, auditors and Directors, then within the next 30 days, it is essential that the Board presents such a special resolution before the Registrar of Companies by filing form MGT-14 which needs to be filed along with all the required documents, i. e., the notice sent to the board; the resolution passed by the Board; the notice sent by the Board to the Auditors, share holders and directors; the explanatory statement sent along with the notice to Share holders, Auditors and Directors; and finally the special resolution which alters or amends the Object Clause of the Memorandum of Association. This is essential as under Section 13 sub clause 10 of the Companies Act, 2013, it is essential to get any amendment to the Object Clause or 'Memorandum of Association' in Registered by the Registrar of Companies.

Step 5: Registration of the Amendment Resolution by the Registrar of Companies:

The Next step in the process of amendment if the object clause of the Memo of Association requires that upon receiving the Form MGT-14 by the Registrar of Companies, filed by the Board of the Company whose Object Clause is to be amended, the Registrar must register the Special Resolution passed by the company. Or else, according to section 13 sub clause 10 of the Companies Act, 2013 if such a special resolution shall not have any effect until it has been registered by the Registrar of Companies, such registration must be in accordance with the provisions of Section 13 itself. According to Section 13 sub clause 9 of the Companies Act, 2013 any such alteration which is filed by the company with the Registrar of Companies needs to be registered by such a Registrar within 30 days of receiving such a form. This form needs to filed in accordance with Form MGT-14 in accordance and compliance of sub clause 6 of Section 13 of the Companies Act, 2013. It is essential that a certificate of such amendment will be provided by the Registrar within 30 days of presenting the form by the Board to the Registrar of Companies.[3]

Through these five steps, any company which has been incorporate under or is governed by Companies Act, 2013 can amend their Objective Clause of Memo of association. It is necessary to do so before expanding or contracting their work and objectives. Any act

[3] Pratik Anand, Procedure: Change in Object Clause as per Companies Act' 2013 TaxGuru (2019), https://taxguru.in/chartered-accountant/procedure-change-object-clause-companies-act-2013.html (last visited Sep 22, 2019).

performed outside the scope of this clause would otherwise become void and the company would further not be held liable for any loss incurred during the process of any act not allowed by the Objective clause.

RESTRICTIONS IMPOSED ON ALTERATION OF OBJECT CLAUSE

Section 17 of the Company Act of 2013 poses restrictions on the amendment of Object Clause and Name Clause of the 'Memorandum of Association'. It states that,

"Section 17 (2) The alteration shall not take effect until, and except in so far as, it is confirmed by the Company Law Board on petition.(3) Before confirming the alteration, the Company Law Board must be satisfied-(a) that sufficient notice has been given to every holder of the debentures of the company, and to every other person or class of persons whose interests will, in the opinion of the Company Law Board, be affected by the alteration; and(b) that, with respect to every creditor who, in the opinion of the Company Law Board, is entitled to object to the alteration, and who signifies his objection in the manner directed by the Company Law Board, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of theCompany Law Board: Provided that the Company Law Board may, in the case of any person or class of persons, for special reasons, dispense with the notice required by clause (a)."[4]

This means that even after the resolution is passed by the members of the board, it does not automatically mean that the Registrar of companies has to abide by the Special Resolution, i. e., the Registrar can raise objections to any alteration of the object clause if it thinks that it is beyond the powers of the company to amend and do not follow the provisions of Section 17. After the amendment of Companies Act in 1974 the responsibility of looking into whether the legal procedure was followed by the company shifted from the hands of the "court" to "Company Law Board". Therefore, it has become essential that a Company Law Board must become satisfied that all the legal requirements must be met with before such a Special Resolution is Registered by a Registrar. The Board must make sure that the each the alteration of the object clause provides the company greater chances of carrying on business more efficiently, pose reasonable restrictions, etc as provided under sub clause 1 of Section 17 of the Indian Companies Act. Further, it is essential that the Board looks into whether all

[4] Section 17, Companies Act, 2013

the share holders and creditors have received the notice with sufficient time. The Board sends notice to the Registrar who can come and gives him an opportunity to raise his objections and suggestions. The Board must act in the interest of members of the Company and its Creditors.

CASE ANALYSIS

"Ashbury Railway Carriage and Iron Co. v Richie[5]*"*

In the above case, Ashbury Railway Carriage and Iron Co Ltd. was a company incorporated under the Companies Act, 1844 in Britain. The Object Clause of this company according to its Memo of Association included, *"to make or sell, or lend on hire, railway-carriages and waggons, and all kinds of railway plant, fittings, machinery and rolling-stock; to carry on the business of mechanical engineers and general contractors…"*[6]The members of the Company took a loan for the construction of a railway line from Richie. This act was later on ratified by all the members of the company. The court held that even though the act of taking financing from Richie had been ratified by all the members of the Company, when such an act is above the power provided to its directors by the Objective clause, then such an act though ratified by the all the members of the company will not make the company liable. Therefore, the court held that the company will not g beheld liable for the financial aid taken from Mr. Richie, rather the members who ratified this transaction will be held personally liable instead. Here, the object clause of the company did not allow that the company can take up financing for the manufacturing of railway lines but, the company contracted for financing railway lines with the respondent. The court held that such an Act violates the Object Clause and therefore, the Doctrine of Ultra Vires shall apply and the company and its share holders can't be held responsible for the Act. Therefore, the members were held personally liable.

"Shabbir Ahmed v. Safedabad Cold Storage & Allied Industries[7]*"*

The facts of this case are that, there was a Extra Ordinary Meeting held for alteration of Memo of Association but Notice was not sent to all the members, so the members who did not receive the notice filed this case. The Petitioners contended that this was against the procedure established by law as the company did not send proper notice to the Members of the company before holding the meeting and a resolution to amend the Memo of Association was passed. So, the court held that, such an alteration which was made after holding of an Extra Ordinary General Meeting would not be valid as the provisions of law were not followed and that would mean that the Act by the Company becomes Ultra Vires. Therefore, the court held that sending a notice prior to any alteration made in 'Memorandum of

[5] (1875) LR 7 HL 653
[6] Ashbury Railway Carriage and Iron Co. v Richie (1875) LR 7 HL 653
[7] (2017) 80 46 (NCLT- Kolkata)

Association' was necessary and an essential and can't be done away with, and any resolution passed in a meeting which was conducted without sending the notices would be void.

"In Re: Bhutoria Brothers ... vs Unknown on 21 May, 1957"[8]

In this case, the company, Bhutoria Brothers (Pvt.) Ltd filed an application for amendment of their Object clause with the Registrar of Companies. This was done after all the prior formalities of calling a board meeting, sending notice and an Extra Ordinary General Meeting was successfully conducted and a special resolution was passed unanimously by the Members of the company. The Object Clause prior to change included, "*purchase, store, sell, manufacture and otherwise dual in the agricultural, mineral and animal products and live-stock, and in the bye-products and the waste-products of their manufacture including jute….*". Which was recommended to be changed to, "*business in optical, photographical, chemical and surgical goods on the one hand and watches, clucks and musical instruments on the other, as also other kinds of machinery.*"[9]

After following the due process, an application was made by filing form MGT-14 but the Registrar refused to accept the alteration as it is, they rather suggested a few changes, which was carried out and approved by the members. The Registrar still did not register the changes in the object clause. So, the company filed the case. The court held that after all the procedures have been duly followed by the company and all the required changes which were recommended by the registrar brought and approved by the members, then the Registrar will have no more say and it is compulsory for him to Register the alteration in the Memorandum of Association.

"In Re: Of Gagalbhai Jute Mills Pvt. vs Unknown on 22 March, 1962[10]*"*

In this case, the company wanted to amend its object clause and a resolution was therefore passed. Accordingly, a resolution was passed by the board and then a notice was therefore sent to the members of the company and according to the procedure, a special resolution was passed. Next the altered clause was sent to the Registrar's office. The Registrar opposed to the alterations in clause 2A of the Object Clause. Then, an application was filed by the company before this court. The court looked into the restrictions laid down by section 17 which restricts starting of a business altogether new.

[8] AIR 1957 Cal 593
[9] In Re: Bhutoria Brothers ... vs Unknown, AIR 1957 Cal 593
[10] (1965) 67 BOMLR 723

It was contended by the parties that whether an additional business be carried on along with the existing business should be decided by the person so doing the business and not someone else.Therefore, the court allowed a few alterations in the object clause but did not allow alterations to a few of the sub clauses

CONCLUSION

Companies Act has come a long way from the time where there was no law governing the Joint Stock Companies in India. In 1860s for the first time when a proper method was established by the Britishers for formation of a Joint Stock Company, Companies Act was the 1st legislation governed the incorporation to dissolution of a company. The act gave greater emphasis on the right of a company for its smooth functioning and liability of its members. Through time, proper procedure has been established to Amend the Object Clause, which was not allowed prior to the Commencement of the Act. Though the Act imposes restrictions on the power of the Companies to Amend the Object Clause, it has come a long way in allowing the amendment. The Judiciary has always in its interpretations taken a very lenient interpretations of the Restrictions imposed on this process by law. The procedure for such an amendment requires 5 steps, i. e., calling a Board Meeting, notice to be delivered to all members, organising an EGM, passing of special resolution by the Members, filing an application with the Registrar of Companies and finally issuing certificate by the Registrar within 30 days. Therefore, the object clause of the 'Memorandum of Association' can be changed by any company but it needs to follow the procedure established by law and is restricted by the limitations imposed by the law on the process.

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ANIMAL JURISPRUDENCE: AN ARGUMENT FOR HARMONIOUS CONSTRUCTION

Rachit Jain

INTRODUCTION: ANIMAL LAW
HISTORY OF ANIMAL WELFARE LEGISLATION OF INDIA
CRUELTY: AN UNVARNISHED TRUTH
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INTRODUCTION: ANIMAL LAW

Animal law is a set of legal rules and doctrines which govern the human being in their practices involving the animal. It includes statutes and judgment that are made for the welfare of the animal. These are anti-cruelty laws that give rights to the animal even though they are not able to exercise it themselves in case of any breach. Therefore it entrusts the responsibility on the human being to prevent the violation of laws. Animals are sentient and have feeling, so they deserve to live their life with dignity and humans must have compassion for them. They are not able to raise their voice but show their suffering through symbols which human being can easily understand.

Animal rights which even most human being did not ponder upon exists in the society and their welfare is an issue worth consideration. The animal also has the right to live peacefully and without unnecessary pain and suffering. But here question persists, are they able to enjoy their rights in the society where there is rampant ignorance by the government as well as citizens? There is always an argument that animals lack reasons and intelligence so they can't be the bearer of rights and human have dominion status over animals. The later part can be considered correct but arguing that they can't be the bearer of rights is erroneous. There is a witty remark "we will recognize the rights of animals whenever they petition for them." The fact that animals can obviously not petition for their "rights" is part of their nature, and part of the reason why they are clearly not equivalent to and do not possess the rights of, human beings.[1] But in case of implementation of animal rights or its violation, the human is the petitioner, respondent, as well as judges and there, is no one to ensure that justice is not only done but seems to be done. Therefore it confers more responsibility on the human being to provide an environment in which no violation of their rights takes place.

HISTORY OF ANIMAL WELFARE LEGISLATION OF INDIA

Animal welfare legislation dates back to pre-independence as an attempt was made for saving wildlife in the form of Indian Forest Act, 1927 which imposes the restriction on hunting in protected and reserved forest. Constitution of India also provide directive

[1] Ludwig Wittgenstein, Philosophical Investigations (New York: Macmillan, 1958), vol. 2, pp. xi, 223.

principle under Article 48, Article 48A and Article 51A (g) & (h) which provide directive principle on state,[2] and fundamental duty on the citizen,[3] towards the animal. *Article 51A* can be used to interpret ambiguous statue.[4] The two major welfare legislation for animals in India is Prevention of Cruelty to Animal (PCA) Act, 1960,[5] and Wild Life (Protection) Act, 1972[6]. PCA act is enacted to prevent the infliction of unnecessary pain or suffering on animals and it provides for the establishment of Animal Welfare board for promotion of animal welfare and to supervise the implementation of the act which dispenses duty on the human while conferring rights to animals. Wildlife Protection Act provides for the protection of Wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto. Both the act also have penal provisions for its violation and also bestow power on the central governments for making amendments and rules for carrying out the purpose[7] of the act. Several rules have been made under the act regarding performing animals, draught and pack animals, slaughterhouses, licensing of farriers etc. to achieve the goal of animal welfare.

CRUELTY: AN UNVARNISHED TRUTH

Cruelty on animal takes place in large number, amongst them few are reported while thousands remain unregistered. The laws are violated publicly but impassivity of administration impairs the whole concern. The Wildlife (Protection) Act, 1972 prohibits the sale of animals,[8] in pet shops. However, these sales are continuing. All kinds of animals can be found for sale in animal markets where they are kept in pathetic conditions. Puppies are drugged to prevent them from crying, large birds are stuffed into small cages and fish become stressed and sometimes die because of confinement, crowding, contaminated water and unnatural temperatures.[9] Animals are transported in small cages and without sufficient food or water and they cannot survive the trauma, so an estimate suggests that around 40%

[2] Sushanta Tagore v. Union of India, AIR 2005 SC 1975.
[3] T.N. Godavarman Thirumulpad v. Union of India, AIR 2012 SC 1254.
[4] P.A. Inamdar v. State of Andhra Pradesh, (2005) 6 SCC 537.
[5] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960.
[6] THE Wildlife (Protection) Act, 1972, No. 53, Acts of Parliament, 1972.
[7] General officer Commanding-in-Chief v. Subhash Chandra Yadav, (1998) 2 SCC 351.
[8] Wildlife Protection Act, 1972, No. 53, Acts of Parliament, 1972, schedule I & ii.
[9] Animals Used for Entertainment | The Issues, PETA India, http://www.petaindia.com/issues/animals-in-entertainment/ (last visited July 20, 2019).

die in captivity and transportation.[10] Even protected animal like star tortoise are sold openly and wild animals are caught and sold in complete violation of provisions of WPA. Captive bird's wings are crudely clipped with scissors to prevent them from flying.[11]

There are many cases in which court has given the decision in favor of week and infirm. A Tonga race was conducted on the eve of Veer Tejaji ka Mela in Rajasthan. Court order to stop the Tonga races as it is leading to cruelty.[12] In the case of *People for Animals* v. *M D Mohazzim & Anr*[13], the court held that birds have fundamental rights including the right to live with dignity and they cannot be subjected to cruelty by anyone. Human beings have no right to keep them in small cages for the purposes of their business or otherwise.

The ruthless act of cruelty is unexceptional as only a few of thousands undocumented are reported every year in India. A report of Mumbai NGO reveals that 19028 cases are reported in Mumbai in last 5 years and not a single arrest has taken place.[14] This shows the law is too weak to inhibit them and animal abusers inescapably go scot-free. If we ponder over cruelty, cases are endless but the focal point is how the human species perform such acts against voiceless animals and got off scot-free.

JALLIKAṬTU ISSUE

If we contend for animal rights then the decision of Supreme Court in the case of *Animal welfare board of India v. A. Nagaraja,*[15] was a landmark judgment and widen the scope of Article 21 in the favour of animals for the first time. Jallikattu is a bull taming event performed especially in Tamil Nadu during the Pongal festival. It is a traditional cultural event but causes major injuries to both bulls as well as human. Therefore, the Supreme Court banned the Jallikattu as it is leading to cruelty. The court stated that:

"*Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding*

[10] Law Commission of India, August 2015, 261 Report on Need to Regulation of shops and Dog and Aquarium fish breeding.
[11] Abdulkadar Mohamad Azam Sheikh v. State of Gujrat, MANU/GJ/0504/2011.
[12] Mahaveer Bishnoi v. State of Rajasthan, 2015 SCC OnLine Raj 1143.
[13] People for Animals v. M D Mohazzim & Anr, 2015 SCC OnLine Del 9508.
[14] Badri Chatterjee Hindustan Times, 19,028 animal cruelty cases in Mumbai over 5 years; not a single arresthttp://www.hindustantimes.com/ (last visited July 20, 2019).
[15] Animal Welfare Board of India v. A. Nagaraja & Ors. (2014) 7 SCC 547.

the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution" Therefore animal life would also be included under right to life as enshrined under Article 21 of the constitution. Court further stated that: "*So far as animals are concerned, in our view, "life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honor and dignity*." It means that animal must also be allowed to lead a life with honour, dignity and without unnecessary pain and suffering.

RESPONSIBILITY LIES ON WHOM?

There are three types of responsibility **(a)** Primary responsibility lies with the citizen of India to not perform any cruelty and respect the fundamental duty to have compassion for animals. **(b)** Secondary responsibility on government and its administrative agencies responsible for implementation of laws to take appropriate action in case of violation of animal rights. **(c)** Third responsibility on Judiciary to give a harmonious construction to animal rights and human interest.

It is the duty of every citizen to see that there is no unnecessary pain or suffering to any animal or bird.[16] Article 51A also makes it a fundamental duty on every citizen to have compassion for animals,[17] so onus lies on the human to care for those who are unable to do themselves. Banning the training and exhibition of animals is valid since it is the moral duty of the state to make laws in furtherance of duties as contained in clause (g) of Article 51A Constitution of India, 1950.[18] Constitutional enactments of fundamental duties, if it is to have any meaning, must be used by the Court as a tool to tab, even a taboo on state action drifting away from constitutional values.[19]

Parens Patriae is the right held by the court to take a reasonable decision on the part of a person who is unable to make one for himself.[20] Usually, such people suffer from

[16] Abdulkadar Mohamad Azam Sheikh v. State of Gujarat, SCR.A/1635/2010.
[17] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Others (2005) 8 SCC 534.
[18] N.R. Nair v. Union of India, AIR 2000 Ker 340.
[19] All India Institute of Medical Sciences Students Union v. AIIMS, AIR 2001 SC 3262.
[20] Black's Law Dictionary, Bryan Garner, ed., 7th edn. (Minn., USA: St. Paul, 1999), p. 952.

disabilities, rendering it impossible for them to make the right decision. The right withheld by the court to begin prosecuting a case on behalf of a legal, disabled citizen. The Court is also 'State' within the meaning of Article 12 of the Constitution of India. Thus, the Court can also act as *Parens Patriae* so as to meet the ends of justice.[21] So it has also become the duty of Court to prevent cruelty on the animal.

Courts in many cases propounded the decision in favor of week and infirm based on the landmark case of A.Nagaraja. The Madras High Court in S. Kannan v. Commissioner of Police,[22] held that protection shall be granted to all kind of birds including poultry against cruelty in any manner, observing- the birds and animals are entitled to co-exist along with human beings. The Court also issued orders prohibiting Cock fight and any other bird or animal fight for the sake of enjoyment of spectators. Similarly, in another case, the court held that to keep birds in cages would tantamount to illegal confinement of the birds which is in violation of the right of the birds to live in free air/sky.[23] All kinds of animal fights and other cruelty act should be prohibited that takes place for enjoyment and other sadistic pleasure.

Even our traditional scriptures call for having compassion for animals. Few lines from Isha-Upanishad, which read as follows: - "The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species." Even Kautilya's Arthshastra talks extensively of animal welfare. For example, it prohibited killing or injuring protected species and animals in reserved parks and sanctuaries. The Village headman was responsible for preventing cruelty to animals and a person found treating an animal cruelly could be restrained in any manner.[24] People should also learn from our traditional and holy scriptures not to violate the right of other species and take responsibility for their welfare.

[21] State of Kerala v. N.M. Thomas, 1976 (1) SCR 906.
[22] S. Kannan v. Commissioner of Police, 2014 SCC OnLine Mad 1186.
[23] Muhammadbhai Jalalbhai Serasiya v. State of Gujarat, 2015 JX (Guj) 378:2014.
[24] Kautilya, ―The Arthshashtra, edited and translated by L.N.Rangrajan 61 (Penguin Books India, 1992).

A good deed done to an animal is as meritorious as a good deed done to a human being, while an act of cruelty to an animal is a bad as an act of cruelty to a human being.[25] ---Prophet Mohammed

ANIMAL WELFARE: AN INTERNATIONAL CONCERN

Animal welfare has become a global concern. Therefore it was recognized by the nations and have included it in their legislative and administrative policy. There are many international convention and agreements taken place for the welfare of animal-like United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Migratory Species (CMS), International Whaling Commission (IWC), and Universal Declaration on Animal Welfare (UDAW) etc.

World Health Organization of Animal Health (OIE), of which India is a member, works for improving animal health worldwide. The Chapter 7.1.2 of the guidelines of OIE, recognizes five internationally recognized freedoms for animals, such as:

- freedom from hunger, thirst and malnutrition;
- freedom from fear and distress;
- Freedom from physical and thermal discomfort;
- freedom from pain, injury and disease; and
- Freedom to express normal patterns of behavior.[26]

These five fundamental rights have been affirmed by the Supreme Court of India in *A. Nagaraj case.* The Supreme Court even reiterated these principles in case of *T. N. Godavarman Thirumulpad*[27] and *Centre for Environmental Law*[28].

The rights of animals have been recognized and embedded in the constitution and other statutes by various countries. Protection of animals has been inducted in Constitution of Germany by way of an amendment in 2002 when the words "and the animals" were added to the constitutional clauses,[29] that obliges 'state' to respect 'animal dignity'. Countries like

[25] Paul Buchanan, Animal Welfare in Islam SouthAsia Global Affairs, http://www.saglobalaffairs.com/special-features/1323-animal-welfare-in-islam.html (last visited Aug 20, 2019).
[26] Animal welfare at a glance: OIE - World Organization for Animal Health, http://www.oie.int/en/animal-welfare/animal-welfare-at-a-glance/ (last visited Aug 25, 2019).
[27] T. N. Godavarman Thirumulpad v. Union of India, 15(2012) 3 SCC 277.
[28] Centre for Environmental Law World Wide Fund India v. Union of India, (2013) 8 SCC 234.
[29] GERMANY CONST. art. 20A.

Switzerland,[30] Austria, and Slovenia also have enacted legislation to include animal welfare in their Constitution.

The Animals Welfare Act of 2006 (U.K.) also confers considerable protection to the animals from pain and suffering. The Austrian Federal Animal Protection Act also recognizes man's responsibilities towards his fellow creatures and the subject "Federal Act" aims at the protection of life and wellbeing of the animals. The Animal Welfare Act, 2010 (Norway) states "animals have an intrinsic value which is irrespective of the usable value they may have for man. Animals shall be treated well and be protected from the danger of unnecessary stress and strain"[31]. Section 26 ofthe Act state that any person who trains animals and who uses animals which are used for showing, entertainment and competitions, including those who organize such activities, shall ensure that the animals are not intentionally subjected to fear, injury or unnecessary stress and strains and are not trained for or used in fights with other animals or people.[32]

The Universal Declaration of Animal Welfare (UDAW) which is an intergovernmental agreement is a campaign led by World Society for the Protection of Animals (WSPA) in order to provide global recognition for the principles of animal welfare. It got considerable support from various countries, including India. The Declaration will create principle guideline on which every nation can work and bring changes in the sphere of animal welfare. It also encapsulated the five freedom defined by OIE. It calls animals as sentient beings and their welfare should be respected.[33] Animal rights have been recognized at the international level and embedded by nations in their governance and policy. India also needs to emphasize on animal welfare and should become an example to the world for giving the dignity of life to animals.

RIGHT TO LIFE: HUMAN V. ANIMAL

Right to life of the human has already been given very wide construction. Right to life should be taken to mean the right to live with human dignity.[34] The right to life includes

[30] SWITZERLAND CONST. art. 120.
[31] Animal Welfare Act, 2010 (Norway), § 3.
[32] Id., § 26.
[33] UNIVERSAL DECLARATION ON ANIMAL WELFARE (UDAW), art. 1 (2011).
[34] Francis v. Union Territory, AIR 1981 SC 746.

all those aspects of life which go to make a man's life meaningful, worth living and complete.[35] While through A. Nagaraja verdict animal has also come under the ambit of Right to life, so both the animals and humans can exercise Right to life which is a fundamental right.

In *Sunil Batra v. Delhi Administration*,[36] the Supreme Court held that the "right to life" included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even include the right to protection of a person's tradition, culture, heritage and all that gives meaning to a man's life. So the right to life of human will extend to the enjoyment of culture and tradition. And we can see in the name of culture like Jallikattu in Tamil Nadu, Bullock cart race in Maharashtra, Kambala in Karnataka etc. take place which often leads to cruelty on animals and violates their Right to Life. Even in the name Freedom of trade and profession, animals are met with cruelty. Killing in the name of religion is also allowed.[37] In such cases, there is a direct collision between the rights of human and animal. For determining the constituent of the 'right', the judiciary has always looked for such facets of 'life' which is essential for humane existence in contrast with an animal.[38] Here tongue-tied proposition has been raised i.e. "Right v. Right" and in exercising one's right there will be the violation of the right of other's and where there is a conflict of interest the universal principle i.e. survival of the fittest will takes place. It is well-settled principle that Right v. Duty will lead to the realization of right. So there is a need for harmonious construction between the rights of animal and the corresponding duty of humans.

All cultural and religious activities that cause cruelty cannot be allowed only on the basis of it being a fundamental right of citizens. In the case *N.Adithayan v. Thravancore Dewaswom Board and Others*[39], Supreme Court held that "*Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made*

[35] Menaka Gandhi v. Union of India, AIR 1978 SC 597.
[36] Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.
[37] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960, sec 28.
[38] Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621.
[39] N.Adithayan v. Thravancore Dewaswom Board and Others, (2002) 8 SCC 106.

by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country." Therefore all custom and traditions having old historical background can be challenged if it violates human rights, statutory right or principle of natural justice. Even we have seen old traditions like sati, dowry, and child marriage have been prohibited as they violate human rights.

A Religious practice which is not an integral part of the practices of the religion is not protected under Article 25 of the Constitution.[40] It has been held by the Supreme Court that in order to get the protection under art. 25(1) of the Constitution of India, 1950, the 'practice' in question must be essential,[41] or mandatory as distinguished from optional, religious practice. Thus it has been held that the sacrifice of a cow on the Bakr-Id-day is not an essential or mandatory religious practice and thus it would be unconstitutional for a government to exempt, on religious grounds.[42] Every aspect of religion is not safeguarded by the Constitution. The non-essential or non-integral parts of religion are subject to regulation by the state in the interest of the community. [43] Cruelty in the name of religion is not justified if it is a non-essential part of religion. Thus, cruelty should not be allowed on the pretext of it being a traditional practice.

PERSISTING GORDIAN KNOT

Despite having the abundant law against cruelty, India has failed to protect their animals against cruelty. Section 11 of the PCA Act, 1960 covers the prevention of surfeit area of all possible actions that causes cruelty. The court held that the words "or otherwise" when used in Section 11, apparently intended to cover other cases which may not come within the meaning of the preceding clause.[44] If there is a prevention of a plethora of acts so why these acts take place in our society. The reason we can find is the sluggishness of administrative agencies who is bestowed with the task of preventing cruelty and take action against the offender and at the same time, the nature of human who does not concede that

[40] Javed v. State of Haryana, AIR 2003 SC 3057.
[41] Quareshi v. State of Bihar, AIR 1958 SC 731.
[42] State of W.B v. Ashutosh, AIR 1995 SC 464.
[43] Sarwar v. Addl. Judge, AIR 1983 All 252.
[44] Lilavati Bai v. State of Bombay, 1957 SCR 721.

animal right is essential and did not take it sternly. The main cause is week penal provisions which are the major reason for ineffectiveness.

Section 11 which prevents humans from treating animal with cruelty have punishment in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty-five rupees but which may extend, to one hundred rupees or with imprisonment for a term which may extend, to three months, or with both.[45] These penalties have not been revised for last 58 years. In *Bharat Amratlal Kothari* case,[46] which amounted to major cruelty only a paltry fine of Rs 50 was imposed on the defendants. These monetary and penal provisions may be relevant at the time of commencement of the PCA Act in 1960 but it has become inconsequential at the present time.

The PCA Act is a welfare legislation for the week and infirm have penal provisions that do not commensurate with the gravity of the offence and defeat the object and purpose of the act. The other facet of problem lies with human enjoyment of cultural, tradition and religious rights and human have dominion stature over animal want to override their rights under the doctrine of necessity but all type of events can't be allowed and it is a strenuous task to decide which acts should be allowed and which should be banned. This needs a harmonious construction so as to allow only essential act under the doctrine of necessity. The lack of willingness of government, administration, and politician also played an important role in ignorance of animal rights.

We should not condemn our justice system as it has even favored animal rights when the matter was placed in the court as in the case of A. Nagaraja & compassion unlimited plus action,[47] but the administrative system should be criticized as they are continuously abortive in their duty as shown by the horrible statistics on cruelty on animals. If we look in an optimistic manner then we can perceive that there is an organization like Animal Welfare Board formed under section 4 of Prevention of cruelty to animal act, 1960,[48] and

[45] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960, § 11 (1).
[46] Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi & Ors, AIR 2010 SC 475.
[47] Compassion unlimited plus action v. union of India, AIR 2016 SC 429.
[48] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960, § 4 (India).

NGO like PETA, PFA etc. that are working for the welfare of the animal and they are becoming the voice of the animal.

RECOMMENDATIONS

Penalty- There is a need for efficacious penal provisions against the offenders under the PCA Act, 1960 as well as other relevant laws. Such a week penalty provisions cannot deter them and they go scot-free. Even in France, cruelty to animals is punishable by imprisonment of two years and a financial penalty (30,000 €). In Bangladesh, the Animal Welfare Law, 2016 provides that anyone involved in the offences like killing an animal or injuring it intentionally will serve a sentence of imprisonment up to a period of two years or will be fined Taka 50,000 or both.[49] Cruelty to the animal has been recognized globally and penalty provisions are also harsh so as to achieve the objective.

It is apparent that India needs to revise the penal provisions in a more comprehensive manner so as to deter the offenders. If penalty provisions are harsh then everyone will ponder over it before violating it. It will lead to creating human compassion for animals and in long run inflicting cruelty will become anathema in the society.

Implementation- There is a doubt that harsh penal provisions can deter the cruelty. The answer is negative because if there is no effective agency to supervise its implementation then it is futile. India is suffering from a problem of proper administration of animal-related issues and implementation of policies. CAG report of 2016 shows that funds meant for animal welfare remain unutilized. So there must be an appropriate agency at district level which is dedicated for the cause of animals. The officials of the agency should be made accountable if there is sloth from their side. Even disciplinary action should be taken against the officials who fail or let down in accomplishing their duty in safeguarding the rights of animals.

Awareness- Any law can only be implemented successfully if it is corroborated with the reason of man and society. Compassion for animals must encapsulate the human philosophy and mind. It can be achieved by creating awareness and seriousness among the public towards laws and rights of animals. They should be made aware of anti-cruelty laws

[49] Law Commission of India, July 2017, 269 Report on Transportation and House-keeping of Egg-laying hens (layers) and Broiler a Chickens.

and animal welfare legislation and the most important are the judgments of the court which laid down many principles for the prevention of cruelty. If they are aware of laws and provision then they can take heed of incidences taking place in daily life and report the matter to appropriate authorities.

Enactment of the draft of Animal Welfare Act, 2011- There is an Animal Welfare Act, 2011 drafted by Animal Welfare Board of India which contains all the provisions that required amelioration in the PCA Act, 1960. Thus, it should be enacted by parliament replacing the PCA Act, 1960 as soon as possible. The penalty provisions have been revised in the draft. Present Act have penalty of Rs 10 to 50 for first time offence which may extend to Rs 100 for subsequent offence and up to 3 months of prison,[50] while the draft has given punishment in the case of a first offence, with fine which shall not be less than ten thousand rupees but which may extend to twenty-five thousand rupees, or with imprisonment up to 2 years, or with both, and in the case of a second or subsequent offence, with fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees, and with imprisonment for a term which shall not be less than one year but may extend to three years.[51]

It also provides 5 freedoms,[52] which every person must ensure in the form of:

- Freedom from thirst, hunger and malnutrition,
- Freedom from discomfort due to the environment,
- Freedom from pain, injury and disease,
- Freedom to express normal behavior for the species,
- Freedom from fear and distress

It also has provision for constitution of state animal welfare board in all state and union territory,[53] so that the problem of implementation of laws can be cured. State Animal Welfare Board shall ensure that the Act and the Rules framed under this Act are given widespread publicity in the State and that due and adequate training is provided to all government officers who are required to enforce the provisions of this Act and the Rules.[54]

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[50] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960, § 11 (1).
[51] Draft of the Animal Welfare Act, 2011, § 20.
[52] Id., § 11.
[53] Id., § 13.
[54] Id., § 14(1).

Publicity, awareness, training and delegated implementation will lead to achieving the purpose and objective of animal welfare. This act is a very comprehensive act and provides a solution to most of the present problem. Therefore, it should be enacted and promulgated as soon as possible

Conflicting Interest- Another area of the problem lies with human's conflicting interest with animal's rights. Human has a feeling of speciesism i.e. human superiority over other creatures leading to exploitation. Cultural, traditional and religious practices also have conflicting interest with animal rights. The solution is harmonious construction and the human need to abandon some interest in favor of animals while safeguarding their essential needs.

We are not advocating a complete relinquishing of human interest but acts which are essential should be allowed under the doctrine of necessity. What is essential and necessary have to be determined while keeping in mind four elements:

(a) Whether act causing unnecessary pain and suffering to an animal

(b) Whether it comes within the preview of the essential or non- essential act for humans

(c) Whether an act is a fundamental and integral part of human life

(d) Personal views and reaction are irrelevant and the decision should be made on reason and conscience.

All animal sport or acts just for sake of "amusement and entertainment" must be banned. Animal rights should also be given importance, not above human rights but equal to human rights and follow the fundamental duty of treating the animal with compassion. They should work towards augmenting animal welfare and definition of animal abuse should be extended, keeping it with time and in consonance with judicial decisions.

CONCLUSION

Issues concerning cruelty have long been a part of society as well as our legal system. However, its increased visibility and perceptibility have been a recent development. The ethical obligation and animal-human conflicts have been augmenting the situation. Legal rights of animals are asserted by statues as well as courts. The weight of their interest has been increased as shown by recent judgments as well as rules made by the statutory

authority. However, still much more need to be done to tilt the scale and human need to understand the reality that there are many species except humans within our legal system. Human is a rational psyche, so it maintains dominion stature over the animals. It can have two interpretation

(a) Human treating animal according to their wishes

(b) Human treat animal with dignity and compassion.

According to the present situation, former can be affirmed true so there is a need to weight the interest of animal equally that can be achieved by state using the government machinery and rulemaking power. Supreme Court has observed that no rights in an organized society can be absolute. Enjoyment of one's right must be consistent with the enjoyment of rights also by others. Where a free play of social forces is not possible to bring about a voluntary harmony, the state has to step in to set right the imbalance between two competing interests.[55]

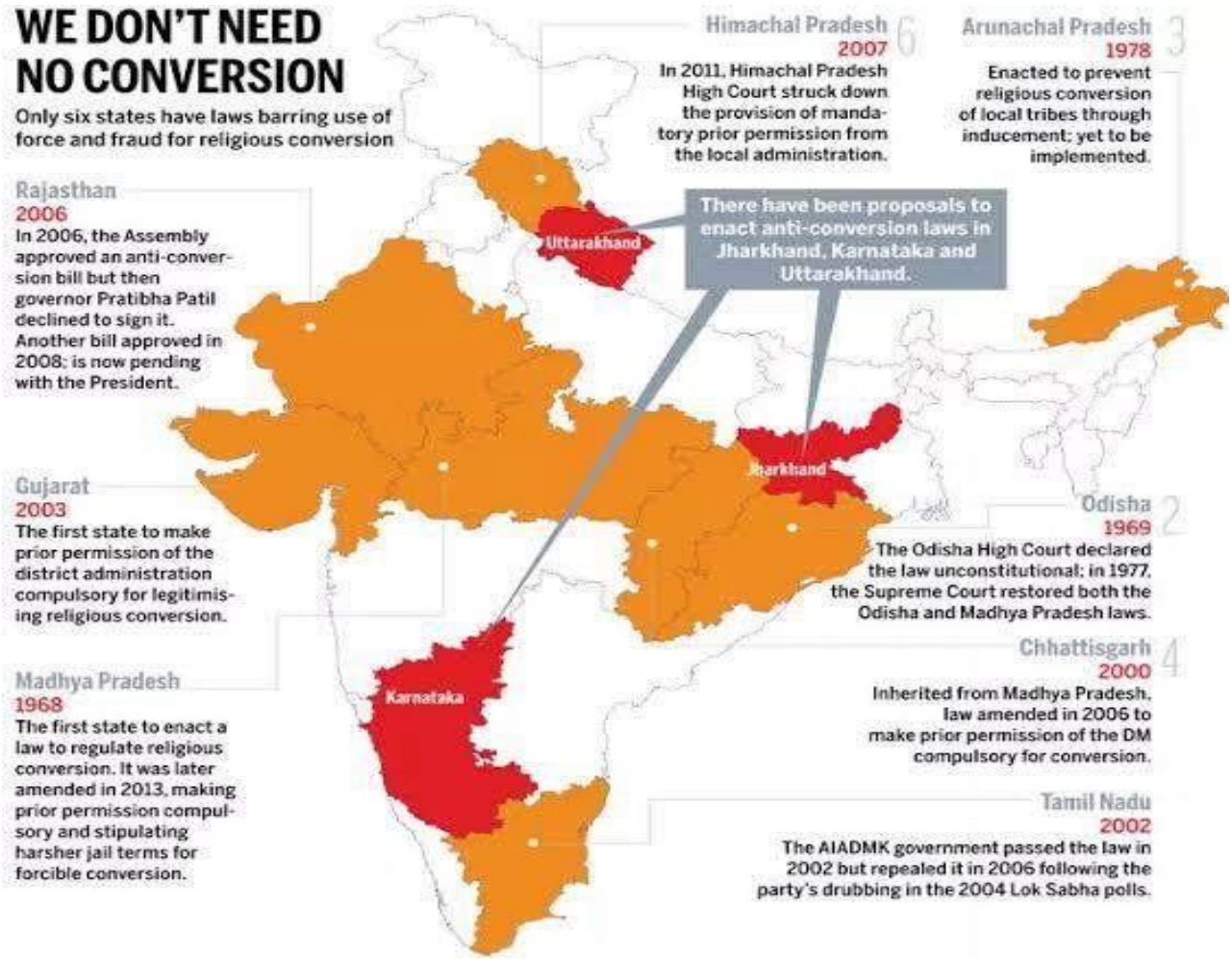
Advocating the rights of animal is to prevent them from unnecessary pain and suffering. There are two positions, deontological and utilitarian, former appeal for the individual duty while deciding what action to take i.e. deciding the correct way of treating animal while later calls for taking decision according to their interest and benefits. Absolute deontological or utilitarian will lead to the inadmissible situation in the society. Acting arbitrarily for one facet will only adverse the situation and solution to this problem will be harmonious construction between the rights of animals and human. Right v. Right analogy should be removed and Right v. Duty should be established. So humans administrating and consuming life in the society must provide legitimate rights to animals into account and bring harmony between the competing interests. India should take all possible efforts to eradicate the feeling of speciesism and emphasize the intrinsic value of animals.

"I am in favor of animal rights as well as human rights. That is the way of a whole human being." --- Abraham Lincoln

[55] Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. State of Gujarat, AIR 1974 SC 2098.

STATE ANTI-CONVERSION LAWS IN INDIA

THE CRUSADE INFLICTED TO THE NEW GENERATION MASSES



STATE ANTI-CONVERSION LAWS IN INDIA

THE CRUSADE INFLICTED TO THE NEW GENERATION MASSES

INTRODUCTION

The Freedom of Religion Acts and "anti-conversion" rule, mainly practiced in India, is a state-level legislation introduced to govern spiritual converts and ultimately put an end to them. The laws currently exist to eight of our twenty-eight states: Arunachal Pradesh, Odisha, Madhya Pradesh, Chhattisgarh, Maharashtra, Jharkhand, Uttarakhand, and Himachal Pradesh. These are the states that invited this wrath on themselves. There are undoubtedly many differences between the laws of the states, but in their substance and form they are very similar. All these draconian laws are aimed at preventing any person from converting or trying to convert another person, either directly or otherwise, by means of "forcible" or "fraudulent" means, or by means of "allurement" or "inducement." However, the anti-conversion laws in Rajasthan and Arunachal Pradesh, have a certain inherent differences. They seem to exclude, from their prohibitions, the conversion to "native" or "original" faiths, which can be described as very small. There are several harsh penalties for violating the rules, varying from monetary fines to even imprisonment; the sentences levied can vary from one to three years in prison and from 5,000 to 50,000 INR (which corresponds to about US$74 to $735) fines. Some of the laws that fall within the same scope provide for more stringent penalties when certain sections such as: women, children, or members of scheduled castes or schedule tribes (SC / ST) are converted into faiths different from their own.

Despite countless condemnations of India's anti-conversion legislations, many human rights organizations have stated that these regulations culminated into just a few prosecutions and no convictions at all. It is noted[1] that such laws create a hostile, and sometimes violent environment for religious minority communities as they do not require any evidence to support convictions of wrongdoing.

[1] Library of Congress, State Anti-Conversion Laws in India (Last visited on: October, 29 2019) https://www.loc.gov/law/help/anti-conversion-laws/india.php

THE BACKSTORY OF ANTI-CONVERSION LAWS IN INDIA

India is a nation where religious beliefs and practices are diverse. The Indian subcontinent is home to four major world religions— Hinduism, Buddhism, Sikhism, and Jainism[2]. According to census data reported in 2011, 79.80% of India's population is Hindu, 14.23% Muslim, 2.30% Christian, 1.72% Sikh, 0.70% Buddhist, and 0.37% Jain.[3]

Originally, during the British Colonial era, Hindu princely states adopted laws restricting spiritual conversions— mainly "in the latter half of the 1930s and 1940s." Such states enacted laws "in an attempt to preserve Hindu religious identity in the face of British missionaries."[4] There were over a dozen princely states, including Kota, Bikaner, Jodhpur, Raigarh, Patna, Surguja and Kalahandi. Some of that period's laws include the *1936 Raigarh State Conversion Act*; the *1942 Surguja State Apostasy Act*; and the *1946 Udaipur State Anti-Conversion Act*.

Following the independence of India, a number of anti-conversion bills were introduced by the Parliament, but none were enacted. *First, the Indian Conversion (Regulation and Registration) Bill was introduced in 1954*, which sought to enforce "missionary licensing and registration of conversion with government officials." This bill failed to gather majority support in Parliament's lower house and was rejected by its members. This was followed by the enactment of the *Religious Protection Act in 1960*, "which aimed at checking the conversion of Hindus to' non-Indian faiths' that included Islam, Christianity, Judaism and Zoroastrianism[5] as described in the Bill.

Ministers of the current government of the Bharatiya Janata Party (BJP) have expressed their support for the adoption at the national level of an anti-conversion law, which is an attack on the

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[2] *Religion: 2001 Census Data*, Office of the Registrar General & Census Commissioner, India, http://censusindia.gov.in/Census_And_You/religion.aspx (last visited Oct. 29, 2019), *archived at* https://perma.cc/ME8W-UBXD.

[3] *Hindu Population Reducing in India as 'They Never Convert People': Kiren Rijiju*, Deccan Chronicle (Feb. 13, 2017; updated Feb. 14, 2017), http://www.deccanchronicle.com/nation/current-affairs/130217/hindu-population-reducing-in-india-as-they-never-convert-people-kiren-rijiju.html, *archived at* https://perma.cc/8BUG-KQ4N; *see also C-1 Population by Religious Community*, Office of the Registrar General & Census Commissioner, India, http://www.censusindia.gov.in/2011census/C-01.html (last visited Oct. 29, 2019), *archived at* https://perma.cc/Q7R7-DRRB.

[4] James Andrew Huff, Note, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10(2) Rutgers J. L. & Religion 1, 4 (2009), http://www.lawandreligion.com/sites/lawandreligion.com/files/ A10S-6Huff.pdf, *archived at* https://perma.cc/7Z7Y-9U8Q.

[5] Indian Law Institute, A Study of Compatibility of Anti-Conversion Laws with Right to Freedom of Religion in India 31 (2007) (submitted to India's National Commission for Minorities).

secular values of the Indian Constitution. In 2015, "high-ranking members of the ruling RIGHT WING POLITICAL PARTYgroup, including the party's leader Amit Shah, called for a national anti-conversion rule." Two representatives of the BJP, including Amit Shah, proposed the implementation of anti-conversion bills in both legislative houses "to criminalize religious conversion without the government's permission[6]." Nonetheless, the proposal of the RIGHT WING POLITICAL PARTYgovernment to enact national legislation reportedly "hit a roadblock" with the Ministry of Law and Justice, which cautioned against the change, arguing that it is "not tenable" as it is "strictly a state subject" — i.e., a topic which lies purely within the constitutional jurisdiction of states under the State List in Schedule Seven of the Constitution.

Freedom of religion laws were enacted at the state level to regulate religious conversions by force, fraud, or other inducements, as discussed below.

[6] *RIGHT WING POLITICAL PARTYLawmakers Plan Anti-conversion Bills in LS, RS*, International Business Times (Nov. 9, 2015), http://www.ibtimes.co.in/bjp-members-introduce-bill-criminalising-religion-conversion-653925, *archived at* https://perma.cc/W4AD-QSVS; *Indian Parliament Will Consider Criminalizing Religious Liberty*, Organization for Minorities of India (Nov. 5, 2015), http://www.minoritiesofindia.org/indian-parliament-will-consider-criminalizing-religious-liberty/, *archived at* https://perma.cc/U7SM-567E.

INITIATIVES TAKEN BY THE STATE GOVERNMENTS

India's Freedom of Religion Acts and "anti-conversion rules" are legislation at the state level that is enforced to govern non-purely voluntary spiritual conversions. Those laws started to be enforced in the 1960s after the inability to pass a Union (or central) anti-conversion legislation and were first implemented by the states of Orissa and Madhya Pradesh. Such laws are presently in effect in eight of the twenty-nine states[7]: Arunachal Pradesh, Orissa, Madhya Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, and Uttarakhand. Several other states, including Manipur, were currently "considering different laws." In the 1980s, the anti-conversion bill was primarily directed at Muslims trying to convert non-Muslims, although Christianity has gained more publicity since the 1990s because of its affiliation with Western-style colonization and the role played by vigorous proselytizing in being a good Christian. One researcher says, The object of each draft bill is largely the same: to restrict the ability of communities and individuals to convert ' from the faith of one's forefathers, ' often in the name of protecting those who make up the ' weaker ' or more easily ' influenced ' sectors of society — including girls, boys, backward castes and untouchables. The anti-conversion laws in Rajasthan and Arunachal do not go any further. Penalties for breaching the laws can range from monetary fines to imprisonment; the laws impose punishments ranging from one to three years of imprisonment and fines of 5,000 to 50,000 Indian rupees (about US$70 to $704). Some of the laws provide for stiffer punishments if women, children, or members of scheduled castes or schedule tribes (SC/ST) are being converted.

[7] Rajshree Chandra, *Converting Religion, Converting Law: Rajshree Chandra*, Kafila (Dec. 24, 2014), https://kafila.online/2014/12/24/converting-religion-converting-law-rajshree-chandra/, *archived at* https://perma.cc/T6D2-HFAJ.

STATE-WISE ANALYSIS

1. Odisha (formerly Orissa)

The Orissa Freedom of Religion Act, 1967, was the first government to pass anti-conversion laws. *Section 3* of that Act provides that "no person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by force or by induction or by any fraudulent means, nor shall any person permit such conversion." Similar provisions appear in all current anti-conversion legislation. The "forcible conversion" offence is punished by up to one year's incarceration, a penalty of up to five thousand rupees, or both. If the crime is performed against an SC / ST minor, female or male, the term of imprisonment may be extended to a maximum of two years and the fine increased to 10,000 rupees.

The Act defines "conversion" as "*renunciation of one religion and adoption of another.*" It further defines "force" to "*include a demonstration of force or a threat of injury of any kind, including the threat of divine disappointment or social excommunication*." According to the Act, "inducement" includes "*offering any gift or gratification, either in cash or in kind, as well as granting any benefit, either*."

Crimes under the Act are identifiable offences, implying that without a criminal order or permission, an indictment or conviction can be made.

In 1989, *the Orissa Freedom of Religion Rules*[8] were published, which "ordered the priest conducting the conversion procedure to ' intimate the year, time and place of the ceremony together with the names and addresses of the individuals to be converted to the Magistrate of the District concerned before the fifteen days of the ceremony. '" Failure to do so would result in a fine of 1,000 rupees.

In 1973, the Orissa High Court declared that the Orissa Freedom of Religion Act, 1967, was "*ultra vires the Constitution.*" In its findings, the Court held that *Article 25(1) of the Constitution* "guarantees the propagation of religion and conversion is part of the Christian religion," that "the term ' inducement ' is vague and that many proselytizing activities may be covered by the definition and the revision of religion." Nevertheless, in *Rev. Stanislaus v. State of Madhya Pradesh*, which is addressed in more depth below, this ruling was reversed by the Supreme Court of India.

2. Madhya Pradesh

[8] Orissa Freedom of Religion Rules, 1989, *available at* http://www.kandhamal.net/DownloadMat/Orissa_Freedom_of_Religion_Rules.pdf, *archived at* https://perma.cc/EAZ9-FC8A.

Madhya Pradesh State was the second state to pass *the Madhya Pradesh Freedom of Religion Act, 1968*, an anti-conversion statute. Instead of using the word "inducement," the Act uses the term "allurement" as defined in *section 2(a)* as the "*offering of any reward in the form of*

1. *Some gift or pleasure, either in money or in kind;*
2. *Giving any material benefit, monetary or otherwise.*"

Section 3 of the Act states that "no person shall, either directly or otherwise, convert or attempt to convert any person from one religious faith to another by force or allurement or by any fraudulent means, nor shall any person grant any such conversion." The offense shall be punishable by imprisonment of up to one year, a fine of up to 5,000 rupees, or both. If the crime is committed against an SC / ST Child, female, or male, the term of imprisonment may be extended to a total of two years and the penalty may be enhanced to 10,000 rupees. Under *section 5* of the Act, the spiritual priest or the individual who converts any man "within seven days after the date of such ceremony" shall give notice of the conversion to the District Magistrate.

Unlike the Orissa High Court, the Madhya Pradesh High Court upheld the 1968 Madhya Pradesh Freedom of Religion Act in 1977[9], claiming that the relevant sections "set the equality of religious freedom for all citizens by prohibiting conversion through objectionable activities such as conversion by force, fraud and allurement."

Madhya Pradesh unsuccessfully sought to enact amending legislation in 2006 requiring the priest to also notify the District Magistrate one month before such conversion, giving ' details of the purification ceremony of the related religion, in which such conversion takes place, together with the date, time, place and the name and address of the person whose religion is to be found. However, the amendment would have allowed the person who wanted to convert to another faith to state his or her intention to change religions "before a District Magistrate or before the Executive Magistrate specifically approved by the District Magistrate of a similar Region, that he or she wishes to change his or her religion on his or her own and at his or her own will and leisure." The District Magistrate was to provide the details to the Police Superintendent after receiving the information, who in turn would have investigated the matter to ensure that no objections were raised to the conversion and reported his findings back to the District Magistrate. However, Governor Balram Jakhar of Madhya Pradesh referred the amending bill to the President who refused to grant it consent because he felt that it "violated the freedom of religion guaranteed by the Constitution because it insists on prior consent."

[9] Rev. Stainislaus v. State of Madhya Pradesh & Ors., 1977 A.I.R. 908 (citing High Court of Madhya Pradesh).

In August 2013, the Madhya Pradesh Legislative Assembly approved a similar amendment to the state's 1968 anti-conversion law "that would make the law more stringent." According to a news report, the 2013 amendment would increase prison terms and fines for forced conversions (up to three years and a fine of up to 50,000 rupees, and in the case of a minor, woman, or person belonging to an SC / ST up to a fine of up to 50,000 rupees. But the governor of the state has yet to grant assent to the law.

3. Arunachal Pradesh

In 1978, the anti-conversion laws were implemented in the states of Andhra Pradesh, Tamil Nadu, and Arunachal Pradesh following the High Court cases in Orissa and Madhya Pradesh. The anti-conversion provisions of the State of Arunachal Pradesh are contained in *the 1978 Arunachal Pradesh Freedom of Religion Act*, and are in line with those enacted in Orissa and Madhya Pradesh. The law, passed "in view of the perceived threat to indigenous religions," was approved on October 25, 1978 by the presidential government. It does not seem to be enforced, however, because the government still has to frame the rules to implement it.

Section 3 of the Act states that "no person shall convert or threaten to convert whether directly or otherwise, any person from any religious faith to any other religious faith by coercion or by 'inducement' or by any fraudulent means, nor shall any individual offer any such conversion." According to the rule, religious faith includes "indigenous faith," which is described as faiths, beliefs and practices like ceremonies, rituals, celebrations, events, abstinence, traditions as permitted, accepted and followed by the indigenous communities of Arunachal Pradesh from the time these communities were established, and includes Buddhism as prevalent among Monpas, Menba.

Some reports seem to construe the law's definition of "conversion" in a way that excludes conversions to native faiths, but it is unclear whether this is a mistake or a consequence of a change that could not be located. This aspect of the law has been criticized by some human rights organizations and legal scholars since its real purpose is to prevent or regulate conversions to faiths such as Christianity and Islam, and exempt "reconversions," raising the issue of equal protection and treatment under the law.

The term ' force' in the law includes a' show of force or a threat of injury of any kind, including a threat of divine disappointment or social excommunication.' The term ' fraud' is defined as'

misrepresentation or any other fraudulent activity,' and' inducement' means' offering any gift or gratification, either cash or in kind, and also includes granting any benefit, either pecuniary or otherwise. Section 5 of the Act requires that the priest or "whoever converts any person" be notified of a conversion within a specified period to be determined by subsidiary rules.

While law enforcement is lacking, Arunachal Pradesh's government reportedly announced it is planning to repeal the law. The announcement was made by Arunachal Pradesh's chief minister in a ceremony sponsored by the Catholic Association of Arunachal Pradesh. The chief minister argued that the current anti-conversion law demoralizes people, targets only Christians, and will be "misused by irresponsible officials in the future." He further stated that the misuse of this law will lead officials to torture and spread violence, which in turn will "break Arunachal Pradesh into pieces." Some commentators argue that behind such an action taken by the RIGHT WING POLITICAL PARTYparty before the 2019 elections, there may be political motives. Since 32 percent of the state population is Christian, Christians in this state would benefit the RIGHT WING POLITICAL PARTYparty. The Arunachal Christian Forum, however, responded to these allegations by saying that behind this action there is no politics and that this has been proven by the history of past elections.

4. Chhattisgarh

As a result of the partitioning of the southeastern districts of Madhya Pradesh, Chhattisgarh State was established in November 2000. It is claimed that Chhattisgarh maintained Madhya Pradesh's anti-conversion statute and introduced it under the 1968 Chhattisgarh Freedom of Religion Act. Even maintained were the branch guidelines for applying the Act.

The rise of Hindu Nationalism and the RIGHT WING POLITICAL PARTYparty in Chhattisgarh since the 1990s led to the passage of a number of anti-conversion laws between 2000 and 2010. Moreover, attempts were made during this period to make pre-existing laws more stringent.

In 2006, the state legislature, in which the RIGHT WING POLITICAL PARTYheld a majority, passed an amendment to the 1968 Act to make it more stringent, but the measure is still awaiting assent. The amendment would redefine “conversion” to provide that “the return in ancestor’s original religion or his own original religion by any person shall not be construed as ‘conversion’.” The bill would also raise the penalties and fines for forced conversion, require prior approval from a district magistrate before a conversion takes place, stipulate that notification must be given to the

magistrate thirty days before the conversion, and authorize the magistrate to "permit or refuse to allow any person to convert to one religious faith." The order is punishable by imprisonment for up to three years and a fine of up to 20,000 rupees.

5. Gujarat (REPEALED)

The Gujarat State's anti-conversion law was enacted as *the 2003 Gujarat Freedom of Religion Act*. The object of the Act is to prevent converts by the use of intimidation, allurement, or dishonest means from one faith to another.

Section 3 of the Gujarat Freedom of Religion Act, 2003 prohibits forcible conversion and states that "no person shall, by force or allurement or by any fraudulent means, convert or attempt to convert any person from one religion to another, directly or otherwise, nor shall any person interfere with such conversion." Nevertheless, compared to the laws of other countries, the language of the concept of "convert" is slightly different and implies "having one man renounce one faith and follow another." Anyone who contravenes section 3 is punishable by imprisonment for up to three years and is also liable to a fine of up to 50,000 rupees. If the offense is committed against a minor, woman or person belonging to an SC/ST, the offense shall be punished with imprisonment for a term of up to four years and a fine of up to 1, 00,000 rupees."

A person who wishes to convert should request prior permission from the District Magistrate about the conversion under section 5 of the Gujarat Act, unlike other state acts where only prior or subsequent notification is needed. The section also requires the person who has been converted to send a notice to the District Magistrate of the "district concerned in which the ceremony of such conversion took place within the time limit and in the form prescribed by the rules." The Gujarat Freedom of Religion Rules 2008 stipulates that such notice should be given "within 10 days from the date of such conversion ceremony." Failure to comply with these permission or notice provisions is punishable by imprisonment for up to one year or a fine of up to 1,000 rupees, or both.

On July 21, 2006, the state-level government of the RIGHT WING POLITICAL PARTYpassed an amendment bill known as the *Gujarat Freedom of Religion (Amendment) Act, 2006*. The purpose of the bill was to replace *section 2(b)* of the original Act, which defined the word "convert," and provide explanations for clarification. The bill attempted to specify that the law's rules "will not extend to the marriage of the same faith between religions." The substitute language for section 2(b) read as follows:

2(b) *"Convert" means to make one person to renounce one religion and adopt another religion; but does not include making one person to renounce one denomination and adopt another denomination of the same religion.*

Explanation: For removal of doubt, it is hereby illustrated that for the purpose of this Act:

1. *Jain and Buddhist shall be construed as denominations of Hindu religion;*
2. *Shia and Sunni shall be construed as denominations of Muslim religion; and*
3. *Catholic and Protestant shall be construed as denominations of Christian religion.*[10]

Nevertheless, when the bill was introduced in 2006, Buddhist and Jain sects raised objections to being subsumed as a branch of the Hindu faith. The state government removed the bill for reconsideration after it was rejected by the president. The Documentation Center for Human Rights in South Asia,

When returning to the legislature the reform proposal, the state government withdrew it and the governor took it into reconsideration. It was especially offensive to be perceived as sects of Hindu faith, Shia or Sunni Muslim religion and Roman Catholics and Protestants. In demonstrating against the change, the Jain group was especially vociferous.

[10] Gujarat Freedom of Religion Act, 2003, *available at* https://home.gujarat.gov.in/Upload/Gujarat Freedom of Religion Act2003_new_home_1_1_221015.pdf, *archived at* https://perma.cc/7VBX-BGTP.

6. Himachal Pradesh

The Himachal Pradesh Freedom of Religion Act, 2006 is "shaped in other Indian states by existing anti-conversion laws" and entered into force on February 18, 2007. According to the South Asia Human Rights Documentation Center, "its adoption is particularly ironic since the Congress Party, which has consistently sought to emphasize its secular credentials, is leading the government of the state." Section 3 of the Act prohibits conversion ' by use of force or by induction or by any other fraudulent means. 'An important difference, however, is that' the provisions of the prohibition clause of the Himachal Pradesh Act further state that ' any person who has been converted from one religion to another, in contravention of the provisions of this section, shall be deemed not to have been conversion from one religion to another.

Section 4(1) of the Act requires any person who wishes to convert to another religion to notify the district authorities at least thirty days in advance. However, "no notice is required if a person returns to his original religion." Notice of conversion must be given to the District Magistrate who may order an inquiry; failure to do so is punishable. An offence under section 3 is punished by up to two years ' detention, a penalty of up to 25,000 rupees, or both, according to section 5. The term of imprisonment may stretch to three years in the case of the conversion of a juvenile, female, or SC / ST, and the penalty may be raised to 50,000 rupees.

The Himachal Pradesh High Court, in a historic 2007 ruling, overturned section 4 of the Act and Rules 3 and 5 of the Himachal Pradesh Freedom of Religion Rules 2007, which enact the Act. The Court held that these provisions violated Article 14 of the Constitution and that "a person not only has the right of conscience, the right of belief, the right to change his belief, but also the right to keep his belief secret." After examining the anti-conversion laws in Madhya Pradesh and Orissa, the Court concluded that "the Himachal Act went beyond the other two Acts and had infringed on the fundamental rights of the convertees," according to a news report.

7. Rajasthan

In 2006, the parliament of Rajasthan State also passed an anti-conversion bill, but it was never approved by the governor of the state. According to one report, the governor "did not sign the bill because of religious minority complaints." Under the bill, "conversion" was defined as "renunciation of one's own religion and adoption of "another" and "own religion" was described as "the religion of one's forefathers." Conversion punishment is two years ' imprisonment, which can extend to five

years, and fines of up to fifty thousand rupees. The crime is "cognizable and irrefutable, and a policeman below the level of Deputy Superintendent of Police shall not prosecute it."

8. Tamil Nadu (REPEALED)

The 2002 Tamil Nadu Prohibition of Forcible Conversion of Religion Ordinance was published, but was later replaced in the same year by the *2002 Tamil Nadu Prohibition of Forcible Conversion of Religion Act*. The Act, now repealed, was passed under the right-wing government's initiative led by the late Jayaram Jayalalithaa, former chief minister of Tamil Nadu. The Act adopted the general structure laid out in the 1967 Orissa Freedom of Religion Act. *Section 3* declared that "no individual shall, whether by force or allurement or through any dishonest means, convert or seek to convert any person explicitly or indirectly from one religion to another." Anyone who "converts any person from one religion to another either by performing a ceremony on his own for such conversion as a religious priest or by participating directly or indirectly in such a ceremony" was required to send notice within the prescribed period to the District Magistrate. The Act imposed a fine of up to 50,000 rupees on anyone found guilty of coercion of religious conversions and three years of imprisonment. If women, minors, or SC / ST members were involved in the conversions, a fine of 1,000,000 rupees and four years of imprisonment were imposed.

Hundreds of Dalits converted to Christianity and Buddhism in reaction against the new anti-conversion legislation without the permission of the local magistrate. The Tamil Nadu Prohibition of Forcible Conversion of Religion Act was repealed by the state government on May 21, 2004, due to electoral implications and minority representation against the anti-conversion provisions.

9. Jharkhand

On August 12, 2017, Jharkhand, a northern Indian state, enacted an anti-conversion law. The BJP, the governing party in Jharkhand, convened an executive session at the state level on May 1, 2017, where they "adopted a resolution recommending a bill to put an end to religious conversion practices in the country." Dubit, the RIGHT WING POLITICAL PARTYspokeswoman for the city, said that "the resolution calls on the state government to enact a law that will render any converts rendered through allurement or coercion unlawful and punishable." The RIGHT WING POLITICAL PARTYand other Hindu nationalist groups in the state "maintain that the service of Christian missionaries in the fields of education and health is a cover for attracting poor tribal and

Dalit people in the villages." Before making a final decision, the state government is reported to have studied draft bills from other states like Gujarat, Madhya Pradesh and other states.

On August 12, 2017, the Jharkhand Vidhan Sabha (Legislative Assembly) passed *the Jharkhand Dharm Swatantra Bill, 2017* (also known as the Jharkhand Freedom of Religion Bill, 2017).[133] News reports indicate that Jharkhand Governor Draupadi Murmu gave her assent to the Bill on September 5, 2017, even though the Act itself states that the Governor approved the Bill on September 6, 2017.

The contravention of *Section 3* ("Prohibition of Forced Conversion") is, according to section 4, a cognizable and non-bailable offence punishable by imprisonment of up to three years, a penalty of up to 50,000 rupees, or both. The term of imprisonment can stretch to four years in the case of the conversion of a juvenile, female, or SC / ST, and the penalty may be raised to 100,000 rupees. *Section 5* provides that a person wishing to convert should obtain the District Magistrate's prior permission concerning the conversion. The Act therefore requires the person who has been converted to give a notice to the District Magistrate of the "district concerned in which the procedure of such conversion took place within the time limit and in the manner specified by the law."

Section 1(3) of the Act provides that "it will enter into force from the date of issue," which is September 11, 2017. However, although the law appears to be in force, some sections of the law—namely *sections 5(1) and 5(2)* ("Prior conversion permission") — require certain prescribed rules to be issued in order to implement the provisions. Section 8 of the Act authorizes the government of the state to make guidelines to enforce the Act. No data about how these rules were released were located, formally or otherwise. On 21 February 2018, a news report entitled "Conversion Rules" revealed that the district administration had published a form that a "religious head should fill in if he or she wishes to convert someone and demands that religious bodies within his or her jurisdiction include information of their conversion-related activities within a week, likely signaling the first structured implementation of the Jharkhand Freedom of Religion Act, 2017.

10. Uttarakhand

On November 20, 2017, the High Court of Uttarakhand issued a decision in the context of a habeas corpus petition suggesting that the state government pass an anti-conversion law. The petition sought the production of one Ms. Sharma, who had allegedly married a Husain Ansari (alias Atul Sharma). In the case, the conversion of Mr. Sharma to Hinduism and his marriage to Ms. Sharma were challenged. The Court noted that this case was not the first it had found concerning inter-religious marriages, and that conversion was a "sham" performed in some of these instances to "facilitate the marital process":

The State Government to counter this inclination. *The Freedom of Religion Act, 1968*, on the analogy of the Madhya Pradesh Freedom of Religion Act and the Himachal Pradesh Freedom of Religion Act, 2006, is expected to be enacted without harming the citizens ' religious feelings.

While making this suggestion, the Court is well aware that it is not the role of the Court to make suggestions to the state government to legislate, but because of the rapidly changing social environment, this suggestion is being made.

The ruling RIGHT WING POLITICAL PARTYconcluded a party meeting on December 17, 2017 in which the state's chief minister announced that the government was planning to send the state assembly an anti-conversion resolution. The state government presented the bill to the State Assembly on March 21, 2018, four months after the High Court's order. The bill was passed by the Assembly on April 18, 2018 and signed by the Governor.

Section 3 of the new law states that incarceration from one and five years and a penalty (which is not defined in the Act) is punished by forced conversion. If a female, juvenile, or SC / ST participant is involved in the transfer, the incarceration period is two to seven years and a fee. Section 3 provides for an exemption for anyone "returning to this ancestral religion," which is not considered conversion under the Act.

Section 8 requires a person who wishes to convert his / her religion to give a statement to the District Magistrate or the Executive Magistrate at least one month in advance "that he / she wishes to convert his / her religion on his / her own and with his / her free consent and without any force, coercion, undue influence or attraction." The spiritual priest who conducts the conversion procedure is also required to give the District Magistrate or any other officer named by the District Magistrate of the district where such ceremony is supposed to be held a one-month advance notice

of such conversion. Upon receiving the information, the District Magistrate "shall receive an investigation by police about the real intention, meaning and reason of the proposed change of faith." Contravention of the declaration / notice provisions "has the consequence of making the said conversion unlawful and invalid" and are liable to stipulated penalties. One important difference between the Uttarakhand measure and that of other states is that it contains a provision on marriage and religious conversion that stipulates as follows:

"Any marriage which was done for the sole purpose of conversion by the man of one religion with the woman of another religion either by converting himself before or after marriage or by converting the woman before or after marriage may be declared null and void by the Family Court or where a Family Court is not established, the Court having jurisdiction to try such case on a petition presented by either party thereto against the other party of the marriage."[11]

[11] Himachal Pradesh Freedom of Religion Rules, 2007, http://www.olir.it/ricerca/getdocumentopdf.php?lang= ita&Form_object_id=5901, *archived at* https://perma.cc/AS8H-M9NN.

TREATMENT OF THE MATTER BY THE SUPREME COURT

India's Constitution grants the right under Section 25 to profess exercise or spread one's religion. In *Ratilal Panachand Gandhi v. State of Bombay*'s case, the Supreme Court explained this clause by claiming that

"*every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for edification of others.*"

Rev Stainislaus v. State of Madhya Pradesh's case Supreme Court questioned whether the right to practice and spread one's faith also included the ability to convert. The Court upheld the authenticity of the first laws against conversion: the *1968 Madhya Pradesh Dharma Swatantraya Adhiniyam,* and the *1967 Orissa Freedom of Religion Act*. The Court found, as summarized by Professor Laura Jenkins, that "restrictions on efforts to convert are constitutional because such efforts impinge on ' freedom of conscience ' and ' public order. '" In one of its findings, the Court held that propagation only indicated persuasion / exposure without coercion and that the right to propagate did not include the right to convert any person. This holding was summed up by the Court as follows:

"It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike."

It must be understood that the freedom of religion enshrined in Article 25 is not granted exclusively in respect of one faith, but includes all religions equally, and an individual may properly enjoy it if he practices his right in a manner commensurate with the like freedom of persons practicing the other religions. What is liberty for one, in equal measure, is freedom for the other, and therefore there can be no such thing as a fundamental right to turn another man into one's own religion.

Because *Article 25(1)* stipulates that the right is essential to ' public order, ' the Court has held that the acts ' clearly provide for the preservation of public order as, if forcible conversion had not been forbidden, it would have generated public disorder in the States, ' and that' the term ' public order ' is narrowly connoted. '

This ruling has been subject to some scholarly opposition for failing to recognize "propagation" as including right to convert and failing to "discuss the meanings of initiation and allurement, which was the main bone of contention" with these rules. The Supreme Court also did not return to the legislative history of Article 25, according to Professor Mustafa and Professor Sohi — the word propagate was included as a concession in the Constitution to persuade Christians that it would include freedom to convert. Therefore, if one takes the reductionist interpretation of propagation — given the court in this case— such a word would be rendered meaningless in the Indian Constitution. Under *Article 19(1)(a)* of the Indian Constitution, the mere right to propagate for the enlightenment of others would already be covered by the right to free speech and expression. Therefore, they contend that the freedom to conversion was in reality included in Article 25 and, as such, the Supreme Court's decision in Stainislaus was not only incorrect, but also contributed to social instability, as Indian Christians believe that they have been cheated in this matter. The assurances provided to them on the incorporation of the word propagate in the Constituent Assembly have not been fulfilled, and the government has done nothing to remedy the situation resulting from the Supreme Court's highly restrictive definition of the expression propagation.

EXECUTION

1. Concerns regarding human rights

Over the years, human rights organizations and institutions have expressed concern about the rights implications of these state anti-conversion laws and the lack of equitable treatment under them. According to the U.S. Commission on International Religious Freedom (USCIRF),"[t]hese laws, based on concerns about unethical conversion tactics, generally require government officials to assess only the legality of Hindu conversions, and provide fines and imprisonment for anyone who uses force, fraud, or' induce' to convert another."

A USCIRF report stated that while India stresses ' complete legal justice ' and prohibits discrimination based on faith, ' there are constitutional requirements, state and national laws that do not conform with international standards for religious freedom or conviction, including Article 18 of the United Nations Declaration of Human Rights and Article 18 of the Universal Covenant on Civil and Political Rights. The report also stated that "anti-conversion laws by designing and implementing them infringe the right of the individual to convert, favor Hinduism over minority religions, and pose a major challenge to Indian secularism." Moreover, "these laws have resulted in unfair practices against minorities."

On the other side, the Hindu American Foundation, a U.S. advocacy group, reported that

Freedom of religion legislation are designed specifically to discourage vulnerable populations and weak groups, such as children or disadvantaged, uneducated or analphabetes, from being exposed to and falling victim to coercive attempts to force religious conversion in return for or receiving health or humanitarian aid, schooling or jobs.

The laws are viewed by proponents as a conversion restriction "to preserve peace and harmony in plural India."

Reports of non-Hindus "reconversion" rituals to Hinduism by hardline Hindu nationalist organisations have been growing. A USCIRF-published report observed that the "reconversion" to Hinduism under the word Ghar Wapsi (returning home) was not protected by any anti-conversion

statute. According to the report, "such exclusion from the purview of religious freedom acts inevitably suggests reconversion through the use of force, fraud or allurement is not punishable under the provisions of these acts." In December 2014, "Hindu nationalist groups announced plans to ' convert ' thousands of Christian and Muslim families to Hinduism as part of a so-called Ghar Wapsi (returning home) Program."

2. Arrests and Convictions

Despite criticism of India's anti-conversion legislation, several human rights organizations, including the USCIRF, stated that "these regulations resulted in few prosecutions and no convictions." Studies released in 2010 and 2011 by the US State Department on International Religious Freedom have reported no arrests and no convictions under different anti-conversion laws during the monitoring times.

Nonetheless, according to the USCIRF, some critics recognize that "these laws create a hostile, and sometimes abusive, atmosphere for religious minority groups because they do not include sufficient evidence to support criminality charges."

More recent reports by USCIRF have highlighted certain incidents of arrests:

1. As a consequence of these rules, religious minority members and followers are threatened with harassment and detention in 2017. For instance, in June 2017, a Catholic nun was arrested along with four tribal women on suspicion of forced conversion.
2. Three Christians were detained in the district of Khandwa in April 2017 on the grounds of charges of converting people.
3. Christians protested in July 2017 in Ludhiana, Punjab, following the murder in public of Sultan Masih, the pastor of the Temple of God Church, on suspicion of his involvement in the conversion of others.

In addition, in its latest international report on religious freedom, the U.S. State Department also highlighted an incident:

Seven Christian pastors— Stanley Jacob, Vijay Kumar, Sumit Varghese, David from New Delhi, Amit from Mathura, Anita from Hathras, and Dinesh from Rajasthan — were arrested by the police

on December 4 as they held a private home prayer meeting. A court sentenced them to 14 days in prison detention on the next day for carrying out a forcible program for conversion.

Other recent incidents of news arrests are described below:

- In early December 2017, police arrested seven Christian preachers in the Mathura district of Uttar Pradesh, North Indian state, "for allegedly carrying out a ' forced conversion campaign ' in a village.
- In mid-December 2017, Indian police arrested a Christian priest in the state of Madhya Pradesh and grilled seminary leaders after a hardline Hindu party affiliated to the central RIGHT WING POLITICAL PARTY "accused them of trying to convert hindus to Christianity by circulating bibles and shouting carols."
- Seventeen preachers, including seven women, have been arrested by the Jharkhand Police for allegedly attempting to convert local residents to Christianity and making objectionable comments against tribal worship places in Dumka. Within the Freedom of Religion Act, all seventeen were reserved.

VIEWS OF THE INCUMBENT GOVERNMENT ON THE ANTI-CONVERSION LAW

Rajeshwar Singh, one of the leaders of leading right wing organisations said in the national media that by 31 December 2021 they would free India from Christians and Muslims. Forced 're-conversions' are one way it intends to do this. Last year, hundreds of Christians are pressured through coercion and stress to reconvert to Hinduism. Despite being the largest democracy in the world, with a constitution that guarantees freedom of religion and belief, in India such extremism thrives. The government is now led by the Rightist political party, the right political wing, and often turns a blind eye to attacks on minorities. A national anti-conversion law is being proposed by the Indian government. Such laws, which are already in force in five of India's states (Madhya Pradesh, Chhattisgarh, Odisha, Gujarat and Himachal Pradesh) and are proposed in a sixth (Maharashtra), are applied disproportionately to minorities. They may be falsely accused of forcing Hindus to change their faith as an excuse for harassing and arresting Christians and Muslims. Hindu nationalists see Hinduism as India's true religion, so when an Indian ' returns' to Hinduism, it is not seen as a' conversion' from another faith, but as a 'ghar wapsi' or' homecoming': they are therefore exempt from the laws of anti-conversion.

Two leaders of India's governing RIGHT WING POLITICAL PARTY faction, one in the lower and one in the national parliament's upper house, are planning to introduce a Private Members bill, each in their own house, to enact a national law against Hindu conversion that would then compel a parliamentary debate.

The Upper House MP, former journalist Tarun Vijay, represents Dehra Dun in Uttarakhand (formerly Uttaranchal) state between Himachal Pradesh and Nepal on India's northern border. Himachal Pradesh has already introduced a Freedom of Religion Act that appears harmless in name but seeks to regulate freedom of religion change.

In an interview with The Tribune, he said the latest Indian "religion" census had revealed that, "For the first time, it has been confirmed that the number of Hindus is less than 80%. We need to take action to stop the decline. Maintaining the Hindus in the country is very necessary.

He continued: "My argument is that religion should remain a matter of personal choice. But in India, it has become a political tool in the hands of foreign powers, targeting Hindus to once again fragment our nation on communal lines. This must be opposed in the name of all communities in India and in the national interest."

Vijay is reported to have said that his proposed bill will advocate a "non-deductible warrant to be issued against the person found to be involved in the conversion act, along with a ten-year prison sentence."

Statements like those who reject yoga and surya namaskar, a Hindu greeting to the sun god in yoga, "must leave India or drown in the sea."

The first International Yoga Day was celebrated from New Delhi to New York on June 21, 2015. In the birthplace of yoga, Indian Prime Minister Narendra Modi conducted a yoga session in the center of the Indian capital attended by 37,000 participants.

Many Christian groups in India voiced their resistance – not to yoga itself, but to another major national event scheduled for a Christian holy day. "Statements like this [about fleeing India and dying in the ocean] render minority communities wary of the government's actions," said the National Christian Council of India at the time, continuing: "We advise the government to be responsive to the different cultural and religious traditions in our state."The two Private Members' Bills come shortly after a sixth Indian state has started the process of introducing an "anti-conversion law".

Such protests have come when Hindu nationalism has been condemned by India's Muslim population, after the lynching of a Muslim at Uttar Pradesh last week, who reportedly preserved and ate beef at home.

In the western Indian state of Maharashtra in March, a total ban on beef was enforced, outlawing the slaughter, consumption or even possession of beef.

Commentators indicated at the time that the prohibition would most seriously affect minorities. India is a secular nation where nearly half of the population eats beef, although most of the Hindus

are abstaining, believing it is sacred. Many communities consume beef and it is not a totally prohibited social taboo.

"This ban is an insult to the poor and the Dalits," said South India Church pastor Rev. Manohar Chandra Prasad (CSI).

Now, Ahsaan Chaudary, headman of the village, after the man's lynching in Uttar Pradesh state, said: "The situation now is such that a Muslim villager cannot buy a cow and bring it home. We're going to be attacked or even killed. It's easy to accuse you of slaughtering the horse, "said the BBC.

CONCLUSION

After rigorous research and findings, we get to know that all over India, we are facing a threat to our very democracy which we claim to be the best and the largest all over the world. The conservative governments are solely after their vote banks and completely rely on as to how to mobilize the public in a way which is in their own vested interests. The anti-conversion laws are nothing but simply a stop on the practice of secularism and on the very serene concept of freedom of practicing any religion, which is supposedly given to the citizens of India by the Constitution of India. The incumbent RIGHT WING POLITICAL PARTIES and the right wing organizations, are the ones who are diluting these set of freedoms which is guaranteed to us by the big book of Law and are infecting the whole of India with this plague. This plague is going to hit us really soon and the consequences are going to be incessantly brutal. There already are many a states which have gotten this bug into their system while some are still left safe, but from the rapid pace which the government seems to possess we clearly can cull out the possibility of this law being a national phenomenon. This law is nothing but a sense of alienation inflicted upon the innocent people who belong to faiths which constitute the minority. It is democracy's foremost and paramount duty to keep everyone engaged and drive the country with no exclusionary steps and policies, whatsoever. Thus, the whole law is immoral in the bigger scheme of things and hence we must realize that this is a doom which is impending on us. We all are sleeping with a big monster beneath our beds and we must realize it's existence and uproot it from its existence before it's too late.

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ARTICLE 370 OF THE CONSTITUTION OF INDIA, GONE: A CASE STUDY

Rakshit Sharma

ABSTRACT

Being one of the incredible conflict in the world the Kashmir issue is now has been resolved. On 5th august 2019, Modi Government has finally dropped bomb by revoking two constitutional provisions 370 and 35A that gave special status to Jammu & Kashmir. India has ended the struggling of people of Jammu & Kashmir, earlier who were facing for their right of self-discrimination. But after the revoking of Article 370 of the Indian Constitution, Pakistan's reaction appeared to be limited to expressing frustration. Two of their three wars over the disputed territory were fought by the nuclear-armed neighbors. A rebellion has been going on for three decades in Indian-administered Kashmir. But overall hypocrisy is Islamic Republic of Pakistan wants India to be secular. This paper analysis the origin of this issue, conflict between India and Pakistan, legality behind scrapping of Article, prospect for its resolution.

Keywords- Article 370, Human Rights, Jammu & Kashmir

INTRODUCTION

India has fulfilled its promise explicitly gave in its manifesto this year in general elections by revoking Article 370 from the Indian Constitution. The foremost issue for India from almost 6 decades was terrorism mainly in Kashmir region where around 41000 people were got killed. After removing of this Article from the Constitution, The effort by Pakistan to give the Kashmir issue a Muslim spin has achieved sudden speed. Prime minister of Pakistan Imran Khan has initiated a massive diplomatic approach to Islamic world championing Kashmir issue as illegal and unethical. But the root cause for the precariousness and hostility in Kashmir after the Independence was Article 370 and 35A as valley has witnessed to much violence which also has broken the relation between India and Pakistan. Muslim militants have often resorted to violence in order to expel Indian troops from the land. Pakistan has supported those militants and terrorists who have deeply hit India.

HISTORY

Kashmir issue started just after British rulers had sliced a giant Indian empire into two countries- Hindu majority India and Pakistan, Muslim majority. Under British India there were around 565 princely states and Kashmir was one of them. The last king of Kashmir Maharaja Hari Singh was feeling insecure as the Pakistani tribal groups started invaded in Kashmir and this lead him to seek help from India, after which Mountbatten the last viceroy of India promised him militarily help and in return Maharaja signed the "Letter of Instrument of Accession to India", which stands controversial

ever since.[1] As per the document, only defense, communication and external affairs would be deal by government of India and rest of the sectors was to be retained by ruler of Jammu & Kashmir, ConstitutionalAct,1939.

Unlike the 565 indigenous nations that had decided to completely integrate with India, these circumstances were unique to Kashmir's accession to India. Accordingly, Article 370 was implemented in the Constitution in order to maintain the particular conditions under which Kashmir agreed to join

India.

SYAMA PRASAD MUKHERJEE'S ROLE

By scrapping way the special status to Jammu and Kashmir, BJP has fulfilled the dream of its founder Dr. Syama Prasad Mukherjee whose slogan was: "*Ek desh mein do vidhaan, do nishaan, do pradhaan nahin chalega*".[2] Shyama Prasad had prolonged the correspondence with Nehru and Sheikh Abdullah on the status of the state is with the most authentic evidence of his stand on the issue. He wrote, 'We would readily agree to treat the valley with Sheikh Abdullah as the head in any special manner and for such time as he would like but Jammu and Ladakh must be fully integrated with India.' 11 may, 1953, Dr Mukherjee was detained for opposing the special status of Jammu Kashmir and after 1month on 23rd June he died under mysterious circumstance. The BJP holds that if Mukherjee's opposition to Article 370 had then been heeded by the government, the scenario in Kashmir would have been very distinct, but the party still did not have the courage to admit that Mukherjee had accepted the suggestion in writing.

EXODUS OF KASHMIRI PANDITS

In 1989, the crisis in Kashmir were got on the peek. Regional and religion tension, Bomb explosions and militants ' sporadic firing became a daily event. Inflaming and provocative speeches were started addressing by people from the mosque frequently. A host of extremely provocative, communal and menacing slogans, interspersed with martial songs, encouraged Muslims to go out on the roads and break the ' slavery ' chains[3]. The dark and horrific night came in the lives of Kashmiri pandits when

[1] Rashmi Sehgal, Kashmir Conflict: Solutions and Demand for Self-determination, Vol. 1 No. 6 ,June 2011, https://pdfs.semanticscholar.org/de6b/3e8254f0d174422873b7ceb309bdce829b6c.pdf

[2] Monideepa Banerjie, How BJP Paid Its Debt To Founder Syama Prasad Mookerjee With Kashmir Move, NDTV, August 05, 2019 19:00 IST

[3] 1, Col (Dr) Tej Kumar Tikoo (Retd.), Kashmir: Its Aborigines and their Exodus , 1d ed, 2012

Muslims started screaming at loud speakers and came to the streets with a mass crowd with a strong message for Kashmiri pandits-*Ralive, Tsaliv ya Galive* which means either convert to Islam, leave the Kashmir valley or die.

The night of January 19 is said to have seen a demented assault of a different level. Threatened Pandits had to leave their own home apparently, with the dire consequences, became broadcasting of vicious jihadi sermons and revolutionary songs in the name of Muslim Kashmir valley. In 1989, pandit political leader Tika Lal Taploo is shot dead by armed men outside his residence. Anti India and anti pandit slogan were called off from the mosques. Many innocent people were got assaulted, killed and raped. Thousands of Pandits moved out of their homes in that one horrible night.

POLITICS

The Home Minister Amit Shah moved the Rajya Sabha scrapping of Article 370 of Constitution in Jammu and Kashmir. The order, which has been signed by President Ram Nath Kovind, comes into force immediately. The union cabinet had the long hour meeting on the concerning issue of Jammu & Kashmir. The government has partially suspended mobile and internet services and imposed Section 144 IPC in Jammu and Srinagar given the current situation in the Kashmir Valley. School and College in several parts of valley are also been closed until the further notice. Also Indian Army and Indian Air force is on high alert.

The Union Government introduced Jammu & Kashmir Reorganization Bill, 2019 which will divide Jammu & Kashmir into two Union Territories- Jammu Kashmir and Ladakh. Kashmir will be union territory with legislature like Delhi, while Ladakh will be union territory without legislature. President Ram Nath Kovind came out with a notification—The Constitution (Application to Jammu and Kashmir) Order, 2019 that will come into force immediately. The order will supersede the Constitution (Application to Jammu and Kashmir) Order, 1954 that has been amended from time to time. The notification made it clear that all the amendments in the provision shall apply in relation to the state of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply.

Home Minister said that Ladakh individuals have been demanding for a long time to offer them the status of a Union Territory to enable them to realize their aspirations. The Union Territory of Ladakh will be without Legislature. Terrorism, he said, cannot be eliminated from the state until Article 370

and 35A are in existence. Article 370 is responsible for the poverty in the state, people are not getting appropriate opportunities. Due to Article 370, insisting construction was stopped in the state, he said real estate prices had not shifted in sync with the national average, while a bag of cement costs Rs 100 more in the state than anywhere else in the country. Due to restrictions on the purchase of land for outsiders, tourism has not developed in the state, he said adding that because of Article 370, no industry can be established. The constitution of India guarantees right to education but because of this article children of J&K are not getting proper education and the opportunity.

Mr. Shah asked in the Rajya Sabha, who is responsible for the people got killed due to terrorism in J&K. After the abrogation of Article 370 Jammu & Kashmir shall become integrated part of India. This Article was drafted as the temporary provision, so how long the temporary provision is to be allow to continue! The BJP also passed another bill on the 10% reservation for economically weaker section of Jammu & Kashmir.

The Rajya Sabha passed the proposed legislation, with 125 votes in favor and 61 against. Then Mr. Shah also explained addressing the Upper House that after scraping of Article 35A, irrespective of their domicile, all the people of India have Property, employment and education in the valley. Some anti-Indian groups misguided the youth of Kashmir to stir up difficulties in the path of Government of India because of Article 370 and 35A, of which Pakistan has always been taking advantage of!

VEHEMENT OPPOSITION

Congress Senior leader P Chidambaram forcefully denounce the government for repealing Article 370 and dismembering Jammu & Kashmir. Mr.Chidambaram started his speech by saying in the constitutional history this will amount to be Black day. He said Centre will have to face catastrophic consequences by scrap of Article 370 and dividing the state. "This is absolute futile practice. You think its victory but history will prove how wrong you are. The government's foremost duty is to protect the state, protect the rights of the people but instead of following this we are reducing state to municipality administration and think it's constitutional."

He raised the question in Rajya Sabha, How Article 370 can be modified by an order under Article 370, as this Article enables you to modify other provision of Constitution. Central is just unleashing the force that they can't handle. I fear, honorable Home Minister, you are pushing 1000s of young men from joining this column to another column. I hope that does not happen.

Mr. Chidambaram also said what you are doing by mischievously misinterpreting these provisions can be done by any other state. Why mechanism to dismember Jammu & Kashmir can't be done to any

other state by promulgate ordinance, dismiss state government, dissolving state legislation, declaring parliament to be state legislature for time being and divide state.

The People's Democratic Party and the National Conference vehemently opposed the move. Former Chief Minister Mehbooba Mufti described the move as "another partition along communal lines". "Today marks the darkest day in Indian democracy. The decision of J&K leadership to reject 2 nation theory in 1947 & align with India has backfired. Unilateral decision of GOI to scrap Article 370 is illegal & unconstitutional which will make India an occupational force in J&K," she tweeted.

PAKISTAN'S REACTION

Pakistan strongly condemned the step India has taken stating it as illegal. Ever since BJP government abrogated the Article 370, Pakistan has downgraded its diplomatic relations with India. The foremost step of Pakistan in protesting against India was closure of Airspace also placing a complete ban on land routes for trading purposes. Also Pakistan plea to other countries that they should push India to revoke its decision. This is not going to be the first time that Pakistan shuts down airspace for India. It closed its airspace on February 27 after significant air strikes in the Balakot region were undertaken by the Indian Air Force to decimate terror camps.

Pakistan also called back their High Commissioner Moin-ul-Haq and send back our envoy. In reaction to the revocation of Article 370 in Jammu and Kashmir, the decline of bilateral trade and diplomatic relations with India does not dent the Indian economy. Instead it will break Pakistan's economy more. India imports items like leather, mineral fuel, ores, fruits, sulphur, limestone, slag, rawhide etc, from Pakistan, and exports cotton, organic chemicals, plastics, paints and machinery to the country.

According to a reports, overall exports from India to Pakistan in the financial year 2018-2019 amounted to about $2.17 billion, which is just 0.83 percent of total exports from India.

According to the report of the Indian Council of Research on International Economic Relations (ICRIER), the size of trade between India and Pakistan is very low. In the financial year 2018-2019; India's exports to Pakistan was only $ 2.17 billion, which is only 0.83% of India's total exports. [4]Simultaneously, India's imports from Pakistan are also less than $50 crores; that's just 0.13 percent of India's total imports.

In the 2018-19 FY; the two counties ' bilateral trade was around Rs.18, 000 crores, which is more than the last year's Rs 1600.

[4] HEMANT SINGH, India-Pakistan Trade dispute: Who is in Loss and Profit? , https://www.jagranjosh.com/general-knowledge/india-pakistan-trade-1565335629-1, AUG 9, 2019

Indian exports account for around 80% of the total trade between these two nations and import accounts for around 20%. In this scenario, it also implies that India has a comparative advantage and Pakistan's reliance on India is very big.

In such a scenario, the issue arises whether or not Pakistan is in a position to terminate its trade ties with India and obtain some political advantages?

Pakistan has launched a national slogan say no to India, they decide to ban all cultural exchange tie ups with India. "No Indian film will be screened in any Pakistani cinema. Drama, films and Indian content of this kind will be completely banned in Pakistan," Information and Broadcasting's special assistance, Firdous Ashiq Awan tweeted.

For too long India has adopted a defensive approach on Kashmir, accepting talks on outstanding issue of Jammu Kashmir. India has Tolerated terrorism in order to kept bilateral dialogue alive with Pakistan but now Kashmir is the integral part of India so now outstanding issue to India is Pak occupied Kashmir.

Pakistan is trying to Internationize this issue but no country want to go against rapidly growing economic state India except China for Pakistan sake. They raised the matter to United Nation Secretary General but except China all were in favor of India as this is bilateral matter and more importantly Article 370 does not figured in UN resolution. They had inserted this Article in Constitution of India and now removed it. Supporting the thoughts of Pakistan, Communist China wants India to follow up democracy in Kashmir.

Pakistan's Economic Survey 2018-19, showed that the country's GDP grew at only 3.3 per cent in the fiscal year 2018-19. On the other hand, India's GDP grew at 6.8 per cent during the fiscal year 2018-19. However, the Indian economy is still much bigger than Pakistan. The size of Indian economy is $2,900 billion, almost nine times larger than Pakistan. Samjhota express and thar express also got banned by Pakistan.

To add salt to the wounds of Pakistan, a significant Islamic nation, United Arab Emirates (UAE), is set to present Modi Order of Zayed,' the country's largest civil decoration for boosting connections between the two nations.

WHAT IS ARTICLE 370?

The Article 370 comes under Part XXI of the Constitution, which deals with "Temporary, Transitional and Special provisions" which grants a special status to Jammu & Kashmir. This is because of the certain commitments made by the government of India to ruler of the state, Maharaja Hari Singh. The

Article came into force in 1949, exempt Jammu & Kashmir state from the Indian Constitution. The Union Government requires the competence of the state government to implement law, except in the matters of defense, foreign affairs, finance and communications. It means to have a separate constitution, separate sets of laws including those related to a separate flag, having dual citizenship, denial of property rights in the region to the outsiders (Indians who don't belong to Jammu & Kashmir).

It has been held by the Supreme Court that the President may by orders extend certain provisions of the Constitution to that state with such modification and exception as he thinks fit[5].

The President may subsequently make amendments and modifications in such orders.[6]

PRESIDENTIAL ORDERS

Under Article 370, the President has order from time to time extended provisions of the Constitution to the J&K. the first Constitutional order was passed in 1950 which was superseded by order of 1954. The important provisions of the Order of 1954 are as follows:

(1) The Constitution of the state J&K shall continue to be operative.
(2) The High Court of J&K shall have all the powers enjoyed by the other High Courts in India except that it cannot issue a writ for "any other purposes".
(3) The jurisdiction of Supreme Court extends to that state.
(4) The Parliament can make law on all entries in the Union list and certain entries in the Concurrent list.
(5) The provision of the emergencies shall be applied only with consent of the state.
(6) The provision for imposing the President rule under Article 352 can be applied to that states. But Article 360 relating financial emergency does not apply.
(7) Provisions relating to the freedoms of trade, commerce and intercourse services and citizenship shall apply to the state.
(8) The Directive principle of state policy do not apply to the state of J&K.
(9) Under Article 368 an amendment to the constitution shall not apply to the state until the president by order applies to that state.[7]

[5] Puranlal lakhanpal v. President of India, AIR1961 SC 1519; Mohd. Maqbool Damnoo v. State of J&K, AIR 1972 SC 963

[6] Sampat Prakash v. State of J&K, AIR 1970 SC 1118.

[7] 5, J.N.PANDY, CONSTITUTIONAL LAW OF INDIA 784-785(5ed 2018)

Article 370 (3) says that the President by the public notification, any declare that Article 370 shall be cease to be operative, or shall be operative only with such exceptions and modifications and from such date as he may specify. But before the president can issue and such notifications the recommendation of the constituent assembly shall be necessary.

Since the Constituent Assembly of the state exists no more, Article 370(3) shall no longer be operative. Therefore if any modification is to be made to Article 370 recourse will have to be had to Article 368 regarding amendment of the Constitution.

But the moot point is whether any amendment made to Article 370 under Article 368 without concurrence of consultation with state government will be effective?[8]

ARTICLE 35A

Article 35A continue the old provision of temporary law enacted by presidential order in 1954 of the territory regulations under Article 370 of the Indian constitution.

The permanent resident is the one who was the state subject on May 14, 1954, or who has been a resident for 10 years, or has lawfully acquired property out there.

It prohibits Indians outside the state of J&K from permanently settling, holding local government jobs and winning education scholarships, buying land. It also deprives the women of J&K from the property rights if they marry a person from outside the state. The provision also extends to children born of any such women, which is also discriminatory in nature.

WHAT WILL BE CONSEQUENCES?

People from all over India irrespective of their state could buy the land and permanently settle in Jammu & Kashmir. Regional people of the state fears that it would lead to transform demography of the state from Muslim majority state to Hindi majority state. From now onwards only one flag will be host in Jammu & Kashmir that is of India. The Financial emergency provision enumerated in the Article 360 of the Indian Constitution shall be applied in the state. India acquires single citizenship governed by Article 5 to 11 of the Constitution. The legislation related to citizenship in enacted under Citizenship Act 1955, so now the citizens of the valley will also be governed these Articles of the Constitution having Single citizenship. Voting rights to the people who came in India after the

[8] 8, MP JAIN,INDIAN CONSTITUTIONAL LAW,838(8ed lexis nexis 2018)

partition were not given the permanent resident status will get their rights and political parties from all over India will now have option to contest in election of Jammu Kashmir.

Article 370 was discriminatory in nature with respect to gender, race, caste and place of birth. The heart and soul of the Constitution that is part III was not applicable in J&K .the Fundamental right guaranteed under the Article 21A which talks about right to education was not applicable in the state, people don't get government jobs unless they are the permanent resident of the J&K state, the Pakistani who married the women of J&K were entitled to get citizenship of the state. Right to information act, 2005 was not applicable. Now more industries and infrastructure could be setup. People can invest here as of now they would have purchasing rights of land.

Due to existence of Article 370 the anti-corruption agencies were not allowed. In a survey of corruption the J&K state is one of the most corrupted states of India. India will be in much stronger position than Pakistan as the advantage they always got from the provision of Article 370 has been ceased. These all things would lead to development and prosperity of the J&K.

CONCLUSION

The genuine test starts now. The constitutional modifications, issued by a presidential order, may face legal challenges Last year, the Supreme Court of India held that Article 370 could not be abrogated because in 1957 the state-level body to approve the change came out of effect. But the quantitative approach says that majority of Kashmiri people wants autonomy of the state. However full independence of Jammu & Kashmir could not be possible due Hindu majority in Jammu region and opposition from India. Mr. Rajnath Singh, Defense minister of India has recently said in his speech that now India will have bilateral talk on Pakistan occupied Kashmir. For taking relief from tension a lot depends on how bilateral talks proceed in the near future.

This revocation will show positive effect in near future as the people of Jammu & Kashmir will get all rights that every Indian should have economically, legally and socially. This step ought to advance equity and fellowship among the people. The local police is under the control of Centre which will step down the terrorist and militant groups. With the notion of the state subject coming to end people of Jammu & Kashmir remain on the par. While this may not be the ultimate solution to this problem, it may well prepare some ground for a better solution, while at the same time relieving the region's individuals from their daily turmoil.

ARUNA SHANBAUG VERSUS UNION OF INDIA: A SPECIAL STUDY IN THE CONTEXT OF EUTHANASIA

Mehak Dhiman & Ayesha Adyasha

INTRODUCTION

The Right to life comes under the ambit of Article 21 of the Indian Constitution. Our constitution has given all the citizens right to live with dignity and liberty, and not just an animal existence. Article 21 also takes Right to health i.e., right to live in clean air, hygienic, safe environment, free education, emergency medical aid, right to livelihood, timely medical treatment in Government Hospital etc under its wing, which many of the people are not able to enjoy because of poverty and the government is not able to ensure it to all its citizens.

Euthanasia in literal terms means ending the life of a terminally-ill patient so that they do not suffer more. The term Euthanasia comes from two Ancient Greek words: 'Eu' means 'Good', and 'thanatos' means 'death', so euthanasia basically means good death. It is an act of ending the life of an individual who is suffering from a terminal illness or is in an incurable condition by injection or by suspending extraordinary medical treatment in order to free him of intolerable pain or from terminal illness. It is also known as 'Mercy Killing' which is a process where the individual who, is in an everlasting severe condition or has no chances of survival as he is suffering from painful life, ends his life in a painless manner. It is a gentle and easy procedure to ensure painless death. Oxford dictionary defines it as **"***the painless killing of a person who has an incurable disease or who is in an irreversible coma***".** According to the House of Lords select Committee on Medical Ethics, it is **"***a deliberate intervention under taken with the express intention of ending life to relieve intractable suffering***"** . Thus it can be concluded from the various definitions seen above that Euthanasia is the deliberated and intentional killing of a human being by a direct action, such as lethal injection, or by the failure to perform even the most basic medical care or by withdrawing life support system in order to release that human being from painful life. The basic intention behind euthanasia is to provide a less painful death to a person who is going to die in all certainty, after a long period of suffering. Euthanasia is practiced so that a person can lead a life as well as die peacefully with dignity. In short, it means putting a person to painless death in case of incurable diseases or when life become purposeless as a result of mental or physical handicap.

RESEARCH PROBLEM

Just as individuals value having authority over where to live, which occupation to seek after, whom to wed, and whether to have kids, so they value having power about whether to keep living when quality of life deteriorates. That is the reason the right to life and the right to die are not two rights, but two portrayals of the same right. The right to life is the privilege to choose whether one will or won't keep living. The right to die is the privilege to choose whether one will kick the bucket (when one could keep living).

EXISTING LEGAL SITUATION

In India, euthanasia is indisputably unlawful. In most of the cases of euthanasia or mercy killing, there is always an intention on the part of the doctor to kill the patient. Thus, such cases would plainly fall under **Section 300,** clause one of the **Indian Penal Code, 1860**. Conversely, as in such cases, if there is the lawful consent of the departed, then it would come under the wing of Exception 5 to the stated section. The doctor or any mercy killer would be liable to punishment under **Section 304** of the **Indian Penal Code, 1860**, for the culpable homicide, not amounting to murder, but this exception is applicable only in cases of voluntary euthanasia (where the patient consents to death). The cases of involuntary and non-voluntary euthanasia would be cancelled out by the first proviso to **Section 92 of the IPC**, which talks about "Medical Negligence" and thus is considered prohibited.

LITERATURE REVIEW

According to a review article on Euthanasia by P.N.Murkey and Konsam Suken Singh, euthanasia in India is a clear act of offence, either a suicide and assistance to commit suicide or a murder. The latest judgement of Supreme Court declares that : Right to Die is not included in the Right to Life under Article 21 of Indian Constitution. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and therefore not compatible and inconsistent with the concept of 'right to life'[1].

According to a journal article on Passive Euthanasia by Garrard and S.Wilkinson- **"**It shall be unlawful for any person responsible for the care of a patient to withdraw or withhold from the patient medical treatment... if his purpose or one of his purposes in doing so is to hasten or otherwise cause the death of the patient".[2]

SCOPE AND OBJECTIVES

This paper talks about a topic which is still widely in debate, i.e., euthanasia. It talks about its position in history as well as now, in the present. It talks about different countries in the world who have legalized euthanasia since a long time. It takes the Indian perspective of euthanasia into consideration by citing different instances where people actually reached out for taking the help of euthanasia for kicking the bucket, where people could not carry on with their lives due to some or the other reason. It also talks about various religions and their beliefs regarding euthanasia. Finally,

[1] PN Murkey, 'Review Article Euthanasia[Mercy Killing]' (*Medindnicin*) <http://medind.nic.in/jal/t08/i2/jalt08i2p92.pdf> accessed 14 September 2019

[2] Garrard and S Wilkinson, 'Passive Euthanasia' [Feb 2005] Vol 31(2) Journal of Medical Ethics 64-68

it analyses the landmark case which resulted in the legalization of passive euthanasia in India, i.e., the case of Aruna Shanbaug vs. Union of India. This case deals with euthanasia in detail by distinguishing between active and passive euthanasia. Laws relating to euthanasia in different jurisdictions were considered. The court deleted into a scenario where the patient was incapable of giving consent and specified who could approach the Court on his behalf. It also laid down guidelines prescribing the situation and procedure of administering passive euthanasia. In conclusion, we have tried to include some of our suggestions regarding this topic.

METHODOLOGY

The doctrinal method was followed for conducting a research on this topic. Various books were referred to, and so were many websites and journal articles, for a clear view on the research paper. Cases referred were taken from case law search engines like SCC Online, Manupatra, etc.

RESEARCH QUESTION

- Does right to life have an inclusion of right to die?

HYPOTHESIS

Right to Life should include Right to Die as a fundamental right, as a person should have the right to decide what he wants to do with his life or how he wants to end it.

CONCEPT OF EUTHANASIA

HISTORICAL BACKGROUND

Euthanasia is one of the most confusing issues which the courts and legislatures all over the world are facing till date. The historic background of euthanasia is derived from the portrayal of Emperor Augustus's passing by historian Suetonius as- **"**fast and without suffering in his wife's arms**"**. The term entered the medical field when Francis Bacon in the seventeenth century utilized it to denote to a simple, effortless and happy demise so as to remove physical misery while under a doctor. In current use, it depends upon the informed consent of the individual before euthanasia is conducted. Wilful extermination or euthanasia is the act of taking an individual's life as a demonstration of leniency to ease them from their desolation. Despite the fact that this training appears to be harmless, it has caused a ton of debate encompassing it.

Euthanasia has deep roots. Before Hippocrates, euthanasia was normal system and doctors expected that they had the authority to kill patients who they thought was not any capable of recovery, regardless of their consent. They acknowledged euthanasia as a part of their practice. Hippocrates viewed this demonstration of killing as an **"**obstruction to the foundation of secrecy among doctors and patients**"**. Presumably, this led the use of these words in The Hippocratic Oath, "I will give no deadly medicines to anybody whenever asked, nor suggest any such counsel".

Euthanasia additionally has a history, although dim, tainted by the Nazi past. The program of euthanasia– likewise called Aktion T4 –locked residents of institutions and medical clinics as targets, taking the disabled and mental patients into consideration. In October of 1939, Hitler signed a notice giving power to doctors to allow "mercy death" to patients judged "hopeless," speaking to the philosophy called "life unworthy of life". Around 70,273 individuals were executed under this program. In Nazi Germany, individuals were executed and killed – for the so-called "great of the nation", as opposed to their benefit. These incidences paved the path to debates on mercy killing, among the general population and health providers, which brought about authorization of euthanasia in certain nations. Australia's Northern Territory was the world's first location to authorize euthanasia in 1996. On April 10, 2001, the Dutch upper house of parliament nominated to make wilful extermination legal, or else known as euthanasia, making the Netherlands the first, and around then, the main nation on the planet to sanction euthanasia. So as to give guidance as to under which condition euthanasia ought to be permissible, it planned a lot of criteria that reflect the criteria created by the courts:

- The request of euthanasia must come from the patient and his request be entirely free and intentional, all around considered, and constant,
- The patient must be having intolerable (physical or mental) pain, with no progress and with no acceptable answers to ease the circumstance,
- This procedure must be performed by a doctor, after counsel with independent colleague who has involvement in this field.

In 2003, the European Association of Palliative Care (EPAC) Ethics team coined the explanation that **"** *medicalized killing of an individual, regardless of whether deliberate or non-deliberate is murder. Euthanasia is just voluntary that is with the assent of the patient* **"**. It very well may be said that in a nation where the basic human rights of people are frequently left unaddressed, absence of education is wild, the greater part the population is not able to access potable water, individuals die each day because of various contaminations, and where medicinal help and care is less- for the few individuals, issues identified

with euthanasia and PAS are unnecessary. Despite that, India is a nation of miscellanies across religious gatherings, educational status, and societies. In this foundation, the discussion on euthanasia in India is all the more confusing as there is likewise a law in this land to punish people who even attempt to end it all, i.e., commit suicide.

The Medical Council of India, in a gathering of its ethics committee in February 2008 in connection to euthanasia opined: **"***Practicing euthanasia will comprise unethical conduct. In any case, on explicit events, the topic of pulling back supporting devices to continue cardio-pneumonic function even after brain death will be chosen just by a group of doctors and not simply by the treating doctor alone. A team of doctors will declare withdrawal of support system. Such group will comprise of the doctor accountable for the patient, Chief Medical Officer/Medical Officer responsible for the clinic, and a doctor selected by the responsible for the emergency clinic from the medical clinic staff or as per the arrangements of the Transplantation of Human Organ Act,1994***"**.

In India, euthanasia is a wrongdoing. Segment 309 of the Indian Penal Code (IPC) manages the attempt to suicide and Section 306 of the IPC manages abetment of suicide – the two activities are punishable in the eyes of law. Just the individuals who are brain dead can be taken off life support with the assistance of relatives. However, different pro-euthanasia organizations, the most prominent among them being the Death with Dignity Foundation, continue battling for legitimization of a person's entitlement to choose his own death.

FACTS OF THE CASE

This case is a writ petition filed under Article 32 of the Constitution, and has been filed on behalf of the petitioner Aruna Ramachandra Shanbaug by one Ms. Pinki Virani of Mumbai, who claimed to be her next friend. It is stated that the petitioner Aruna Shanbaug was a staff Nurse working in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27th November, 1973 she was attacked by a sweeper named Sohanlal Valmiki in the hospital who wrapped a dog chain around her neck and tugged her back with it. He tried to rape her but on finding that she was menstruating, he sodomized her. To restrain her during this act, he twisted the chain around her neck. The next day on 28th November, 1973 at 7.45 a.m. a cleaner found her lying on the floor with blood all over in a lifeless condition. It is suspected that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. It is alleged that the Neurologist in the Hospital found that she had plantars' extensor, which indicates damage to the cortex or some other portion of the brain. She also had brain stem contusion injury with associated cervical cord injury. It is alleged at page 11 of the petition that 36 years have gone by since the incident and then Aruna Ramachandra Shanbaug was about 60 years of age. She was very light-weighted, and her fragile bones could break if her hand or leg were awkwardly caught, even

accidentally, under her lighter body. She had stopped menstruating and her skin had become similar to papier mache' stretched over a skeleton. She was prone to bed sores and her wrists were twisted inwards. Her teeth had decayed causing her a lot of pain. She could only be given mashed food, on which she survived. It was alleged that Aruna Ramachandra Shanbaug was in a persistent vegetative state and was a dead person (virtually) who had no state of awareness, and her brain was virtually dead. She could neither see nor hear anything nor could she express herself or communicate, in any manner whatsoever. She was not able to chew or taste any food. She was not even aware that food has been put in her mouth. Her excreta and the urine was discharged on the bed itself. Once in a while she was cleaned up but in a short while again she went back into the same sub-human condition.

It was alleged that there is no possibility of any improvement in her condition and that she was entirely dependent on KEM Hospital, Mumbai. It was prayed to give directions to the respondents to stop feeding Aruna and let her die in peace.

The respondents, KEM Hospital and Bombay Municipal Corporation filed a counter petition denying the facts as stated by the petition. Since there were differences in the petitions filed by the petitioner and respondents, the court decided to appoint a team of three eminent doctors:

- Dr. J.V. Divatia (Professor and Head, Department of Anaesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai),
- Dr. Roop Gursahani (Consultant Neurologist at P.D. Hinduja Hospital, Mumbai) and
- Dr. Nilesh Shah (Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital)

to investigate and report on the precise physical and mental conditions of Aruna Shanbaug.

REPORT BY THE APPOINTED DOCTORS

The doctors studied Aruna Shanbaug's medical history in detail and opined that she was not brain dead. She reacted to certain situations in her own way. For example, she liked light, devotional music and favoured fish soups. She became uncomfortable if a lot of people were in the room. She remained calm when there were fewer people around her. She was able to take oral feeds till 16th September 2010, when she developed a feverish illness, probably malaria. After that, her oral intake became less and a feeding tube (Ryle's tube) was passed into her stomach through her nose. Since then she received her major feeds by that tube, and was able to accept the oral liquids occasionally. The staff of that Hospital was taking appropriate care of her. She was kept clean continually. She appeared to have negligible language understanding or expression. She did not

appear to be fully aware of herself and her surroundings, she was unlikely to have any awareness of her illness.

The doctors contended that Aruna was neither brain dead nor in coma owing to their observations. Thus, the doctors opined that euthanasia in this matter was not necessary. They concluded that-

- they did not find any hint from the body language of Aruna as to the willingness to end her life.
- Any decision regarding Aruna's treatment is supposed to be taken by a surrogate. The staff of KEM hospital took good care of her. Hence, the Dean of that hospital, who represents the hospital, can be a suitable surrogate.
- Further, the nursing staff at KEM Hospital was more than ready to take care of her.
- If the doctors treating Aruna Shanbaug and the Dean of the KEM Hospital, together acting in the best interest of the patient, feel that withholding or withdrawing life-sustaining treatments is the course of action to be taken, they should be allowed to do so, and their actions should not be considered unlawful.

IMPORTANT SUBMISSIONS OF LEARNED COUNSELS

Mr. Shekhar Naphade, learned senior counsel for the petitioner, depended on the decision of *Vikram Deo Singh Tomar vs. State of Bihar*[3] where it was seen: **"** *We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen* **"**. He also relied on the decision in *P. Rathinam vs. Union of India & Anr*[4] in which a two-Judge bench of this Court quoted with approval a passage from an article by Dr. M. Indira and Dr. Alka Dhal in which it was mentioned **"** *Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality* **"**. He particularly emphasized paragraph 25 of *Gian Kaur vs. State of* Punjab[5] in support of his submission that Aruna Shanbaug should be allowed to die.

Mr. Pallav Shishodia, learned senior counsel for the Dean, KEM hospital, Mumbai submitted that Ms. Pinky Virani had no locus standi in the matter and it was only the KEM hospital staff which should have filed such a writ petition.

[3] 1988 (Supp) SCC 734
[4] (1994) 3 SCC 394
[5] 1996(2) SCC 648

IMPORTANT SUBMISSIONS BY LEARNED ATTORNEY GENERAL

Learned Attorney General, Mr. T. R. Andhyarujina, appearing for the Union of India submitted as under :

- Aruna Ramchandra Shanbaug has the right to live in her existing state.
- The state that Aruna Ramchandra Shanbaug is presently in does not rationalize ending her life by withdrawing hydration/food/medical support.
- The above-mentioned acts or series of acts and/or such omissions will be cruel, inhuman and intolerable.
- Withdrawing/withholding of hydration/food/medical support to a patient is unknown to Indian law and is opposing to law.
- In case hydration or food is withdrawn/withheld from Aruna Ramchandra Shanbaug, the efforts which have been put in by batches after batches of nurses of KEM Hospital for the last 37 years will be in vain.
- Besides causing a deep sense of resentment in the nursing staff as well as other well-wishers of Aruna Ramchandra Shanbaug in KEM Hospital including the management, such acts/omissions will lead to discouragement in them.
- In any event, these acts/omissions cannot be legalized at the instance of Ms. Pinky Virani who desires to be the next friend of Aruna Ramchandra Shanbaug without any locus.

ISSUES RAISED

- When a person is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies and medicines be permissible or 'not unlawful'?
- If the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his/ her desires be respected when the situation arises?
- In case a person has not previously stated such a wish, if his family or next of kin makes a request to withhold or withdraw futile life-sustaining treatments, should their wishes be respected?

JUDGEMENT

- The Court drew opinion that based on the doctors' report and the definition of brain death under the Transplantation of Human Organs Act, 1994, Aruna was not brain dead.

She could respire without a support machine, had feelings and produced essential stimulus. Though she is in a PVS, her condition was stable. So, terminating her life was unjustified.

- Further, the right to take decision on her behalf bestowed with the management and staff of KEM Hospital and not Pinki Virani. The lifesaving method was the mashed food, which was her mode of survival. The removal of lifesaving technique in this case would have meant not to feed her. The Indian law in no way promoted not giving food to a person. Removal of ventilators and discontinuation of food could not be compared. Allowing euthanasia to Aruna would mean reversing the efforts taken by the nurses of KEM Hospital over the years.

- Moreover, in continuance of the *parens patriae* principle, the Court to avoid any misuse vested the power to determine the termination of life of person in the High Court. Thus, the Supreme Court allowed passive euthanasia in some conditions, subject to the approval by the High Court following the set procedure. When an application for passive euthanasia is filed, the Chief Justice of the High Court should constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench and after consulting such medical authorities it may take any step. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and the close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its decision. The above procedure should be followed all over India until Parliament makes laws on this subject.

- However, Aruna Shanbaug was not given euthanasia as the court opined that the matter was not fit for the same. If at any time in the future, the staff of KEM hospital or the management felt a need for the same, they could approach the High Court under the procedure prearranged.

- This case clarified the issues revolving around euthanasia and also laid down guidelines regarding passive euthanasia. Alongside, the court also made a reference to repeal Section 309 of the Indian Penal Code.
- It distinguished passive euthanasia from active euthanasia.

- By legalising the Living Will, the Supreme Court has enabled people to extend this privilege even to the phase when the individual is incapable of spelling out the line of treatment he accepts or rejects. Thus, if the individual were to clearly work out a "will" or "advance order" saying that he might not want to be put on artificial life support system in case he goes into a state of coma or is unfit to express his choice by then of time, the instructions will prevail.

EUTHANASIA IN FOREIGN COUNTRIES- A GLOBAL VIEW

BELGIAN EUTHANASIA LAW

Belgium's Senate confirmed the law by a significant majority on October 25, 2001. On May 16, 2002, following two days of discussion, the lower house of the Belgian parliament supported the bill by 86 cast a ballot in support, 51 against, and 10 non-participations. The legislation set up the conditions as follows-

- The candidates for euthanasia need to reside in Belgium.
- The age of patients should be at least 18 years and specific, voluntary, and repeated demands are needed that their lives be ended the precise number of which is not provided and open to interpretation.

EUTHANASIA IN THE NETHERLANDS

The Netherlands was one of the chief nations to allow active euthanasia and PAS(Physician-Assisted Suicide) in post-war period with the section of the Euthanasia Act in 2002. The law stipulated the following criterias :

- The patient's request shall be voluntary;
- The patient's suffering should be intolerable;
- The patient shall be well-informed about their situation and prospects;
- There are no reasonable choices left;

EUTHANASIA IN JAPAN

Euthanasia is defined in Japan as **"***an act to relieve an intense pain of the patient, whose time of death is inescapable, on his/her sincere request and to make the patient meet his/her very own peaceful death***"**. Euthanasia is classified into five classifications namely- pure , indirect, active and passive euthanasia and physician-assisted suicide.

INDIAN PERSPECTIVE OF EUTHANASIA

As stated before, a country where poverty and unavailability of basic resources rule, issues regarding with euthanasia are superfluous. In India, euthanasia is a wrongdoing. Section 309 of the Indian Penal Code (IPC) manages the attempt to suicide and Section 306 of the IPC manages abetment of suicide, which are culpable in nature.

EUTHANASIA AS AN OFFENCE UNDER S-309 OF IPC

Euthanasia is an offence in India covered under Section 309 of IPC[6] i.e., attempt to suicide. If it is caused by some other person, he will be guilty of the offence of murder, or culpable homicide not amounting to murder (if one has the consent of the person seeking euthanasia). In case euthanasia is decriminalised and made permissible under the law, a sixth exception to Section 300 of I.P.C[7]. will have to be added stating that culpable homicide shall not be a crime if it is granted to a person in a case of euthanasia under the rules made by the State.

It must be stated that even people who are in favour of legalising euthanasia have expressed a view that it should be permitted in exemplary cases where there is no chance of survival of a person or where his pain and suffering are incurable. They suggested constitution of an expert committee which will consist of medical experts, social workers headed by District Judge to consider whether the case before them is fit to be granted permission for euthanasia. This, in their view, will eliminate the possibility of misuse of legalisation of euthanasia. The court observed that **"***a person attempts suicide in a depression and hence needs help, rather than punishment***"**. There are instances when life does not have any meaning for patients awaiting death who reach a stage where life becomes worse than the death. For this cause, legalization of euthanasia should be done for the sake of humanity. This judgment is indeed a welcome step in the right direction.

Those who do not support legalisation of euthanasia contend that it will mean "legalisation of murder" hence criminals would misuse this and the police and the law would be of no relevance then. According to them, "merciless living is better than merciful killing". They argue that a person has no right to take a life when he cannot give one. Moreover, the serious dreaded diseases which were potential causes for euthanasia such as T.B. Small pox, Cancer and even Acquired Immune Deficiency Syndrome (AIDS), which were potential causes for euthanasia have no longer remained incurable and hence there is no need to legalise euthanasia.

[6] The Indian Penal Code (Bare Act)
[7] Ibid

MEDICAL STATUS

Although a few people may choose that the suffering and outrage that describe their lives are not sufficiently terrible to make life not worth proceeding, other individuals in a similar situation will consider ending their lives. Similarly, as it is inappropriate to force individuals to pass on, so is it wrong to pressure individuals to persist conditions that they observe to be unbearable.

As said before, the point is reiterated that the privilege of life and the privilege to die are not two different rights, but rather two viewpoints of a similar right. The privilege of life is the right to choose to live. The privilege to die is the right to choose whether one will die or not. On the context that the privilege to life was just a mere right to select to keep living and did not include a privilege to choose not to keep living, at that point, it would be a responsibility to live a life instead of a privilege to life.

The privilege to die requires explanation as it need not be a privilege just to help with consummation of one's life. Rather, it requires just add up to a privilege not to be kept from picking up help with ending one's life. The privilege to kick the bucket requires being interpreted just as a privilege not to be kept from being helped by the individuals who will give aid. At the end of the day, the individuals who think assisted suicide and willful extermination are unethical, ought to not be duty-bound to (help) kill others. On the other hand, they ought to also not be acceptable to keep others from offering help to the individuals who have rationally verified that their lives are not worth proceeding. No one ought to be compelled to help, nor constrained to not help.

Some may ask as to why help is vital. In a few circumstances, individuals have turned out to be so weakened that they are justly unfit to murder themselves. If individuals have no alternative of help, they may be obliged to murder themselves before they feel that life has turned out to be unbearable, simply because they realize that they will be unable to get any kind of help at a later stage, once their condition worsens. Even individuals who can kill themselves may rise toward the help of others, and particularly medicinally ready individuals. This is because killing oneself can be a chaotic or unduly painful act. For instance, tossing oneself before fixing an extension may cause hurt to others. Similarly, an overdose could prompt a more decent demise, yet lay people know too nominal about how unfailingly to end their lives rather unfailingly in that way.

Neglecting to overdose appropriately or being found before death could leave a man in a vegetative condition, which is precisely what that individual may have been looking to stay away from. With the help of a skilled specialist, individuals can compose to die at a picked time, in protection and with pride. It is along these lines it is completely reasonable that individuals may favor this choice to taking their own lives unassisted.

RELIGIOUS VIEWS ON EUTHANASIA

Most religions do not have a liking towards euthanasia. The Roman Catholic church, for instance, is a standout amongst the most dynamic associations in restricting euthanasia. The Dharmasutras denied suicide. Essentially all religions express that the individuals who become helpless through sickness or incapacity deserve special consideration and assurance, and that legitimate end of life care is a better plan than euthanasia. Religions are against killing for various reasons:

God has forbidden it

All religions, virtually, with a Supreme God have a direction from God in their sacred texts that says 'you should not slaughter'. This is normally deciphered to signify "you should not murder innocent human beings". This rules out euthanasia (and suicide) just as homicide, as doing any of these is eventually against God's requests, and would be an attack on the authority of God .

Human life is holy

Human lives are special on the primary and vital ground that God made them. Therefore, human life ought to be ensured and safeguarded in any case. Therefore we shouldn't meddle with God's arrangements by trying to shorten human lives .

Human life is unique

Human beings are made in the picture of God. Therefore they have a unique reverence and pride. This esteem doesn't exactly depend on the nature of a specific life. Taking a life abuses that exceptional regard and pride . Even if it's one's very own life and even if that life is loaded with torment and suffering.

Eastern religions

Some Eastern religions adopt a alternate strategy. The key thoughts in their frame of mind to death are achieving freedom from mortal life, not hurting living beings. Euthanasia clearly clashes with the second of these, and it intrudes with the first.

Opportunity from mortal life

Hinduism and Buddhism see mortal life as a feature of a continuing cycle in which we are conceived, live, die, and are renewed. The ultimate point of each being is to be totally freed from the material world. During each cycle of life and death people walk towards their ultimate freedom. How they live and how they die displays a very important part in choosing what their next life will be, thus in shaping their adventure to freedom. Shortening life meddles with the working out of the laws that govern this procedure (the laws of karma), thus meddles with that individual's journey to freedom.

(Caution: this 'clarification' is over-simplified; there's significantly more to these religious thoughts than is composed here.)

Non-hurt - the guideline of ahimsa

Hinduism and Buddhism respect all the lives (not simply human life) as associated with the procedure above. Therefore they state that we should try to abstain from hurting living things. This rules out murdering individuals, regardless of whether they need to die or not.

RIGHT TO DIE AS A PART OF RIGHT TO LIFE

According to Pipel and Amsel- **"***Contemporary supporters of 'rational suicide' or the 'right to die' usually call by 'rationality' that the decision to kill oneself be both the independent choice of the agent desired by liberals, and 'a best option under the situations' choice desired by the ascetics or useful, as well as other natural conditions such as the choice being constant, not an impulsive decision, not due to mental illness, achieved after due planning, etc***"**.

Starting from the case of [8] ***State v. Sanjay Kumar*** , the Delhi High Court disapproved section 309 of IPC as an 'survival and a contradiction' which was then followed by different views of different High Courts on section 309.

In the case of [9] ***Naresh Marotrao Sakhre v. Union of India***, it detected the difference between Euthanasia and suicide. Suicide being an act of self-destruction, to end one's own life without the aid or support of any other human activity whereas euthanasia being different as it involves the intervention of a human agency to end one's life.

In [10] ***P. Rathinam v. Union of India*** the court gave a relief to the people trying suicide, section 309 was held to be illogical and deserves to be removed from the statute book to civilize the penal laws.

Soon, this was also overruled in the case of [11] ***Gian Kaur v. State of Punjab*** and it was held that right to life does not contain right to die or to be killed. It was further held that right to life was a natural right personified in article 21, but suicide was unnatural termination of life and hence, 'mismatched and inconsistent' with the right to life. The right to life includes right to live with human self-esteem, which would mean the existence of such a right up to the end of natural life. However, the court held that one may have the right to die with dignity as a part of the right to live with dignity.

[8] (1985) Crl. Law Journal, 93
[9] 1995 Cri L J 96 (Bom)
[10] AIR 1994 SC 1844: 1994 Cri. L. J. 1605: (1994) 3 SCC 394
[11] 1996(2) SCC 648

According to this article[12] right to life means the right to lead meaningful, complete and dignified life. The object of the fundamental right under Article 21 is to prevent any constraint by the State to a person upon his personal liberty and deprivation of life except according to procedure established by law.

The meaning of the words "**personal liberty**" came up for attention of the Supreme Court for the first time in *A.K. Gopalan v. Union of India*[13]. At that time the scope of Article 21 was a bit narrow. In this case the Supreme Court held that the word deprivation was construed in a narrow sense and it was held that the deprivation does not restrict upon the right to move freely which came under **Article 19 (1) (d)**. Finally, in *Maneka Gandhi v. Union of India*[14], the Supreme Court overruled Gopalan's case and widened the scope of the words "**personal liberty**", which is: **"***The expression personal liberty in Article 21 is of widest in nature and it covers a bundle of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19***".**

Now, the question arises whether right to life under Article 21 includes right to die or not. This question came for consideration for first time before the High Court of Bombay in *Maruti Shripati Dubal v. State of Maharashtra* [15] in which the Bombay High Court held that the right to life guaranteed under Article 21 includes right to die, and the hon'ble High Court struck section 309 IPC which provides punishment for attempt to commit suicide by a person as unconstitutional.

In *P Rathinam v. Union of India*[16] a Division Bench of the Supreme Court supported the decision of the High Court of Bombay in Maruti Shripati Dubal case and held that under Article 21 right to life also includes right to die and laid down that section 309 of Indian Penal Code dealing with ' **attempt to commit suicide is a penal offence**' is unconstitutional.

This issue was again raised in *Gian Kaur v. State of Punjab*[17]. In this case a five judge Constitutional Bench of the Supreme Court overruled the P. Rathinam's case and held that "Right to Life" under **Article 21** of the Constitution does not have an inclusion of "**Right to die**" or "Right to be killed" and there is no ground to hold section 309, IPC as constitutionally invalid. The real meaning of the word 'life' in Article 21 means life with human self-respect and pride. Any aspect of life which

[12] Article 21 of Constitution of India,1950
[13] 1950 SCR 88
[14] 1978 SCR (2) 621
[15] 1987 (1) BomCR 499
[16] AIR 1994 SC 1844
[17] 1996(2) SCC 648

makes life dignified comes under its ambit, but not that extinguishes it. The '**Right to Die**' if any, is fundamentally inconsistent with the "**Right to Life**" as is "death" with "Life".

LEGAL DENIAL OF RIGHT TO DIE

The law treats every attempt to take life, either of oneself or of another a punishable offence under the Indian Penal Code. Any assistance or abetment rendered is also a punishable offence. Furthermore, concealing information about such an attempt is also an offence. In the present context, the following legal provisions are important[18]:

- **Section 299, Indian Penal Code, 1860-** Culpable Homicide- whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Hence in India, Euthanasia is undoubtedly illegal. As in cases of euthanasia or mercy killing there is an intention on the part of the doctor to kill the patient, such cases would clearly fall under the clause 5 of section 300 of Indian Penal Code, 1860 resulting the killing would amount to murder[19].
- **Exception 5 to Section 300** - However, in such cases if there is a valid consent of the deceased then exception 5 of the said section[20] would be attracted and the doctor or mercy-killer would be punished under Section 304 for culpable homicide not amounting to murder[21]. But it is only cases of voluntary Euthanasia (where the patient consents to death) that would attract exception 5 to Section 300. Cases of non-voluntary and involuntary Euthanasia would be struck by proviso one to Section 92 of the Indian Penal code and thus be rendered illegal[22].
- **Section 92**- It is important to note that in euthanasia there is intentional causing of death whether with or without the patient's consent so the protection of Section 92 whose very basis stands on "good faith" is contradictory to the concept of Euthanasia rendering no legal protection to the mercy-killer. In India, the concept of consent has not been extended beyond examination and treatment out of ethical, cultural, social and legal considerations.

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[18] 'EUTHANASIA IN INDIA: LEGAL AND JUDICIAL PERSPECTIVE' (*Shodhgangainflibnetacin,* hh) <https://shodhganga.inflibnet.ac.in/bitstream/10603/172264/10/10_chapter%204.pdf> accessed 25 September 2019

[19] This section provides for killing of a human being by another human being with an intention to kill that another and also provides for the punishment of such an offence.

[20] This provision deals with death with consent, which has been fixed at eighteen years.

[21] This section provides for punishment for culpable homicide not amounting to murder.

[22] It contains general exception with regard to any harm done in good faith even without the consent of the consenting party.

In addition, the professional aim of alleviation of pain and suffering has not been stretched to include participation in the destruction of an individual under any circumstances[23]. The intent to kill qualifies euthanasia as a crime under the Indian Penal Code, 1860. A physician who practises euthanasia would be charged under Section 299 or Section 304- A, depending on the method used[24].

- **Section 107 and Section 202** -All people including relatives who participated or were aware of such intent on the part of the physician could be charged under Section 107 (Abetment of a thing) and Section 202 of Indian Penal Code and in cases where the entire process is undertaken at their behest, relatives could be charged under Section 299 or 304 as well. A physician might cite the provisions of sections 87, 88 and 92 to defend him in cases where he is alleged to have used terminal sedation for an act of mercy-killing. Intent might become a material consideration in such a case[25].

CONCLUSION AND SUGGESTIONS

Death cannot be controlled by anyone, it cannot be leashed. Nor can one escape it. But, to a certain point, if a person can choose how he wants to die, he would gladly do so. Therefore, a person should have a say over his death in this case. Moreover, in the event that the right to life were just a privilege to choose to keep living and did not additionally incorporate a right to choose not to keep living, at that point it would be an obligation to live instead of a right to life.

- Instead of decriminalizing the right to die and permitting it generally, it can be allowed in rarest of rare cases.
- Right to die can also be allowed in suitable cases of passive euthanasia by taking the agreement of the patient or by the info and consent provided by the doctors.
- If there is no hope for the patient, then it is better to relieve both the patient and the family members of the emotional trauma, it is better to end it once and for all so that everyone is not suffering on a daily basis.
- The financial aspect is also an important aspect as, when money is being spent on some patient who has no scope of recovering in the future, then it is just a wasteful expenditure which will ultimately deteriorate the financial condition of the family

[23] 'EUTHANASIA IN INDIA: LEGAL AND JUDICIAL PERSPECTIVE' (*Shodhgangainflibnetacin*, hh) <https://shodhganga.inflibnet.ac.in/bitstream/10603/172264/10/10_chapter%204.pdf> accessed 25 September 2019

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ACID ATTACKS: A CRIME AGAINST HUMANITY

Amrusha Sengupta

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INTRODUCTION

"Childhood should be carefree playing in sun, not living a NIGHTMARE in the darkness of the soul"

-Dave Pelzer, A Child called "it"

Childhood is the age of pleasure and enjoyment. It is the stage where the infant goes to school, spends time with their family, and gets affection from his parents. The importance of a better carefree environment for children is to protect their incredible future and contribution towards nation building as childhood is the base of a good adulthood. The future of a country depends upon the present of country's children. It becomes necessary for a nation to invest upon the country's future by protecting their rights and framing and implementing laws regarding child welfare.

Child labourers are exploited, paid minimal wages and made to work under unhealthy conditions which adversely affect their mental and physical health. This makes the nation to be deprived of the healthy working force required for its continuous progress and growth. The lives of the children have become miserable in such conditions making it pitiable.

Child labour is a big socio-economic problem which has to be solved by the combined efforts of the people and the government. One of the major causes of child labour is poverty and lack of educational facilities. Children (0-14 years) constitute approximately one-third of the population of India. Article 24 of the Indian Constitution states "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment".

One in every 11 children in India is working. Child labour has been decreasing at an abysmal rate of 2.2% per year from 2001 to 2011, as per an analysis of census data by non-governmental organization CRY (Child Rights and You). There are still 4.5 million children in age group 5-14 years who are working.[1] The major occupations engaging child labour are Pan, Bidi & Cigarette making, Construction, Domestic workers and Spinning & weaving. Uttar Pradesh (20.58%) tops the list followed by Maharashtra (11.41%), Bihar (10.37%), Andhra Pradesh (9.29%), and Madhya Pradesh (6.57%).[2]

[1] Working Children, Census of India 2011
[2] Working Children, Census of India 2011

Efforts have been made by the government of India in forming of stringent statutory legislations but the implementation at the ground level is not upto its mark even though Child labour is banned under the article 24 and later right to education was guaranteed by the 86th Constitutional Amendment which inserted 21A in the Constitution there is major violations of these rights. Further, Child Labour (Prohibition and Regulation) Act, 1986 was passed by the Parliament to counter the problem of child labour in a more effective manner but needed amendments time to time and was amended recently in 2016.

HISTORY OF CHILD LABOUR IN INDIA

The presence of child labour in the society can be traced back from the history long back ago as children used to help their parents while working in the fields with them. The form of exploitation of children started during the age of industrialization from 17th century. It was the era where large numbers of human population were employed in the factories instead of machinery. During this period there was a large structural change in the pattern of occupation. Many articians were forced to work in these factories because they lost their jobs. But the evil thought of exploitation emerges in the mind of the factory owners as they started employing children in their factory because the cost of employing them was less as compare to adults.

Earlier child used to work in the factories for continuous 12 to 18 hours a day, six days a week in order to earn a penny. Children more often of the age group of 7 years began working with the tending machines in the spinning mills, they used to work in the factories without having proper light and air and the chemical substances often harm them, best example of this bangle industries.

CONSTITUTION OF INDIA AND CHILD LABOUR

Laws in India banning employment of children date back to 1881, under the colonial rule.[3] The act formed in 1881 banned the employment of children below the age of 7 years in factories was the first action by Indian government against child labour. The Children (Pledging of Labour) Act, 1933

[3] Indian Factory Act, 15th April, 1881

followed by the Employment of Children Act, 1938 were the first statutory enactment dealing with child labour which was repealed by the Child Labour Act, 1986. The Child Labour (Prohibition and Regulation) Act 1986 is an outcome of various recommendations made by a series of Commissions.[4] This legislation was enacted to reform the legal measure, as the policy of both Prohibition and Regulation.

Constitution of India contains provisions for upliftment, development and protection of children providing free education for children till the age of 14 years. Indian Constitution deals with child welfare through specific rights entailed to them under fundamental rights and some specific legislation under directives principles of state policy. The following Articles of Indian constitution states child welfare –

FUNDAMENTAL RIGHTS:

Provisions related to the welfare of the child rights are reflected in Article 15(3) - Nothing in this article prevents the State from making any special provision for women and children. Thus article empowers the State to make special provisions for the children in order to stop exploitation against them. Further Article 21A - The State shall provide free and compulsory education to all children of the age 6-14years.The article inserted keeping in view creating the necessary base for the economy by providing education free of cost, as most of the population in India is living below the poverty line this force them to send their child on manual works rather than sending them to the school ultimately results in child labour. Article 23 - Prohibits traffic in human being and beggar and other similar forms of forced labour. (Child Trafficking for slavery is a major issue as to child labour). Trafficking in human being for sex, making them to work for their employers for lifetime are some of the serious problem prevails in the economy and new problem such as trafficking in child which need to be tackling as quickly as possible. The main provisions the deals with child labour in India is given under the Article 24 which states that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. This article is important as it prohibits the child labour in hazardous employment in order to bring welfare to the children.

[4] The National Commission on Labour 1969; The Gurupadswamy Committee on Labour 1976 and Sanat Mehta Committee 1984

DIRECTIVE PRINCIPLES OF STATE POLICIES:

Article 39 (e) - Requires the State and secure that the tender age of children are not abused and to ensure that they are not forced by economic necessity to enter avocations unsuited in their age or strength. Those children are given opportunities and facilities to develop in a healthy environment of freedom and dignity and that childhood and youth are protected.

Article 39 (f) - Enjoins the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment.

Article 45 - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 51A (k) - It is the fundamental duty of the parent or Guardian to provide opportunities for education to the child or ward between the age of 6 and 14 years.

The main object of these articles is to ensure that there is no injustice and infringement of child rights, equal opportunities must be given to a child for overall development.

LAWS AND GOVERNMENT POLICIES AGAINST CHILD LABOUR IN INDIA:

Legislations are formed by the government in order to ensure the welfare of the citizens of the country. There are some legislations which strictly deals with the welfare of the children and prohibits and prescribe punishment for the employer who employees those children to work for them. Abolition of child labour laws can be formed by both central and state governments.

The Children (Pledging of Labour) Act, 1933

The Act declares any agreement by a parent or guardian to pledge the labour of a child below 15 years of age for payment or benefit other than reasonable wages and to the detriment of the child, to be illegal and void. It also provides punishment for such parent or guardian as well as those who employ a child whose labour is pledged.

The Factories Act, 1948

The Act prohibits employment of children below the age of 14 years in any factory. A child of 15-18 years can be employed in a factory only if he obtains a fitness certificate from a medical practitioner and they shall work for not than four and half hours. Working in night hours was also prohibited.

Indian Penal Code, 1860

There is no special provision for punishment for child labour, but S.374 prescribes a punishment of imprisonment of one year and/or fine, for unlawful compulsory labour. S.370 makes the buying or disposing of any person as a slave an offence punishable with imprisonment which may extend to seven years and/or fine.

Therefore, a need arose for the central legislation for punishment for child labour.

Child Labour (Prohibition and Regulation) Act, 1986

The Child Labour (Prohibition and Regulation) Act, 1986 was enacted with the main objective to protect the childhood of the young generation of the country and provide them basic necessary requirements which are necessary for their growth. The basic objective of the Act is to prohibit the employment and to regulate the conditions of work of the children who have not completed the age of 14 years in some occupation as defined under the Part-A of the schedule or in any of the workshops wherein the process mentioned in the part-B is carried out; provided that nothing in this section shall applicable to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government. The act provides for constituting of a Child Labour Technical Advisory Committee (CLTAC) who is responsible for advising the government about additions to the Schedule lists (the factories and establishments where the children may be employed or where they can't be employed).

This Act prohibits employment of children below the age of 14 years in hazardous occupations. Such hazardous occupations have been identified by law. This Act recognizes 18 occupations and 65 processes that are hazardous to the children's lives and health of children. Employment of children below the age of 14 in such industries is an offence. Section 12 of this Act requires prominent display of "child labour is prohibited" at construction sites and industries in local language as well as in English.

In order to ensure security against working conditions The Act also provides that no child shall be permitted to work between 7 p.m. and 8 a.m. and shall not be forced to work over time. Further no child shall work for more than 3 hours before he has an interval of one hour. A child cannot work in more than one place on any day. A weekly holiday is allowed. The Act also provides health and safety measures for the welfare of the children. Amicable working facilities such as drinking water, latrines and urinals, cleanliness, disposal of wastes and effluents, ventilation and temperature, etc. should be provided by the employer as defined under Section-13 of the Act, it is also mandatory for the employer to take the measures for safety from dust and fume, artificial humidification, fencing of machinery etc.

Act also provides the punishment for the employer for employing any child in contravention of the provisions of the Act – imprisonment for not less than 3 months extending to 1 year or with fine not less than Rs. 10000 extending to Rs. 20000, or both.

Critical Analysis

1) The Act is in favour of regulation rather than abolition of Child Labour.

2) Absence of any measures for rehabilitation of the child.

3) Employers pretense as family members making use of proviso annexed to section 3 under the Act which makes them escape from prosecution and continue exploiting children.

4) Age of the child is differently defined under different laws.

5) Falls short of making all forms of child labour illegal.

POLICIES OF THE GOVERNMENT AGAINST CHILD LABOUR IN INDIA:

Government of India laid down a National Policy on Child Labour in 1987 for eradicating Child Labour from India and to provide rehabilitation for children working in hazardous occupations. Government launched "Sarva Shiksha Abhiyan" in 2001-02 under the 10^{th} five year plan to provide elementary education to all age groups. Children between 5-9 years were directly enrolled under this scheme. This scheme resulted in a significant outcome.

On August 01, 2006, the Government imposed a ban on employment of children as domestic servants or servants in dhabas (road side eateries), restaurants, hotels, motels, teashops, resorts, spas or in other recreational centers.[5]

Child Labour (Protection & Regulation) Amendment Act, 2016

The Act increased the number of places where the child cannot be employed. The Act lays down ban on employment of children below 14 years in all occupations except in "own account enterprises" i.e. family business and in entertainment industry provided education of child does not get hampered. A new category of persons called "adolescent (14-18 years)" is added. The amended Act prohibits employment of adolescents in hazardous occupations as specified (mines, inflammable substance and hazardous processes). The Central government has the power to add or omit any industry being stated in the list as "hazardous industry". The Act enhances the punishment increasing the fine from 20,000 to 50,000 and imprisonment 6 months to 2 years. The offence has been made cognizable for repeated offenders.

Critical Analysis – 1) The Act states list of hazardous occupation has been reduced which will encourage child labour. Section 4 of the Act gives discretionary power to the government authorities to revise the list.

2) The child labour in family enterprises would become a major concern as to forced labour. Section 3 (5) permits work in family or family enterprises and the hours of work is not defined.

3) The Act contravenes the domestic legislations reversing the gains of previous laws. It goes against the Right to Education Act, 2009 by allowing children to work in family enterprises.

4) Lacks the provisions regarding regulating, inspection and monitoring systems.

EFFORTS OF JUDICIARY AGAINST THE PROBLEMS OF CHILD LABOUR:

Several petitions (also in the form of public interest litigations) have been filed in courts on the issues addressing child labour, welfare and rights of child.

[5] Press Information Bureau, Government of India, MLD/L.53 (Cpi-iw) 1.8.2006.

In ***People's Union for Democratic Rights v Union of India***[6] the issue concerned the conditions of workmen engaged in the construction work of various projects connected with the Asian Games, including child labour. The Court held that construction work was 'plainly and indubitably a hazardous employment', wherein employment of children below the age of 14 years would amount to a violation of fundamental rights under Article 24 of the Constitution. The court further stated No child would willingly submit himself/herself to work and only does so in the face of great deprivation and economic and social hardships. Identifying child labour as a form of forced labour, irrespective of the work being done, would help one understand the practice as a violation of fundamental rights of a child and as being against the spirit of the Constitution.

The same was held in the case of Labourers working on ***Salal Hydro-project v. State of Jammu and Kashmir***[7]. In 1996, an another case highlighted the State's failure to effectively implement the laws against child labour in ***M.C. Mehta v. State of Tamil Nadu***[8], the Court issued detailed guidelines for the eradication of child labour. The Court framed guidelines to the employers to provide separate premises for children, facilities for recreation and proper diet, though the children were allowed to work in match factories. The Court asked State Government to implement these guidelines properly and form strict rules in regarding the employment of children to factories.

In ***Sheela Barse v. Union of India***[9] the Supreme Court has ordered release of all children below the age of 16 years from jails in light of Article 39 (f). The Court directed the States to set up necessary remand homes and juvenile courts. A child is an asset to the nation and, therefore, "it is the duty of the State to look after the child with a view to ensuring full development of its personality."

In ***Lakshmi Kant Pandey v. Union of India***[10] the Supreme Court has given a very wide and liberal interpretation to the Constitutional Provisions and has directed Government to take various steps for child welfare. Reading Article 15, 24, 39(e) and 39(f), the Supreme Court has emphasized upon the importance of child welfare in India. By interpreting above articles, the Court has laid down detailed guidelines for the adoption of children by foreign parents as there was no statute for this purpose.

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[6] AIR 1982 SC 1473
[7] AIR 1984 SC 177: (1983) 2 SCC 181
[8] (1996) 6 SCC 756
[9] AIR 1986 SC 1773: (1986)3 SCC 596
[10] AIR 1984 SC 469: (1984) 2 SCC 244

PUCL vs. Union of India and others[11], in 1998, dealt with the trafficking of children for labour. The court ordered that Rs. 200,000 be paid as compensation to the brother of a child who was trafficked for labour and beaten to death by the trafficker. Further, the court also ordered compensation of Rs.75000 is paid to three other boys who were also trafficked. While the states were asked to pay the compensation, they were also implored by the court to actively work towards eradicating trafficking of children for labour or else become responsible for compensating victims within their jurisdiction.

In ***Bachpan Bachao Andolan vs. Union of India and others***[12], in 2011, the Supreme Court, while dealing with the working and living conditions of children working in circuses, stressed on the fundamental right of children to free and compulsory education, as enshrined in Article 21A of the Constitution. It directed the Central Government to issue notifications prohibiting the employment of children in circuses within two months, so as to implement the fundamental right to education. Directions were also given to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children were to be kept in the Care and Protective Homes till they attain the age of 18 years. A proper scheme of rehabilitation of rescued children from circuses was sought.

In ***A. Srirama Babu vs. The Chief Secretary***[13], (1997) the High Court of Karnataka was of the opinion that there should be a total ban on employing children below the age of 10 in any employment and that the law should also extend to children in the unorganized sector. Assisted by the Campaign against Child Labour (CACL), the court acknowledged the need to remove the distinction between 'hazardous' and 'non-hazardous' employments and stated that "Hazard is not to be understood as a physical threat or injury alone. If the consequence of the labour rendered by him renders the child a sick and prematurely aged person, such labour certainly causes hazard to the health of the worker". Measures to ensure deterrence were also part of the court's directions. These included non-renewal of license of an earring employer, denial of statutory benefits such as tax holiday, rebate, etc. and punishment or penalty under CLPRA to be in addition to those prescribed under other laws that may apply to an employer for employing children. The court also directed action against parents and guardians responsible for neglecting their children and their welfare.

[11] (1998) 8 SCC485
[12] AIR 2011 SC 3361
[13] ILR 1997 KAR 2269

In **Court on its Own Motion v Government of NCT, Delhi**[14], the Delhi High Court, in 2009, took note of the lack of implementation of the constitutional mandate and statutory provisions regarding children and the absence of coordination between different agencies of the Government of NCT of Delhi and other authorities. It directed the implementation of the Delhi Action Plan, as prepared by National Commission for Protection of Child Rights, by the Labour Department, with some modifications. The Action Plan provides a detailed plan for the interim care and protection of children rescued from labour, and details responsibilities of various authorities. The police have the power to arrest the employers of the child labour as well as the owners of the premises let out to such employers. In a situation where reports of physical, sexual and economic exploitation of 16-17 year old maid servants in cities like Delhi were on the rise, this judgement came as a great relief. The Court said that while the CLPRA would not be applicable to the rescue of children above the age of 14 years and the liberation of child workers from non-hazardous occupations, these situations would be governed by the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Bonded Labour System (Abolition) Act, 1976.

Combating child labour practice:

Children need moral and material security and understanding of their psychological needs. There are two main approaches to combat child labour -

1) Traditional Approach – It emphasizes on legislations and their active and proper enforcement by various governmental agencies and their officials.
2) New or Practical Approach – This approach may also be called comprehensive or pragmatic. Both the government and non-government organizations are involved in dealing with the problem. They provide protection to working children and trying to make the work 'more humane'.

Principles underlying elimination of child labour:

1) Schooling for learning and practical problem solving
2) Integrated physical, mental and social development
3) Protection to working children
4) Making work creative and educated

[14] 163 (2009) DLT 641

5) Working children should be made to feel themselves as agents of change.
6) Employers can also contribute by stopping employing children and by obeying the rules and regulations.

CONCLUSION:

Though there being various Constitutional provisions and legislations for controlling child labour in India there is a problem in its implementation. The children are still being exploited and there has been recent increases in child labour statistics after the new amendment act has come into force i.e. Child Labour (Protection & Regulation) Amendment Act, 2016. The steps taken by the government to combat the menace of child labour shows that it totally desires to eliminate child labour. Despite such number of enactments and policies, it has been not a proper measure to control child labour. Child labour is still prevalent in India due to certain reasons i.e. poverty, low wages of the adults, unemployment, lack of education, migration to urban areas etc.

Without there being so many reasons no child would have to toil his life in pity and vain. Out of all causes, poverty is the basic reason which compels a parent to send his child to work. "Otherwise, no parents, specially no mother, would like that a tender aged child should toil in a factory in a difficult condition, instead of it enjoying its childhood at home the paternal gaze."[15]

Right to education has been a good scheme to combat child labour but there are still some major efforts needed by the government and the people. Both are responsible for the development of a child to reach ultimate goals in life and to schedule their nations on the path of prosperous growth. There is a major defect in implementation of the laws on ground level due to corruption and ignorance of law as a method.

Child labour as an activity has become a vicious cycle to attain its momentum till proper brakes of law are applied to it. Poverty is the reason and major cause for child labour which leads to lack of education and absence of literacy in the society. The lack of education further leads to unemployment and less skills due to lack of diligence to learn. This makes society more poor and uneducated. The scheme of free education to children has also not worked out fully into the terms as due to traditional attitudes of parents and families to not to send to schools and instead make

[15] M.C. Mehta v. State of Tamil Nadu : AIR(1996) 6 SCC 756

them work as child labourers in the fields or in industries. There is an uneducated approach of parents for not sending schools to children to just fear as there is no guarantee of jobs in future. And instead make their child work in industries just to make up some family income.

The schemes related to mid-day meals, free books and stationeries are working out their level gradually but that does not seem to be implemented but in actual sense shall be implied. Ground level small groups should be formed to keep a check on such implications of schemes. Other than the government, there is also a responsibility upon individuals to state to facts to the authorities of any such cruel acts of child labour being carried out in the nearby areas of the society. There should be co-operation between government and non-government organizations dealing with the menace of child labour. There is also a suggestion to follow International norms in respect of child labour related laws and take examples from the nations who have already eradicated the menace of child labour from the society through its stringent law and policy programmes.

COMPARATIVE ADVERTISING: BALANCING MANUFACTURER VIS-A-VIS CONSUMER INTEREST

Deepti Verma & Harsha

INTRODUCTION
LEGAL FRAMEWORK OF COMPARATIVE ADVERTISING:
CONSTITUTION OF INDIA AND COMPARATIVE ADVERTSEMENT
JUDICIAL PERSPECTIVE
SHIFT IN PARADIGM: SUSTANTIAL PROOF REQUIRED FOR PUFFERY
CONCLUSION

INTRODUCTION

Advertisement plays a pivotal role in influencing consumers and stimulating sale of the product. Globalization and Liberalization have increased the competition so much that every company wants to advertise its product to survive and remain in the race of competition. Everyday multiple players in the market come up with innovative tactics to show their product as superior to others and make every possible effort to come up with one of the best ways to disseminate information to its consumers. It is human psychology that consumers are attracted towards the more advertised product so each company advertises its product in the best possible way to boost the sale of its product in the market.

Advertising where products of one trader is compared with products of other trader is called comparative advertising. The crux of comparative advertising is well defined in the old slogan "Anything his can do, mine can do better". According to Jack Bowen, President of Benton & Bowels, "comparative advertising positions a product within a specific category, so that consumers can relate to that product or category"[1]. It increases consumer's knowledge and awareness about the nature and quality of the whole range of products that are compared, promotes competition[2] and helps consumers in taking an informed decision. Comparative advertising generally consist of two components, Puffery and Denigration. Puffing is exaggerated advertising, blustering and boasting, on which no reasonable buyer would rely and is not actionable. It may also consist of general claim of superiority over comparable goods that is so vague that it will be understood as merely the seller's expression of opinion. Even if advertisement is puffed up with malice against the competitor, it doesn't give rise to any actionable claim. On the other hand if a tradesman says his competitor's product is inferior to his product, it amounts to denigration. He lends himself in trouble as defaming competitor's goods is not permissible under law.

Part II of the paper highlights the existing statutory and non-statutory provisions dealing with the comparative advertising. Part III examines the constitutional perspective towards the same. Part IV and V deal with the judicial aspect i.e. the stand taken by judiciary during the initial phase of liberalization and shift in its perspective with the passage of time. Part VI concludes the paper

[1] Tom Bradshaw, *Comparative ads: what's their status now ?*, 74 TELEVISION/RADIO AGE (1974).
[2] WR Cornish & D Llewelyn, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 741 (6 ed. Sweet & Maxwell Limitation 2007).

emphasizing the lacunae in the existing legal framework and suggests remedial measures that are needed to be implemented.

LEGAL FRAMEWORK OF COMPARATIVE ADVERTISING:

Post liberalization the Indian economy underwent a significant change since it stepped up towards opening up of markets from a state controlled economy which resulted in advent of a wider range of products coming in the market that led to a cut throat competition among companies. With the increasing competition, the companies started to show their products best in the eyes of consumers in comparison of others. Such behavior led to dissemination of untruthful information to the consumers. To regulate such comparative advertising, a chapter on 'Unfair Trade Practices' was introduced in MRTP Act in 1984, just a few years before liberalization.

Monopolies and Restrictive Trade Practices (MRTP) Act was enacted in 1969 to "ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices as are prejudicial to public interest."[3] As the country stepped up towards liberalization, government made some significant changes in the act to make it conducive to the changing state of affairs. One of such amendments was addition of Sec 36 A defining unfair trade practices in comparative advertisement to protect consumers from untruthful and misleading claims.[4] Unfair trade practice means trade practice of making any statement which falsely represent that goods and services are of particular standard and gives public assurance of efficacy and usefulness of the product that is not based on adequate test. But it couldn't survive for long and was repealed due to its inefficiency to deal with upcoming cases and to meet the need for modern competition problems.

MRTP Act was replaced with the Competition Act, 2002 with the intent to ensure efficient allocation of economic resources in free competition market. Later provisions of unfair trade practices were imported in Consumer Protection Act, 1986 from MRTP Act. Though it took into

[3] K. Srinivasan, *competition for the MRTP act,* THE HINDU (Nov. 30, 2018, 02:30 PM), https://www.thehindubusinessline.com/2000/07/20/stories/122001mr.htm.
[4] The Monopolies and Restrictive Trade Practices Act 1969 Sec 36 A (vi).

consideration the interest of consumers but couldn't provide much relief to sellers, manufacturers and service providers.[5]

When India became member state to the TRIPS agreement, the need of an appropriate law was felt that could give protection to one's trademark at national and international level. So Trademark Act was passed in 2000 to increase globalization of trade, promote investment, to provide better protection to trademarks and to prevent fraudulent use of the mark.[6] Though TM Act doesn't use the word 'comparative advertising' specifically, but it has provision dealing with it under Sec 30(1). Comparative advertising is permissible under the act till it is in accordance with 'Honest Practices' and is not detrimental to the repute of other's trademark. The word 'Honest Practices' has not been defined by the act but judiciary has interpreted the term in several cases.[7]

The European court of justice also interpreted the term 'Honest Practice' as "expressing a duty to act fairly in relation to the legitimate interests of the trademark owner, and the aim as seeking to reconcile the fundamental interests of a trademark protection with those of free movement of goods and freedom to provide service in the common market."[8] To prove an advertisement as dishonest, one needs to establish that advertisement is untruthful and misleading to consumers. Despite Trademark Act, the need of a uniform integrated legislation was felt in the market industry to enhance public confidence in advertisement and to ensure honesty and truthfulness in representations. Thus, a non-statutory body, Advertising Standard Council of India (ASCI), was adopted in 1986. ASCI is a self-imposed regulation in advertising industry consisting of Board of governors and Consumer Complaints Council. Chapter IV of ASCI deals with comparative advertising and states that a manufacturer can compare his product with others even by stating name of his competitor's product provided:[9]

A. It is clear what aspects of the advertiser's product are being compared with what aspect of the competitor's product.

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[5] As seen in Colgate Palmolive (Indian) Ltd. v. Anchor Health and Beauty Care Private Ltd., 2009 (40) PTC 653.
[6] Trademark, OFFICE OF THE REGISTRAR OF TRADE MARKS (Nov. 30, 2018, 04:00 PM), http://www.ipindia.nic.in/about-us-tm.htm.
[7] See Hawkins Cooker Ltd v Murgan Enterprises, 2012 Indlaw DEL 4344. "Honest practice is satisfied when one cannot decipher a commercial relation between registered proprietor of trademark and other person business."

[8] See C-2/00 Michel Holterhoff v Ulrich Freieslelen, September 20, 2001.
[9] The Code for Self-Regulation of Advertising content in India (Dec. 2, 2018, 08:00 PM), https://www.ascionline.org/images/pdf/code_book.pdf.

B. The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered that is truly the case.

C. The comparisons are factual, accurate and capable of substantiation.

D. There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.

E. "Honest practice is satisfied when one cannot decipher a commercial relation between registered proprietor of trademark and other person business." The advertisement doesn't unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.

These principles were designed to protect consumers from being misled or deceived by advertising tactics of manufacturers. They also prescribe limit for puffery as to what extent a product can be puffed up and fall in the category of denigration. But due to lack of enforcement mechanism to implement the above principles, its rules remain only recommendatory in nature.

CONSTITUTION OF INDIA AND COMPARATIVE ADVERTSEMENT

Article 19(1)(a) of the constitution of India explicitly protects freedom of speech and expression. Advertising is also a form of speech that is used to disseminate information to persuade consumer to buy a particular product. Initially advertising was not included within the purview of Article 19(1)(a) of the Indian constitution**.** In *Hamdard Dawakhana v. Union of India*[10] court stated that although advertisements constituted a form of speech, but they were not constitutive of the concept of "free speech" as they were guided by the object of commercial gain in order to promote trade and commerce. "The advertisements in the instant case related to commerce or trade and not to propagating of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Art. 19(1)(a)."

[10] Hamdard Dawakhana v. Union of India, AIR1965 SC 1167.

Subsequently in the case of *Tata Press Ltd. vs. Mahanagar Telephone Nigam Ltd*[11] the Hon'ble Supreme court held that "commercial speech cannot be denied the protection of Article 19(1)(a) of the Constitution merely because the same is issued by businessmen". It further observed that advertisement is a mode of disseminating information to consumers and gives substantial contribution to print and electronic media organization.

Hence, we can infer that commercial speech comes under the purview of Article 19(1)(a) of the Indian Constitution and advertisement being a Commercial speech is protected under the same and certain restrictions has also been imposed by Article 19(2) of the Indian Constitution. Commercial Speech which is untruthful, unfair, misleading, deceptive can be regulated or prohibited by the State under Article 19(2).

JUDICIAL PERSPECTIVE

With the liberalization of the economy numerous cases were filed in the court regarding disparagement by competitors. Initially courts adopted very limited approach showing indifferent attitude towards consumers. It inclined to enhance the competition in the market by allowing companies to puff up their claims without any substantial proof to support the same. The first issue regarding comparative advertising came before the court in 1996 in *Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.*[12] In this case plaintiff and defendant were engaged in the same business of manufacturing clothing detergent brand. An advertisement was aired on TV in which defendant compared 'Ujala' with a product similar to 'Robin Blue' with similar shape and size. Advertisement stated 'Ujala' as cheaper and effective as compared to 'Robin Blue'. Court held the advertisement as disparagement of plaintiff's product and laid down five principles to state the law on the subject:

1. A manufacturer can claim his goods to be best in the world, even though such claim is false.

2. He can assert that his goods are better than his competitor's despite such statement being untrue.

3. To show his goods better he can even compare his goods with his competitors.

[11] Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd, AIR(199 5) 5 SCC 139.
[12] Reckitt & Colman of India Ltd. v. M.P. Ramchandran&Anr, 1999 PTC (19) 741.

4. While making comparison, he cannot criticize the goods of his competitor. To say otherwise defaming competitor's goods are not permissible.

5. In case of defamation if an action for recovery of damages lies, then the court is also competent to grant an order of injunction to restraint repetition of such defamation.

Here the court drew borderline as to what extent advertiser can boast his product and if he goes beyond that it comes in the domain of denigration which amounts to disparagement of competitor's product. The remarkable part of the holding was liberal attitude of the court to enhance the competition among traders. It gave very wide interpretation of puffery without taking into consideration the interest of consumers.

The position on Puffery was reconsidered in the case of *Glaxo Smith Klien Consumer Health Care Limited v. Heinz India Private Limited and Ors*[13]. Herein, plaintiff and defendant were manufacturers of nutritional drink 'Horlicks' and 'Complan' respectively. An advertisement was broadcasted in which defendant claimed his product has 'extra growing power' which enables kids to grow faster as compared to other drinks. Plaintiff argued that defendant was misleading consumers as the claim was made in untruthful manner without any proof to support the same as result of which plaintiff is facing a huge economic loss. Here also court didn't adopt any different approach than the previous case. Adhering to the *Ramchandran case*[14], court held that advertiser can puff his claims in any manner he wants until it slanders his competitor's product. Again, in *Godrej Sara Lee case*[15] court observed that defendant can highlight positive features of his product irrespective of the veracity of such claims. As long as he is not making any negative claims against the product of his competitor, no possible objections can be raised.

From *M.P. Ramchandran*[16] to *Godrej Sara Lee case* [17] the position remained the same as court continued to make wide interpretation of term Puffery and failed to take into consideration the interest of consumers. A significant departure was made in 2008 by Madras High Court in the case of *Colgate Palmolive (India) Limited v Anchor Health and Beauty Care Private Limited*[18] because first time court took into consideration the interest of consumers. Herein, plaintiff and defendant were dealing in the

[13] Glaxon Smith Klien Consumer Health Care Limited v. Heinz India Private Limited and Ors., 2007 (2) CHN 44.
[14] Supra note 12.
[15] Godrej Sara Lee Ltd. v. Reckitt Benckiser (I) Ltd, 2006 (32) PTC 307.
[16] Reckitt &Colman of India Ltd. v. M.P. Ramchandran&Anr, 1999 PTC (19) 741.
[17] Supra note 15.
[18] Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd., 2009 (40) PTC 653.

same line of business and were manufacturers of toothpaste under trademark 'colgate' and 'Anchor' respectively. An advertisement was aired in which defendant claimed his product 'Anchor' is the 'only' one to contain all three ingredient i.e. Calcium, Fluoride and Triclosan. Moreover he also stated that his toothpaste is 'first' to provide all round protection. Plaintiff objected to the assertion of the defendant as he made false statements because plaintiff's product also contains all these ingredients and gives overall protection. He argued that use of the words "ONLY" and "FIRST" goes beyond the tolerable limits of puffery resulting into disparagement of his product.

Court held that use of the words 'first' and 'only' are enough to mislead a prudent consumer to think that Anchor is the only product containing all these qualities. Along with this it observed that defendant misrepresented the consumers because he didn't come up with any scientific basis to prove his claim. Though court didn't call it a case of disparagement because defendant didn't slander his competitor's product actively but it surely made it a case falling under unfair trade practices.

The case marks an important shift in the reasoning of the court because it had never taken into account the consumer's interest previously rather focused on the protection of competitor's interest. By this judgment court not only recognized consumer a significant stakeholder in the market but also protected him from getting misled by advertising companies.

SHIFT IN PARADIGM: SUSTANTIAL PROOF REQUIRED FOR PUFFERY

"A manufacturer can claim his goods to be best in the world, even though such claim is false"- it was one of the principles laid down by the court in *Ramchandran case*[19]. A series of cases adhered to this principle interpreting term puffery in a wider sense. However with the passage of time judicial perspective began to change and consumer was recognized as a significant stakeholder in the market. Later courts began to ensure that consumer didn't get flustered by misleading claims but still position remained same regarding wider interpretation of puffery. The consistent view was taken by the courts till 2010, except *Colgate Case*[20], was that advertiser while comparing his product with his competitor, can state that his product is better than his competitor even when such claim is false provided it doesn't disparage the competitor's product.

[19] Supra note 16.
[20] Supra note 18.

A significant departure from this pattern was made by Delhi High Court in the case of *Dabur India Limited v M/S Colortek Megalaya Private Limited*[21]. Here plaintiff and defendant were manufacturers of mosquito repellant cream, Odomos naturals and Good Knight naturals respectively. Defendant claimed in an advertisement that his mosquito repellant cream consists of Tulsi, Lavender and Milk Protein that protect skin from rashes, allergy and stickiness unlike other creams. Plaintiff argued that the advertisement disparages his product as the claim seems to convey the message that his cream causes allergies and rashes. However court held that the advertiser didn't cause any disparagement to plaintiff's product. It merely highlighted its positive aspect without suggesting anything negative to his rival product. It further observed that puffed up claims are allowed considering the fact that they don't go beyond the permissible assertion having reasonable factual basis. No one can say that his goods are best in the world without any substantial proof to support the same. The case marks an important shift in the reasoning of the court because merely claiming a product better than others is not enough, the assertion so made should be backed by substantial proof. Now Consumer's interest was playing a dominant role in influencing the court's decision.

Here court also referred to the case of *Dabur India Ltd. v Wipro Limited, Banglore*[22] where in High Court observed that "it is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to that of the defendant." Therefore advertiser should be careful enough not to denigrate its competitor's product.

This case was recently followed in *Hindustan Unilever Limited, Mumbai v Gujarat Co-operative Milk Marketing Federation Limited, Mumbai and others.*[23] Here plaintiff was the manufacturer of frozen desserts and ice creams under the mark "KWALITY WALL'S" on the other hand defendant was a co-operative society of milk producers in Gujarat and was also engaged in production of ice cream under mark "AMUL". Two advertisements were broadcasted where defendant claimed "use real milk Amul ice cream and not frozen desserts which has vanaspati oil". It also used the tag line "Amul is real milk, Real ice cream". Plaintiff contended that defendant had made a false claim as all frozen desserts don't contain vanaspati oil and due to such claims plaintiff is facing a huge economic loss.

[21] Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd, 2010 (42) PTC 88.
[22] Dabur India Ltd. v. Wipro Limited, Banglore,2006 Indlaw DEL 373.
[23] Hindustan Unilever Limited, Mumbai v. Gujarat Co-operative Milk Marketing Federation Limited, Mumbai and others, 2017 Indlaw MUM 842.

Court held that defendant has abused the rights guaranteed under Art 19(1)(a) by maligning, belittling and denigrating the product of its competitor. This is not even the case of comparative advertising because defendant has compared two entirely different features i.e. milk is compared with vanaspati oil and it shows the intention of defendant to denigrate the product of plaintiff who is market leader of that product. Here court also referred the *M/S Colortek Megalaya*[24] case holding defendant guilty of disparaging its competitor's product by making untrue statements as all frozen desserts are not necessarily consist of vanaspati oil.

If we analyze the precedents set by judiciary, the legal position regarding comparative advertising seems to be well settled. Now courts have limited the ambit of puffery, a clear demarcation has been made between puffery and denigration and consumers have also been recognized as significant stakeholders in the market. From *Ramchandran*[25] to *Hindustan Unilever Limited case*[26], judiciary has played imperative role in molding legal framework of comparative advertising in a positive manner.

CONCLUSION

In this growing age of globalization and liberalization where there are plethora of products to choose from, advertising if done effectively can be the most effective way to help consumers to decide which product or service is best suited for them. Comparative advertising is not only beneficial to the manufacturers of the product but also beneficial for the consumers as in this process it educates the consumers and helps them in taking an informed decision as to which product is better amongst all the products in the market. The relevant question arises here is whether the so called "informed" decision of the consumer can be considered informed when traders are allowed to puff up their claims without exposing the demerits of other products? If yes, then it wouldn't be wrong to say that consumers are misled by market players by making superlative claims**.** If not, then the purpose of comparative advertising to educate consumers gets defeated.

If we analyze the legal position of comparative advertising in U.K., it seems very much similar to India but there is a crucial difference between the protectionist measures of the two countries. U.K.

[24] Supra note 21.
[25] Reckitt &Colman of India Ltd. v. M.P. Ramchandran&Anr, 1999 PTC (19) 741.
[26] Supra note 23.

allows its advertisers to show their competitor's product as inferior provided such assertion is backed by reasonable and valid claims. It helps consumers to make an objective comparison between the products and take an informed decision. However, in India manufacturers are allowed to merely puff up their claims rather than showing negative aspects of other products. Let's say if two companies are claiming their products best in the world and only positive aspects of the products are shown in the advertisement. Now it's beyond ones understanding how it is going to help consumers to take an informed decision. Though such provision is favorable to the manufacturer but is equally detrimental to consumer's interest.

Thus, it becomes imperative to find a balance between interest of manufacturers and consumers so that latter doesn't become prey to their "ill-informed" advertising. It is recommended that ambit of comparative advertising should be extended a bit further and manufacturers should be allowed to highlight negative aspect of their competitor's products.

CONSTRUCTION CONTRACTS, THEIR TYPES AND RISK ALLOCATION

Tarunveersingh Yadav

INTRODUCTION
TYPES OF CONSTRUCTION CONTRACTS
RISK ALLOCATION
RISK ALLOCATION THROUGH DISCLAIMER CLAUSES
TRUST, RISK BEHAVIOR AND COST REDUCTION:
CONCLUSION & RECOMMENDATIONS

INTRODUCTION

Construction contracts are the written agreements signed by the contracting parties (mainly an owner and a contractor), which bind them, defining relationships and obligations[1]. A construction contract is a document that sets a date and specifies which parties are going to participate in the construction process and contains several sections of clauses defining the scope, terms, and conditions of such agreement.

A contract agreement should have the following essential sections:

1. **Project description**: This section of the contract agreement contains a blurb or extract of what the project is about. The most important idea or description of the problem being addressed. It can be a summary of items or just a paragraph defining what needs to be solved.
2. **Contract price**: This area will describe the type of contract price been awarded and the total amount of money being contracted. It will also set possible additions or deductions to the contract and how they are going to be released. There are many variations and different schemes on how to negotiate the right pricing structure.
3. **Payment basis**: How the money is going to be paid to the contractor. Either on a monthly basis or whatever payment method is preferred, it should also specify what percentage of money should be retained on every application for payment. It will also define when the payment is due, the penalty for late payments, interest being accrued, and other applicable situations related to the payment and invoicing terms.
4. **Construction schedule or calendar**: The total of days or how the project schedule will be divided. It should describe either calendar days or business days and can be presented either through a CPM, Gantt chart, or just a bar chart.
5. **Contract document list**: A list of all contract documents that form part of the contract agreement. Drawings, exhibits, specs, and supplemental conditions can be part of this list.
6. **Construction scope**: Description of all construction activities, including some descriptions of things that will form part of the project. The scope normally can be measured or quantifiable.
7. **Construction conditions and responsibilities**: The section of conditions and responsibilities is the one that sets responsibilities for the owner and the contractor, and the

[1] M O'Riley, Civil Engineering Construction Contracts, Thomas Telford Publication (1996)

extents of who is responsible for providing documents and information. It contains specific terms for liens, penalties, withholding, arbitration rules, and specific instructions on how to process claims and proceed with disputes.

8. **Contract laws**: Governing laws, lien requirements, claims procedures, arbitration procedures, insurance, substantial completion requirements, final completion, and liquidated damages. It can also provide procedures on how to terminate or suspend the work and the agreement with the contractor.

TYPES OF CONSTRUCTION CONTRACTS

There are several types of construction contracts used in the industry, but there are certain types of construction contracts preferred by construction professionals.

Construction contract types are usually defined by the way, the disbursement is going to be made and details other specific terms, like duration, quality, specifications, and several other items. These major contract types can have many variations and can be customized to meet the specific needs of the product or the project.

A. Types of construction contracts based on timeline of execution:

1. Express Contracts

This type of agreement defines very well the purpose and scope of the agreement. Under this alternative, the stipulations and terms of the contract are understood clearly by each part.

2. Executed Contracts

An executed contract agreement provides a warranty period or malfunction. Under this agreement, services have been rendered, but the contract protects one party when the other's performance fails to provide the proper warranty for defective or incorrect installation.

3. Conditional Contracts

A conditional contract agreement is an agreement used when services could not be provided at the time the contract was signed. It stipulates a future date when services will be rendered if certain conditions are met.

B. Types of construction contracts based on Pricing:

1. Lump Sum or Fixed Price Contract

This type of contract involves a total fixed priced for all construction-related activities. Lump sum contracts can include incentives or benefits for early termination, or can also have penalties, called liquidated damages, for a late termination. Lump Sum contracts are preferred when a clear scope and a defined schedule has been reviewed and agreed upon.

This contract shall be used when the risk needs to be transferred to the builder and the owner wants to avoid change orders for unspecified work. However, a contractor must also include some percentage cost associated with carrying that risk. These costs will be hidden in the fixed price. On a lump sum contract, it is harder to get credit back for work not completed, so consider that when analyzing your options.

2. Cost Plus Contracts

This type of contract involves payment of the actual costs, purchases or other expenses generated directly from the construction activity. Cost Plus contracts must contain specific information about a certain pre-negotiated amount (some percentage of the material and labor cost) covering contractor's overhead and profit. Costs must be detailed and should be classified as direct or indirect costs. There are multiple variations of Cost Plus contracts and the most common are:

- Cost Plus Fixed Percentage
- Cost Plus Fixed Fee
- Cost Plus with Guaranteed Maximum Price Contract
- Cost Plus with Guaranteed Maximum Price and Bonus Contract

Cost plus contracts are used when the scope has not been clearly defined and it is the owner responsibility to establish some limits on how much the contractor will be billing. When some of the aforementioned options are used, those incentives will serve to protect the owner's interest and avoid being charged for unnecessary changes. But the cost-plus contracts are difficult or harder to track and more supervision will be needed, normally do not put a lot of risk in the contractor.

3. **Time & Material Contracts when scope is not clear**

Time and material contracts are usually preferred if the project scope is not clear, or has not been defined. The owner and the contractor must establish an agreed hourly or daily rate, including additional expenses that could arise in the construction process.

The costs must be classified as direct, indirect, markup, and overhead and should be included in the contract. Sometimes the owner might want to establish a cap or specific project duration to the contractor that must be met, in order to have the owner's risk minimized. These contracts are useful for small scopes or when you can make a realistic guess on how long it will take to complete the scope.

4. **Unit Pricing Contracts**

Unit pricing contracts is probably another type of contract commonly used by builders and agencies. Unit prices can also be set during the bidding process as the owner requests specific quantities and pricing for a pre-determined amount of unitized items.

By providing unit prices, the owner can easily verify that he's being charged with un-inflated prices for goods or services being acquired. Unit price can easily be adjusted up and/or down during scope changes, making it easier for the owner and the builder to reach into agreements during change orders.

RISK ALLOCATION

Construction risks are a major element that can significantly affects the final cost of any project. Specifically, how these risks are allocated has a direct bearing on the final total cost. The cost of these

risks is carried by the owner, contractor, or both, as determined by the type of the construction contract[2]. Risk allocation always occurs in any situation where more than one party (owner, contractor, consultant, etc.) is responsible for the execution of a project. Making sure that as many risks as possible are recognized and managed is good practice in any project. This activity is an important step in that this allocation can significantly influence the behavior of the project participants and hence impact both project performance and final cost.

In any certain project, the owner's goal can best be achieved by selecting the contract type that will most effectively motivate the contractor to the desired end. This step is also dependent on completeness of information for the bidder(s) at tender time and the extent that the owner wishes to take specific risk. In this context, contract risk can be divided into performance risks and cost risks[3].

Regarding risk allocation, the concept of "limitation of liability" dates back more than three hundred years, when the British Parliament declared, as part of Maritime Law, that a ship's owner should not bear greater liability than the value of the ship's hull[4]. In this context, every contract allocates risk. Not all contracts allocate risk equitably or such that the power and authority to manage the risk is allocated along with the risk itself. Given the opportunity, an owner should favor efficient allocation of risk between parties to a project that simultaneously reduces risk and improves project performance. This appropriate risk allocation is a significant contributor to low transaction cost of any specific project and vital issue in the success of the contracting process. However, in an owner–contractor relationship at least, a common aim of owners appears to be to avoid risk as far as possible by allocating as many risks as it can to the contractor[5].

RISK ALLOCATION THROUGH DISCLAIMER CLAUSES

Any construction project involves risk and there is no possibility to eliminate all the risks associated with a specific project. All that can be done is to regulate the risk allocated to different parties and then to properly manage the risk. This can be done through the language of the construction contract.

[2] F. Hartman, Don't park your brain outside—a practical guide to improving shareholder value with SMART management, PMI Publications (2000)
[3] *supra*
[4] W. Zoino, Cautious risk taking (1989), pp. 65-68

[5] D. Gransberg, M. Ellicot, Best-value contracting criteria, Cost Engineering, Morgantown (1997), pp. 31-34

The decisions regarding risk sharing or risk shifting are made within the context of an owner's contracting policy[6]. One of the objectives of the contract is to serve as a framework between the parties to establish which one has assumed which risk.

One way in which the contracting parties attempt to address the right and responsibilities for risk is through dealing directly with the issue of legal liability by including provisions that exclude liability arising from certain causes. Disclaimer (exculpatory) clauses are examples of such provisions. Such clauses attempt to transfer one party's risk (which may be a legal liability) to another by contractual terms. In other words, these clauses are intended to exclude an owner's liability in contract and often in tort for cost incurred by a contractor[7].

There is a significant amount of literature that discusses possible options for improved contracting methods and better risk allocation processes. These studies present new ways for doing business such as partnering/alliances, risk sharing/reward systems, incentive-based contracts and others. However, these new contracting strategies between owners and contractors are still founded largely on the self-interest of each participant. Motivation for performance under these strategies has focused largely on retribution for non-performance. In most cases, the relationships of the contracting parties are still defensive and, in some cases, adversarial. The atmosphere spawned by these relationships has not been conducive to innovation or cooperation between parties[8]. With all of these solutions, owners are generally unwilling to carry project risks and where possible, transfer them contractually to contractors through disclaimer clauses in order to have a control system over these risks in what we call contract documents[9].

[6] J. Kozek, C. Hebberd, Contracts: share the risk, Journal of Construction Engineering and Management (1998), pp. 356-361

[7] I. Goldsmith, T. Heintzman, Building contracts. 4th ed, Carswell (1995)

[8] J. Drexler, E. Larson, Partnering: why project owner–contractor relationship change, Journal of Construction Engineering and Management (2000), pp. 293-297

[9] S. Ward, C. Chapman, B. Curtis, On the allocation of risk in construction projects, International Journal of Project Management (1991), pp. 140-147

TRUST, RISK BEHAVIOR AND COST REDUCTION:

In the construction industry, risk behavior has been grouped into three general classifications: risk averse, risk neutral, and risk taker[10]. Each of these behaviors will affect how an individual or organization would react to a specific contractual agreement.

One of the most important finding is that a significant relationship exists between the amount of the premiums associated with the disclaimer clauses and the level of trust between the contracting parties, specifically between owners and contractors. In other words, under a high trust relationship with owners, contractors tend to lower the risk premiums associated with disclaimer clauses because their perception of the disclaimer clauses risk is low.

The results also show that owners and contractors are willing to change their risk allocation practice regarding these clauses (use a different mechanism for risk allocation) when contracting parties have previous working experience with each other, which can be related to trust relationship. As a result, contracting parties are willing to have another method of risk allocation when:

- A contracting party has evidence that other party will protect his interests;
- A contracting party has an industry or practical evidence that other party is knowledgeable enough to manage the risk; and
- A contracting party has a good industry reputation.

Owners and contractors under a trust-based relationship are likely try to manage and mitigate risk primarily for their own benefit and not to the disadvantage of the other party. The converse is more typical in most of today's contractual relationship in the construction industry.

CONCLUSION & RECOMMENDATIONS

[10] C. Erikson, M. O'Connor, L. Boyer, Construction process risk allocation, Transaction of the American Association of Cost Engineers (1978), pp. 9-12

Recent research and industry experts have indicated that inappropriate risk allocation through disclaimer clauses in contracts is a significant reason for increasing the total cost of a project. Any improvement in the process would result in significant savings for the construction industry.

This study indicates that using disclaimer clauses to shift project risks to the other contracting party is still the general traditional practice in the construction industry. It also indicates that there is a significant relationship between trust and risk allocation through disclaimer clauses that can result in cost saving in the construction industry. The survey respondents report that to reach a better risk allocation process, a trust relationship between the contracting parties should exist first. This can be done through certain stages as follow:

- a clear understanding of the risks being born by each party and who owns or can manage the risk;
- more time and effort in the front-end of a project and sufficient experience to manage or mitigate the risks and administrate the contract;
- a negotiation phase prior to the start of the contract should exist, this phase is required to build a trust relationship between the contracting parties, then this negotiation phase can be part of the contract itself; and
- adequate risk-sharing or risk-reward system should exist to share the benefits if the risk does not occur during the project lifecycle.

The rationale for better risk allocation between owners and contractors ought to be based on meeting these conditions as far as possible. Missing one of these criteria is very likely to trigger inappropriate risk allocation process for any given project and hence bring additional cost for the contracting parties.

CREDITORS PROTECTION UNDER COMPANY LAW

Prattay Lodh

INTRODUCTION

A creditor is a party that has a claim on the services of a second party. It is a person or institution to whom money is owed. The first party, in general, has provided some property or service to the second party under the assumption that the second party will return an equivalent property and service. On the other hand, Investors are the backbone of the securities market, and they play a vital role in the activity of stock market along with enhancing the level of activity in the economy. Earlier the Companies Act 1956, was unable to assure the investor's interest and overcome corporate crime. It didn't compete with the needs of changing business environment.

A shareholder or creditor is the most vital organ in the company. A company can grow only if its shareholders and creditors are happy and satisfied from the working of the company. As soon as the company starts any kind of the missfescence the company is set to start its own nightfall.

Thus, there is a symbiotic relationship between a creditor and investor, however each of them being very contradictory to each other. It is different from the creditors who contribute to the debt capital of the company, who in turn get fixed rate of interest on the money so lent. Moreover, creditors have limited voting rights only with respect to those matters which directly affect their interest such as reduction of capital, winding up of company etc.

The paper, at great length, discusses the concept of operation in mismanagement, minority shareholder in relation to the majority shareholders and eventually the remedies of any such shareholder. This would be including of three important remedies, them being personal action, derivative action and class action. The paper also discusses the concept of a situation of insolvency of the company and the remedies of a creditor in that respect.

Protection of investors means safeguard and enforcement of the rights and claims of a person in his role as an investor. The capital of a company may be divided into Equity capital and Debt capital. The persons who contribute to the equity capital of a company are called investors. Investors have the voting rights in every matter of the company and are entitled to get dividend.

A society like India where companies in order to raise its capital by use of credit[1] carries a risk for those who are owed money by the firm will have to suffer if the company is unable to pay its debt on the due date. If the firm owe money to a number of creditors and all of them pursue their entitlements and remedies obtainable to them would craft a chaotic contest that could produce

[1] Cork report: Report of the review committee on Insolvency Law and Practice (Cmnd 8558, 1982) Ch. 1.

inefficiencies and unfairness. In order to protect the interest of creditors and also to safeguard the future availability of credit, effective insolvency procedures are need to be established so that creditors may be able to collect their claims and their rights are adequately protected and so that different creditors are treated equally.

THE CONCEPT OF OPPRESSION AND MISMANAGEMENT

After the comprehension of the contents of this research paper, it becomes imperative to understand firstly the meaning and definition of term 'oppression'. The meaning of the term 'oppression' as explained by Lord Cooper in the Scottish case of *Elder v. Watson Ltd*[2] was cited with approval by Wanchoo J of the Supreme Court of India in *Shanti Prasad J v. Kalinga Tubes Ltd.*[3] the term oppression was explained in this case as "the essence of the matter to be seems to be that the conduct complained o should be at the lowest involve a visible departure from the standards of fair dealing, ana a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely".

This explains that when a person wants to invest money in that company, the individual gets the details of the company through the article of association or memorandum of association. They invest a certain amount of money in the company and when the prima facie reason due to which a investor invest money in the company fails, there is oppression of the part of the Company and in this instance, the shareholder becomes victims of such oppression.

To understand the definition and concept of mismanagement, it becomes inperative to delve deeper into the illustration of *Rajahmundhra Electric Supply Corp V. Nageshwaram Rao*[4], in this case, petition was brought against a company by certain shareholders of the company on the ground of Mismanagement by Directors. The court found that the Vice Chairman grossly mismanaged the affairs of the company and had drawn considerable amount for this purpose. The court found out that the board of director was insufficient to act against the chairman and were powerless in that respect. This was found to be of sufficient ground of mismanagement of the company by the Chairman by the court.

[2] Elder v. Watson Ltd, (1952) SC 49 Scotland.
[3] Shanti Prasad J v. Kalinga Tubes Ltd, (1965) 1 Comp LJ 193.
[4] Rajahmundhry Electric Supply Corp V. Nageshwaram Rao, 1956 AIR 213, 1955 SCR (2)1066.

MINORTY SHAREHOLDER AND MINORITY SHAREHOLDERS

The protection of the minority shareholders within the domain of the company of corporate activity constitutes one of the most difficult problems facing modern company law. The aim must be to strike a balance between the effective control of company and the interest of the small individual shareholders.

The group of shareholders is divided into two categories, them being Majority shareholders and Minority shareholders. The majority shareholders are those shareholders who have the controlling powers in their hands ie controlling the affairs of the company, on the contrary Minority shareholders are those shareholders who have invested their money in the company but they are not holding so many shares that can give them controlling powers; and because of this their interest in the company and its affairs in the company are sometimes neglected.

The concept of oppression and mismanagement has a great dealing with minority and majority shareholders because these are two atrocities which are conducted by the majority shareholders, leaving the minority shareholders to suffer the consequences of the acts of the majority shareholders.

Furthermore, in the case of *Foss V. Harbottle*[5] the basic principle of this concept was laid down by the court. This basic principle comes in with a certain exception as this principle was something which was in violation of the interest of the minority shareholders. The courts will not intervene in the matters of shareholders in matters of internal administration and will not interfere with the management of a company by its directors so long as they are acting within their powers under the Articles of the company.

Thus, in case where there are disputes amongst the members of the company or any other dispute between two companies or otherwise, it is the goodwill of the company which will eventually be tarnished and eventually the edge will be given to other competitors. Therefore, the court provided a benefit to a company keeping this in mind, held that courts should not intervene in the matter of the company itself.

But this, in the modern day and age is seen as a lacuna than any kind of empowerment to the minority shareholder. This in itself is making the monirity shareholder weaker at every stance. The

[5] Foss V. Harbottle, (1843) 67 ER 189.

Minority shareholder, who himself is at a weaker footing is now put to a even lower pedestal because of this judgement. Therefore, this judgment has certain types of exceptions attached to it.

However, the court has also given certain exceptions to this rule, among which one is "oppression and mismanagement". It has been stated by the Calcutta High Court in *Kanika Mukherjee V. Rameshwaram Dayal Dubey*[6] that the principle embodied in Section 397 and 398 of the Indian Penal Code which provides for prevention of oppression and mismanagement is an exception to the rile wich was provided in Foss V. Harbottle[7] which laid down the sanctity of the majority rule.

REMEDIES AVAILABLE

After assessing the above three aspects in great detail, what can be concluded from this is that operation and mismanagement are two activities which need to be prevented at all costs. The key contention being that question regarding the operation of a company cannot be raised in the court of law, but to that too as disputed by the aforementioned case, there are certain exceptions which prevail, one of them being in a case where the minority shareholder is hostile and dominated/ overpowered by the majority shareholder to a great extent. It is now time to take a look in furtherance to this, where this section would be describing various remedies which exist in the hands of the Creditor(s).

Investors are the insiders of the company. They are known as shareholders or members of the company. It is to be noted that all members may not be shareholders, but all shareholders are the members of the company. Section 41 of the Companies Act, 1956 provides that "member" includes the subscribers of the memorandum of a company, every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, and every person holding equity share capital of company and whose name is entered as beneficial owner in the records of the depository. Section 2(55) of the Companies Act, 2013 provides for the definition of member" which is same as that given under S. 41 of the Companies Act, 1956.

[6] Kanika Mukherjee V. Rameshwaram Dayal Dubey, 1966 1 Comp L.J 65 Cal.
[7] Ibid, point 5.

Still, a shareholder with an overlapping claim may sue in respect of original distinct or additional damage-which does not reflect company loss. Canvassing the authorities, the Johnson Court gleaned the following principles:[8]

1. The rule in Foss-v-Harbottle[9] provides the starting point that A cannot bring an action against B to recover damages for an injury done by B to C.

2. Where the shareholder's loss is not separate and distinct from but is reflective of the direct loss suffered by the company as a result of the defendant's conduct, then no personal loss from the diminution in the market value of the shares arises and accordingly the shareholder has no right of action: Prudential Assurance.

3. The gloss on this is that the defendant's conduct can cause loss in two directionsone, arising as a shortfall of assets or profits, being a loss to the coffers of the company; the other being a loss to his own pocket as when he is induced to part with his shares at an undervalue: the Heron distinction. [10]

4. If the duty is owed to the shareholder only and ex hypothesi the company has no cause of action, then the shareholder can recover such losses, if not too remote, as he can prove to have been caused by the defendant's conduct no matter that the losses arises [sic] through loss of dividends or his share of profits in the company or a fall in value of his shares: George Fischerl [11]and Gerber.[12]"

SECTION 241, COMPANIES ACT, 2013

This section provides, that any member of a company who complains regarding oppression or mismanagement being occurred in a company, may apply to the Tribunal. Moreover, even the Central Government, if of the opinion that the affairs of the company are being conducted in a manner prejudicial to the public interest, then it may itself apply to the Tribunal for an order. This section of the paper, includes three different action which the shareholders can take, them being Personal action, Derivative action, or Class Action.

[8] Johnson v. Gore Wood & Co., 1999 B.C.C. 475, 497-498 (Eng. C.A.).
[9] Ibid, point 5.
[10] Heron Int'l Ltd. v. Lord Grade [1983] B.C.L.C. 244 (Eng. C.A.).
[11] George Fischer (Great Britain) Ltd. v. Multi Constr. Ltd., Dexion Ltd. (third party) [1995] B.C.C. 310 (Eng. C.A.). T.
[12] Gerber Garment Tech. Inc. v. Lectra Sys. Ltd. [1997] R.P.C. 443 (Eng. C.A.).

PERSONAL ACTION

In this, the shareholder claims their personal rights which arise from the Constitution of the Company ie Memorandum of Association and Articles of Association. However, in Indian Companies Law, personal action of the shareholders aggrieved from the acts of the oppression or mismanagement do not posses any statutory provision.

A personal action would subvert the rule in Foss-v-Harbottle[13] and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting.[14]

DERIVATIVE ACTION

It can be defined as an action by one or more shareholders of a company where the cause of action is vested in the company and the relief is accordingly sought on its behalf. Since the company has distinct legal personality with its own rights and liabilities which are different from those personal rights personal rights of individual shareholders, this action is brought by a shareholder not to enforce his or her own personal right but, rather, the rights and liabilities of the company; which company cannot itself do, as it is controlled by the 'wrong doers'.

An interesting area of law is the law governing derivative action mechanism which enables the shareholders of a company to bring an action on behalf of the company against third party before a regular civil court. Again, there is no specific statutory provision for derivative action in the Indian Company Law.

However, the doctrine of derivative action is recognized by the Indian Courts. If a shareholder alleges that a wrong has been done to the company by persons in control thereof, he may bring a

[13] Ibid, point 5.
[14] Johnson v. Gore Wood & Co., 1999 B.C.C. 474, 488 (Eng. C.A.), citing Prudential Assurance (No. 2) [19821 Ch. 204, 222G-223D, 224A-B.

derivative action where he derives the authority from his corporate right to sue in behalf of the company in which the individual is based on.

The premise on which the court entertain this extraordinary form of action, is upon the complaining shareholder's assertion that the company cannot sue as the persons in control would not bring an action on its behalf or for its behalf or for its benefit.

In order to be classified as a derivative action, the following aspects must be classified-

It must be brought in a representative form, even though it is the company, rather than the other shareholders, whom the person initiating the legal action/ proceeding seek to represent. This, by implication, all the other shareholders are bound by the result of the action. Although the action is brought on behalf of the company, the company appears as a defendant, so that the action takes the form of a representative action by the initiating shareholders (other than the alleged 'wrong doer') against the alleged ' wrong doer' (who are in fact, in control of the company) and the company.

A derivative claim may be brought by a shareholder in the following instances-

1. Ultra-vires: A shareholder may bring in the derivative action in respect of matters which is ultra- vires to the memorandum of associations or articles of association of the company, and which no majority shareholders can sanction.
2. Fraud on minority- Directors and shareholders will also be liable if the conduct of the majority of the shareholders constitute a "fraud in minority", ie a discriminatory action. For example, where the shareholders have passed a special resolution with an effect of discriminating between the majority shareholders and minority shareholders, so as to give the former an advantage of which the latter were deprived.
3. Required Resolution- Certain actions of the company can be approved only by passing a special resolution at a general meeting of shareholders. If the majority seeks to circumvent this legal requirement and pass only an ordinary resolution, or do not pass such special resolution, in the manner required by law, any member or members can bring an action to restrain the majority.
4. to safeguard interests of the company- For instance, an obvious wrong may have been done to the company by the Directors, but because of the control of such Directors on the majority shareholders, such shareholders may not permit an action to be brought

against the 'wrong doer' Directors. Therefore, to safeguard the interests of the company, any member or members may bring a derivative action.

CIVIL LIABILITY FOR MISSTATEMENT IN PROSPECTUS

Section 62 of the Companies Act, 1956 lays down civil liability for misstatement in prospectus. Where a prospectus invites persons to subscribe for shares in or debentures of a company, the director, promoter (i.e. party to the preparation of prospectus) and person who has authorised the issue of the prospectus, shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein.

Any person who has subscribed for shares against public issue and sustained loss or damage due to such misstatement is entitled to relief under this section.

Section 35 of the Companies Act, 2013 provides for the civil liability for misstatement in prospectus. Where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and the following persons given below shall be liable to pay compensation to every person who has sustained such loss or damage. The persons liable, along with the Company are-

a) Director of the company at the time of the issue of the prospectus;
b) Has authorized himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately or after an interval of time;
c) Promoter of the company;
d) Has authorised the issue of the prospectus; and
e) An expert who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.

The measure of damages for the loss suffered by reason of the untrue statement, omission etc. is the difference between the value which the shares would have had but for such statement or omission and the true value of the shares at the time of allotment.[15]

In applying the correct measure of damages to be awarded to compensate aperson who has been fraudulently induced to purchase shares, the crucial criterion is the difference between the purchase price and their actual value. It may be appropriate to use the subsequent market price of the shares after the fraud has come to light and the market has settled.[16]

In *R. v. Lord Kylsant*[17], a table was set out in the prospectus showing that the company had paid dividends varying from 8 to 10 percent in the preceding years, except for two years where no dividend was paid. The statement showed that the company was in a sound financial position but the truth was that the company had substantial trading loss during the seven years preceding the date of prospectus and the dividends had been paid, not out of the current earnings, but out of the funds which had been earned during the abnormal period of war. The prospectus was held to be untrue due to the omission of the fact which was necessary to appreciate the statements made in the prospectus.

CRIMINAL LIABILITY FOR MISREPRESENTATION IN PROSPECTUS

Section 63 of the Companies Act, 1956 lays down criminal liability for misrepresentation in prospectus. Every person who has authorised the issue of the prospectus containing any untrue statement shall be punishable with the imprisonment which may extend to two years, or with fine which may extend to Rs. 50,000 or both.

Section 34 of the Companies Act, 2013 provides that where a prospectus contains any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, then every person who authorizes the issue of such prospectus shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.[18]

[15] McConnel v Wright, (1903) 1 Ch 546.
[16] Smith New Court Securities Ltd. v Scrimgeour Vickers (Asset Management) Ltd., (1997) 1 BCLC 350 (HL).
[17] R. v. Lord Kylsant, (1932) K.B. 442.
[18] Section 447 of the Companies Act, 2013.

INVESTOR EDUCATION AND PROTECTION FUND

Section 205C of the companies Act, 1956 provides for the establishment of Investor Education and Protection Fund by the Central Government. It is a mandatory duty on the Government.[19] The amounts that shall be credited to the Fund are –

a) Amounts in the unpaid dividend accounts of companies;
b) The application moneys received by companies for allotment of any securities and due for refund;
c) Matured deposits with companies;
d) Matured debentures with companies;
e) The interest accrued on the amounts referred to in clauses (a) to (d);
f) Grants and donations given to the Fund by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund ; and
g) The interest or other income received out of the investments made from the Fund.

Provided that no such amounts referred to in clauses (a) to (d) shall form part of the Fund unless such amounts have remained unclaimed and unpaid for a period of 7 years from the date they became due for payment.

Section 205C(3) of the Companies Act, 1956 provides that the Fund shall be utilised for promotion of investors' awareness and protection of the interests of investors in accordance with such rules as may be prescribed.

Section 125 of the Companies Act, 2013 provides that Investor Education and Protection Fund ("Fund") shall be established by the Central Government. The following amounts shall be credited to the Fund-

a) The amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund.

b) Donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund.

[19] R.R. Drury, The Relative Nature of Shareholders Right to Enforce The Company Contract, Cambridge Law Journal, Vol.45, No 2 (Jul. 1986).

c) The amount in the Unpaid Dividend Account of companies transferred to the Fund under sub-section (5) of section 124. Section 124 provides for the Unpaid Dividend Account. Section 124(1) states that where a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

d) Section 124(5) provides that where any money so transferred to the Unpaid Dividend Account of a company which remains unpaid or unclaimed for a period of 7 years from the date of such transfer shall be transferred by the company along with interest accrued, if any, to the Investor Education and Protection Fund established under section 125 (1).

e) The amount in the general revenue account of the Central Government which had been transferred to that account under sub-section (5) of section 205A of the Companies Act, 1956, as it stood immediately before the commencement of the Companies (Amendment) Act, 1999, and remaining unpaid or unclaimed on the commencement of this Act.

f) Section 205A (5) of the Companies Act, 1956 prior to the abovementioned Amendment provided that- Any money transferred to the unpaid dividend account of a company which remained unpaid or unclaimed for a period of 3 years from the date of such transfer, shall be transferred by the company to the general revenue account of the Central Government.

g) The amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956.

h) The interest or other income received out of investments made from the Fund.

i) The amount received under sub-section (4) of section 38. Section 38 of the Companies Act, 2013 provides that any person who makes or abets- (a) making of an application in a fictitious name to a company for acquiring or subscribing for its securities, or (b) makes or abets making of multiple applications to a company in different names or in different combinations of his name or surname for acquiring or subscribing for its securities or (c) otherwise induces directly or indirectly a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name shall be liable under Section 447 i.e. shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Where a person has been convicted under this section, the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person. The [20]amount so received through disgorgement or disposal of securities shall be credited to the Investor Education and Protection Fund.[21]

j) The application money received by companies for allotment of any securities and due for refund
k) Matured deposits with companies other than banking companies
l) Matured debentures with companies
m) Interest accrued on the amounts referred to in clauses (h) to (j)
n) Sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years
o) Redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and
p) Such other amount as may be prescribed

The proviso to this section provides that the amount referred to in clauses (h) to (j) shall not form part of the Fund unless such amount has remained unclaimed and unpaid for a period of 7 years from the date it became due for payment.

INIDIVIDUAL PERSONAL RIGHTS

As a general rule, personal rights are not to be enforced through derivative rights. However, some exceptions have been recognized in the case of rights that have been conferred on the shareholders by the Companies At itself, or the respective articles of association. These are known as individua membership rights. For example, the right to vote, the right to be nominated as a candidate for the post of directors, etc.

CONVERSION, CONSOLIDATION AND RE-ORGANISATION OF SHARES

Section 61 of the Companies Act, 2013 provides for power of Limited Company to alter its share capital. A limited company having a share capital, may, if so authorised by its articles alter its

[20] Section 38(4) of the Companies Act, 2013.
[21] Section 38(3) of the Companies Act, 2013.

memorandum in its general meeting to – consolidate and divide all or any of its share capital into shares of larger amount than its existing shares, and convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination.[22]

CONSOLIDATION OF SHARES

It is a process of combining a specified number of shares into one new share, and that new share has to be of a nominal value equal to the aggregate of the shares so consolidated. Thus it is a process by which a company reduces the number of issued shares and increases the par value of each.

As a shareholder, the number of shares owned would be reduced, their face value would rise to compensate, and the market price of the shares should also rise .This power has to be exercised in the general meeting in the manner authorised by the articles.

CONVERSION OF SHARES

Stock is the aggregate of fully paid up shares legally consolidated, portions of which aggregate may be transferred or split up into fractions of any amount, without regard to the original nominal amount of the shares.

Section 61(1) (c) of the Companies Act, 2013 enables a Company limited by share or a Company limited by guarantee with a share capital, if so authorised by the Articles, to convert the whole or any of its paid-up shares into stock or vice-versa.

Stock cannot validly be issued directly, even against payment of full nominal amount in cash. Shares must first be issued and paid-up in full and then converted into stock.

SHARE RE-ORGANISATION

[22] Brown v. British Abrasive Wheel Co, (1919) 1 Ch. 290.

It includes certain transactions in which new shares are issued to the shareholders in a Company, or the rights attaching to shares are altered, or a company's share capital is reduced.

The most common share re-organisation transactions are bonus issues and rights issues. In both cases, new shares are allotted to some or all of the existing shareholders in proportion to their shareholdings. Bonus share means when huge profits are accumulated and the Company with the intention to distribute these profits, instead of paying the dividends or bonus in cash, issues fully paid-up new shares to its members or applies the dividends belonging to the shareholders in payment of the unpaid value of shares already held by them.

Section 66 of the Companies Act, 2013 provides that subject to confirmation by the Tribunal, a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by special resolution, reduce its share capital in any way, and thus may-

(a) Diminish the nominal amount of the shares so as to leave a less sum unpaid; or

(b) either with or without extinguishing or reducing liability on any of its shares- (i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or (ii) pay off any paid-up share capital which is in excess of the wants of the company.

CONCLUSION

Though several provisions were provided under the Companies Act, 1956 for protection of the interests of the shareholders, it did not keep pace with the changing business environment. The new companies Act addresses several investor concerns and seeks to provide a more hospitable environment for minority shareholders especially in the wake of scams and scandals. Under the new Act, a prescribed number of members and depositors can file application against the management or the Company "if its affairs are conducted prejudicial to their interest or the interest of the Company and may call for specified orders in such respect."

An application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the specified persons affected by any act or omission. Further, where the members seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall lie on the firm and of each partner who was so involved.

Investors are also entitled to an exit option if a company changes its objects. "Specific provision has been formulated to provide exit opportunity by the promoters to the dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus," Corporate Professionals said in a note describing the provisions on the new law.

Analyzing the various provisions of the Companies Act, 2013, it can be concluded that legislature has taken affirmative step to protect the interest of the investors. Since investor's contribution is very essential in raising fund by the company, care must be taken to address their needs. However, the investors' onus of proof of their reliance on the prospectus, and the loss or damage being caused by the untrue statement included in the prospectus, are impediments to the recovery of compensation for their investments in an IPO. But such provision is necessary in order to balance the interest of the Company and the investors.

CONSTITUTIONALITY OF MARITAL RAPE EXEMPTION UNDER IPC - IN REFERENCE TO

INDEPENDENT THOUGHT v. UNION OF INDIA,

2017 10 SCC 800.

Sanjana Dwivedi

INTRODUCTION
ORIGIN AN EVOLUTION OF THE MARITAL RAPE CONCEPT
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INTRODUCTION

At a time when people in this country speak about women empowerment, there exists a crime that transgresses the basic fundamental right of a married woman in the form of marital rape, which the law blatantly refuses to recognize. Sec 375 exception 2 of IPC clearly stated that sexual intercourse by a man with his wife not below 15 years of age did not amount to rape. This sparked a lot of controversy and debate and raised a question on the constitutionality of this provision as it violated the fundamental rights of a minor married girl between the age of 15-18 and was in contradiction with various other legislations.

It was in the case of Independent Thought v Union of India in 2017 that his issue was addressed and the Supreme Court finally read down the provision by increasing the age from 15 to 18 years thus protecting the rights of the minor wife. However it does not address the issue of adult married women and their rights which seems to be a matter of concern.

Marital rape is an act of sexual intercourse done by the husband with his wife without her consent. The constitutionality of the marital rape exemption has always been a debatable issue in our country. At one point where this is considered as a violation of basic human rights of a woman, our Indian legislations on the other hand refused to acknowledge marital rape as an offence by the virtue of the exception 2 under sec 375 of the IPC which specifically stated-

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."[1]

This exception raised 2 major concerns-

1. The status of married girls between ages of 15-18, whether non-consensual sex amounted to marital rape.
2. The status of adult women above the age of 18, whether it amounted to as marital rape.

It was in the case of Independent Thought v. Union of India[2] that the issue regarding marital rape of girls between 15-18 years of age was raised challenging the constitutional validity of exception 2 of sec 375, of IPC as this provision not only transgressed some of the fundamental

[1] Sec 375, exception 2 ,Indian Penal Code 1860
[2] 2017, 10 SCC 800

rights guaranteed under the constitution like Art 14 and Art 21 but also was in violation of various international obligations that India was a part of.

The Supreme Court referred to various international treaties and even made a reference to the Convention on the rights of a Child (CRC) which puts an obligation on the state to keep the best interest of the child as a priority. It made a reference to the report submitted on forms of violence against women by the Secretary General of the United Nations to the General Assembly which highlighted the ill effects of child marriage as a harmful traditional practice and referred to marital rape as a heinous crime which needed to be criminalised.

The judgement also went on pointing towards the violation of several other Indian legislations such as the Prevention of Children Sexual Offences Act 2012, Protection of Women from Domestic Violence Act 2005. etc. made by the exception clause

This case not only highlighted the issue of child sexual abuse but also brought into the light the issue of child marriage as the provision legitimised the marital rape of minor wife.

The practice of child marriage is a nationwide concern as it amounts to a gross violation of human rights, depriving the child of their right to life, equality and dignity and the autonomy over personal decisions.[3]

As a result,the division bench of the Supreme Court of India comprising of Justice Madan B Lokur and Justice Deepak Gupta in this judgement finally read down the exception under sec 375 and changed the age from 'below fifteen years' to 'below eighteen years of age.' Thus non consensual intercourse between the age group 15-18 years is now considered as rape.

The judgement however remains silent on the issue of marital rape of adult women as there is no such issue raised in the instant case. Moreover the general trend was considered to be against this concept as it is claimed to be an attack on the sacred institution of marriage.

There was a fear that if the exception to sec 375 of IPC was removed in totality, there would be a misuse of this law by the adult married women against their husbands and it would then be difficult to protect the latter's marital rights which might go against the basic essence or foundation of marriage. But what it does not take into consideration is that by discriminating

[3] Child Marriage and the Marital Rape exception, SC observer, September 1 2018, 12:00, http://old-scobserver.clpr.org.in/cases/child-marriage-marital-rape-exception-ipc/

between married and unmarried woman one is violating their fundamental right to equality under art 14 as well as right against discrimination under Art 15(1) of the Constitution.

Also not considering the concept of consent regarding sexual intercourse in a marriage is a direct breach of Right to privacy of a woman which is now guaranteed as a fundamental right in the Indian Constitution under Art 21.

The decision taken in this judgement has been praised widely by the people as it was a necessary step taken towards the protection and well being of minor wives as in our country the age of adulthood is considered to be 18 years of age below which a person is presumed to be incapable of legally taking any decisions. It was an attempt made to repeal a 158 year old law during which child marriage was still a common practice and when girls got married usually by the time they turned 15.

However there laid a lot of expectations from the Supreme Court to strike down the provision completely by not just blurring the lines between minor married and unmarried girls but also between adult married women and minor married women. This led to an NGO RIT Foundation and the All India Democratic Women's Association challenging the constitutionality of sec 375 through a PIL in the High Court of Delhi, on the grounds that it wasn't successful in protecting the married women adequately from being sexually assaulted by their partners. The decision in this case is still yet to come.

Recognition of the offence of marital rape coupled with criminal punishment would deter husbands from crossing the boundary set by law. It would also sensitise them towards their wives' needs and hence improve their marriage.

While it is commendable that rape with minor wife has finally been considered as an offence which does bring a ray of hope, but a lot of speculation still exists as to why not all married women are taken into consideration when it comes to marital rape.[4]

[4] **Deya Bhattacharya** , SC says marital rape can't be considered criminal, Firstpost, September 3 2018, 22:00 https://www.firstpost.com/india/sc-says-marital-rape-cant-be-considered-criminal-tradition-doesnt-justifyassault-child-marriage-3917749.html

ORIGIN AND EVOLUTION OF THE MARITAL RAPE CONCEPT

The marital rape exemption has its origin in the statements made by Sir Mathew Hale, Chief Justice in England, during the 1600s. He wrote in his legal treatise, 'Historia Placitorum Coronae' or 'History of the Pleas of the crown', "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract."[5]

This theory known as the 'Implied Consent Theory of Sir Hale' became an integral part of the legal systems of all former British Colonies that adopted the common law system. Australia was one of the first common law country to pass reforms in 1976 that criminalised marital rape.[6]

In United States, the right of a husband to have intercourse with his wife also provided the husband a ground for divorce if his wife refused sex till the late 1800's. This defence had become a part of the rape laws in almost every state. But eventually the marital rape exception was realised to be flawed when the Supreme Court of Virginia observed that,

"it is difficult to fathom how accusing a husband with the heinous offence of rape can be more disrupting than the violent act of rape itself"[7]

Around a decade or two ago, there were various Scandinavian countries as well as countries belonging to the Communist Bloc that had passed laws criminalising spousal rape including Sweden, Norway, Denmark, the former soviet Union and Czechoslovakia. Poland was one of the first countries to have a law explicitly criminalising this offence in the year 1932.

Since 1980's, many of the common law countries such as Canada, Ireland, New Zealand, Malaysia, Ghana, Israel and the United States had been successful in legislatively abolishing the marital rape Immunity.

In the 21st century modern India, women empowerment would remain an utopian illusion, if she is deprived of something as basic as her freedom of consent in her marriage to have sexual intercourse. It violates her right to privacy, thus transgressing the right to live a life of dignity

[5] Sir Mathew Hale, Historia placitorum Coronae (History of pleas of the crown), Volume 1,1736
[6] Child Marriage and the Marital Rape exception, SC observer, September 3 2018, 12:00, http://old-scobserver.clpr.org.in/cases/child-marriage-marital-rape-exception-ipc/
[7] *Weishaupt v. Commonwealth,* 315 S.E.2nd 847 (Va. 1984).)

under Art 21 of our constitution which is a fundamental right. It is the need of the hour to criminalise the act of marital rape in India to uplift the status of women and sensitise the men to the needs of their wives.

- **CAUSES OF MARITAL RAPE**

Marital rape is a heinous crime, that not only reflects the state of the mind of the perpetrator but also the state of the society we stay in. A scenario where this crime is not even acknowledged as one and is considered as a justified right of the husband. The reasons for marital rape can span right from small and petty domestic issues to sexual perversion of husband or his inherent desire to show himself as superior to women.

Thus one of the key reasons of this menace, is wide spread gender inequality prevailing in our society. It acts as a mirror to the male dominated patriarchal system of norms where women whether married or unmarried do not have equal rights.

In our Indian society, the woman is given the traditional role of being pati-vratastri, meaning pure, failthful and obliging. Thus it's a woman's duty is to fulfil her obligations towards her husband without any questioning.

Economic dependence over her husband and in-laws also acts as a reason why the married woman is unable to protect herself from the practice of marital rape and is bound to bear the violence. Psychologically they are tricked into believing that one of the ways she could repay the favour of her maintenance in her husband's family after marriage is by obliging to all of his needs.

In the past few years, many politicians have expressed very disturbing views on the concept of marital rape. Maneka Gandhi, who is the Union Minister of Women and Child development stated that marital rape cannot be applied to Indian context. Also Haribhai Parthibhai Chaudhary, Member of the parliament from Gujarat has said,

"It is considered that the concept of marital rape, as understood in the international context, cannot be suitably applied in the Indian scenario due to several factors, including level of

education, illiteracy, poverty, obsolete social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament."[8]

Absence of any legal provisions recognising marital rape as an offence and lack of awareness amongst women adds fuel to the fire. Married women only have the option of using sec 498A of IPC, which lays down provisions on cruelty, if they need to allege sexual violence against their husbands. At the most, women could be relieved of this situation by filing for divorce under sec 13 of the Hindu Marriage Act on the basis of cruelty.

Although sec 377 is a provision used to prohibit unnatural intercourse, it is an act that could take place in between straight people and women have thus used sec 377 to press charges of rape against their husbands.

- **MARITAL RAPE – THE LEGAL CONTEXT**

Sec 375 of the Indian Penal Code defines the offence of rape. While the Criminal law amendment Bill 2013, increased the age of consent of a woman from 15-18 years, (meaning that below 18 years of age any sexual intercourse with or without consent of the woman would amount to rape) the exception 2 of the section stated-

"Sexual Intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape."[9]

Thus sec 375 created a distinction between married and unmarried girls between the age of 15-18 years of age as well as married and unmarried women. While it protects unmarried girls it denies the same protection to married girls thus denying them justice by discriminating them. This kind of distinction made deprives the married women from equal protection of laws regarding rape thus violating Article 14 of the Indian Constitution. This thus justifies that this exception must be removed immediately.

[8] Deya Bhattacharya, SC says marital rape can't be considered criminal, Firstpost, September 3 2018, 23:12 https://www.firstpost.com/india/sc-says-marital-rape-cant-be-considered-criminal-tradition-doesnt-justify-assault-child-marriage-3917749.html

[9] Sec 375, exception 2, Indian Penal Code, 1860

After the brutal case of Nirbhaya gang rape, the Justice Verma Committee was formed in the year 2013 following which the Criminal law amendment Act 2013 was passed. The Committee stated in its report that the exception of the law under sec 375 of the Indian Penal Code needs to be repealed immediately. Thus even under 498 A of IPC, cruelty must not be confined to only mental and physical abuse but must also include sexual abuse.

Various Judicial decisions over the course of time have laid their views on marital rape in India and the need to criminalise it-

- The Supreme Court in ***Bodhisattwa Gautam v Subhra Chakraborty*** has pronounced that marital rape is a crime against basic human rights and the violation of the victim's right to life and dignity as guaranteed under Art 21 of the Indian Constitution[10].
- In the case of *State of Maharashtra v Madhkar Narayan*, the Supreme Court has held that every woman was entitled to sexual privacy and such privacy must be free of violations.[11] Despite this, the judiciary has not recognized marital rape.
- Hon'ble Supreme court in the case of ***Independent Thought v. Union of India***[12] Writ petition (civil) No. 382 of 2013, date of decision 11.10.2017, had amended **Exception 2** to **Sec 375** IPC by removing the phrase "the wife not being under 15 of age" and replacing it with the phrase as "the wife not being under 18 years" .

In the case of *Independent Thought v. Union of India,* the centre told the SC bench consisting of Justices Madan Lokur and Deepak Gupta that it stands by exception 2 of sec 375 of the IPC to provide protection to the husband, his minor wife as well as their sanctity of their conjugal relationship. Independent thought, an NGO, in a petition in 2013, had challenged exception 2, which states that sexual intercourse by a man with his own wife, wife not being under 15 years of age is not rape.

The plea made by Independent Thought to the judiciary was simple: It urged that all minors be protected from rape under sec 375, irrespective of the marital status.

[10]Bodhisattwa Gautam versus Subhra Chakraborty, 1996 AIR 922
[11] State of Maharashtra versus Madhkar Narayan , AIR 1991 SC 207
[12] Independent Thought v. Union of India, SC 2017

The writ petition clearly stated that the exception 2 under Sec 375 was violative of Articles 14, 15 and 21 of the Constitution of India, and that consent for any sexual relationship should be increased to eighteen, irrespective of marital status of the girl child.

Moreover, the Protection of Children from Sexual Offences Act, 2012 (POSCO) states that a girl under the age of 18 years is a child and hence, does not have the capacities — physical, emotional or mental — to take an informed decision about engaging in sexual intercourse. The petition stated: "If this is the object for increasing the age of consent to 18 years in 2013, then marriage of girl at the age of 15/16/17 years does not make the girl mature enough [mentally or physically] for the purpose of consent. Thus, the law is ex-facie discriminatory as the classification has no rational nexus with the object."[13]

- Justice K.S.Puttaswamy and Anr. v. Union of India, was a landmark judgement of the Supreme Court of India regarding right to privacy decided on 24th August 2017 which was referred to in this case as it clearly implies that a woman has a right to bodily integrity, sexual autonomy state and reproductive choice which is integral to her right to privacy.[14]
- NGO RIT Foundation and the All India Democratic Women's Association challenged the constitutionality of sec 375 through a PIL on the grounds that it wasn't successful in protecting the married women adequately from being sexually assaulted by their partners. According to them, the exception to sec 375 violates Art 14 and 15 of the constitution, which prohibits discrimination without an intelligible basis; art 21 which guarantees the right to life and personal liberty and art 19 which guarantees the freedom to express or withhold sexual desire in all consensual contexts.[15]

'The legal marital rape fiction created by Exception 2 under Section 375 of the Indian Penal Code, 1860 has resulted in millions of women to be legally raped. The government's own latest data shows that 6% of married women were sexually assaulted by their husbands.'[16]

[13] Independent Thought v. Union of India, SC 2017
[14] K.S.Puttaswamy and Anr. v. Union of India, (2017) 10 SCC 1
[15] Akanksha Jain,Marital Rape: Married, Married But Separated, & Unmarried-Classifying Rape Victims Is Unconstitutional, Live law, September 7,2018, 13:57 https://www.livelaw.in/marital-rape-married-married-separated-unmarried-classifying-rape-victims-unconstitutional-petitioners-submit-delhi-hc-read-written-submissions/
[16] Akanksha Jain,Marital Rape: Married, Married But Separated, & Unmarried-Classifying Rape Victims Is Unconstitutional, Live law, September 7,2018, 14;30 https://www.livelaw.in/marital-rape-married-married-

The Delhi High Court observed in this case that marriage does not mean that a woman always consents for physical relations with her husband. It also discussed how physical force was not the only ingredient needed to constitute an offence of rape.[17] A bench of the acting Chief justice Gita mittal and C Hari Shankar also went on saying that in a relationship like marriage, both man and woman have a right to say no to physical relations.[18]

The case is still pending in the High Court of Delhi and the public has great expectations that this judgement when passed would finally lead to the criminalisation of marital rape.

separated-unmarried-classifying-rape-victims-unconstitutional-petitioners-submit-delhi-hc-read-written-submissions/

[17] RIT Foundation v Union of India, W.P (C) No. 284/2015

[18] Prarthana Mitra, Married partners can say "no" to physical relations, observes Delhi High Court, Qrius , September 9st 2018,10:00, https://qrius.com/married-partners-can-say-no-to-physical-relations-observes-delhi-high-court/

INDEPENDENT THOUGHT V UNION OF INDIA- CASE ANALYSIS

In the case of Independent Thought v Union of India[19], the constitutionality and legality of the marital rape exemption under Sec 375, exception 2 was challenged as being violative of fundamental rights under the constitution. The exception stated that a man could have non-consensual sex with his minor wife between 15-18 years and still not amount to rape whereas the age for consent under sec 375 had already been increased to 18.

Thus there was a creation of unnecessary discrimination between married and unmarried girls between 15- 18 years of age without any rational justification violating Art 14, 15(1), 15(3), 21 under the constitution.

The division bench of the Supreme Court comprising of Justice Madan B. Lokur and Justice Deepak Gupta gave concurring opinions deciding the case in the petitioner's favour by reading down the Exception 2 to sec 375 of IPC and amending the age mentioned as not below 18 years. The judgement however did not take into consideration the issue of marital rape of adult women above 18 years of age.

The exception 2 of sec 375 of IPC was presumed to be unconstitutional as it violated the fundamental rights guaranteed under the constitution.

- **Article 21**

"No person shall be deprived of his life or personal liverty except according to procedure established by law."[20] Art 21 has an extremely wide ambit which includes within itself the right to make a reproductive choice.

In *Suchitra Srivastava v. Chandigarh Administration*[21], "the right to make a reproductive choice was given the same treatment as right to life and personal liberty.

"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from

[19] 2017, 10 SCC 800
[20] Art 21 , Constitution of India , 1950
[21] (2009) 9 SCC

procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods."[22]

Further, in a case it was held that, "In a country governed by the rule of law, police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction."[23]

It has also been observed that "Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person." This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in Suchita Srivastava "…. the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question."[24]

"One cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity.An early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC."[25]

- **Article 14**

"The State shall not deny to any person equality before the law or the equal protections of the laws within the territory of India."[26]

The provision in question under IPC creates a distinction between married and unmarried women between the age of 15-18 years of age. While on one hand the law protects the unmarried minor child between the said age group but on the other hand, the married girl child between 15-18 years of age is not protected by law as marital rape isn't an offence under IPC.

[22] Suchitra Srivastava v Chandigarh Administration , (2009) 9 SCC
[23] Ritesh Sinha v State of U.P(2013) 2 SCC 357
[24] Devika Biswas v. Union of India (2016) 10 SCC 726
[25] Independent Thought v Union of India 2017, 10 SCC 800, para 88
[26] Art 14, Constitution of India, 1950

It was held that there wasn't any discernable object behind the distinction that was made between married and unmarried minor girls. The object even if present had no rational nexus in relation to the marital status of the minor girl. Thus the classification which was made was held as arbitrary, violating Art 14 of the Indian Constitution. Also the rationale should not be limited to minor girls only. There is no proper justification behind classification of women into married and unmarried in consideration to their right to refusal to sexual intercourse. A woman should not be presumed to have impliedly given consent to intercourse with her spouse just by virtue of marriage.

"It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a **female** [not just a minor female] has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished."[27]

The parliament has increased the age of marriage and consent both, from time to time to 18 years of age. Thus keeping the age group 15-18 years of married girls immune to consent for sexual intercourse with their husbands is unreasonable, unjust and unfair thus violative of the rights of a girl child.

Thus the present scenario does not satisfy the test of arbitrariness under Art 14 due to which this provision must be considered as unconstitutional.

"It is trite to say that legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent."[28]

- **Article 15(3)**

[27] Independent Thought v Union of India 2017, 10 SCC 800, para 82
[28] Satyawati Sharma v. Union of India (2008) 5 SCC 287

This fundamental right guaranteed to the citizens by the Indian constitution enables the State to make special provisions for the benefit of women and children [29]and is thus a source of protective discrimination.

This was done keeping in view the unfortunate past of our country where women had always been disadvantageous when it came to rights and obligations. Thus this was an attempt made to permit certain facilities to them in order to establish actual equality in consonance with Art 14 of the Indian Constitution.

Thus Art 15(3) must not be read restrictively but in its widest form. Thus any legislation made in respect of a girl child must be interpreted in such a manner that it overrides any legislation that seeks to restrict any form of benefit available to a girl child.

Since exception 2 of the IPC creates an artificial distinction between an unmarried and a married girl child without any reasonable nexus, it can be considered to be in contrary and in violation of both Art 15(3) and Art 21 of the Constitution.

As per Justice Madan Lokur, under Art 15(3), the Parliament has powers to make laws for the welfare of children and women and the Prevention of Children Sexual Offences Act was a prerogative of Art 15(3) made by the legislature. But this provision of IPC is in direct conflict with the said legislation. There is an artificial distinction between rape of a married girl child and that of aggravated penetrative Sexual assault that is totally arbitrary and discriminatory. Hence indirectly the said provision is in violation of Art 15(3).

According to Justice Deepak Gupta, The State should not aim to form a law that negatively affects its citizens especially, a minor girl child. Referring to the Vishaka case, it was emphasised,

"A forceful sexual intercourse with a 15 or 16 years old girl child leads her to trauma which is injurious to her body as well as her mind. Exception 2 is violative of Article 14, 15 and 21 of the Constitution as it puts a girl's both physical and mental health in serious jeopardy."[30]

A. INCONSISTENCY WITH OTHER LEGISLATIONS

The marital rape exemption under IPC was found to be not only violative of the fundamental rights but also in violation of several legislations such as:

[29] Art 15(3), Indian Constitution
[30] Vishaka v State of Rajasthan, AIR 1997 SC 3011

1. **Protection of Human Rights Act 1993-**

Under sec 2 d of the act human rights is defined as, 'the rights relating to life liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India'[31]

Forcing a girl child into sexual intercourse by her husband without her consent amounts to a violation of her right to liberty and dignity which is a human right guaranteed under the Constitution as well as embodied under various international conventions to which India is a part of such as The Convention on the Rights of the Child(CRC) & the Convention on the Elimination of All forms of discrimination Against Women (CEDAW).

2. **Protection of Women from Domestic Violence Act, 2005-**

Under sec 3 of the Act, if the husband of the girl child harms or injures her or endangers the health, safety, life, limb or mental and physical well being of his wife causing sexual or physical abuse, he would be liable to have a protection order issued against him and to pay compensation to his wife.[32]

Sexual abuse is defined as including any conduct that is of sexual nature that aims to humiliate, degrade, abuse or violate the dignity of a woman.

The non recognition of the crime of marital rape of a girl child thus lies in direct contradiction as the same is considered as an offence under the Domestic violence act, 2005.

3. **Prohibition of Child Marriage Act , 2006**

This act is considered as one of the most important legislations which deals with the subject of protective rights of children.

Sec 3 of the Prohibition of Child Marriage Act provides that a child marriage is not void but voidable at the option of either of the parties to child marriage. But it penalizes a male adult marrying a child with a rigorous imprisonment extending to two years or with fine upto Rs 1 lakh.

[31] Sec 2 (d), Protection of Human Rights Act, 1993
[32] Sec 3, Protection of Women Against Domestic Violence Act , 2005

The Parliament through these provisions has always been against the concept of child marriage, but in reality in a country like India, traditional child marriages are still a common sight even if it's a harmful practice. This is the reason why the offence is not considered as void but voidable which too is a right often not exercised by the party due to the social stigma attached to it.

Moreover non criminalisation of sexual intercourse within the child marriage leads to more exploitation of the child brides violating their dignity and privacy.

A major part of the judgement is dedicated to child marriage and the associated evils. The exception under sec 375 of IPC, as it related to minor girls, seeks to legitimize the practice of chid marriage, as child marriage entails sex with the minor child bride inevitably. It also condones the negative effects of this practice on the girl child and it doesn't take into consideration the possibility of the effect of prospective children on the girl child. Not only is there a loss of reproductive choices for the girl in a child marriage but also a destruction of self esteem and confidence.

Child birth, which is often a result of sexual intercourse, takes a serious toll on the health of a woman below 18 years of age and may lead to an intergenerational effect of producing children that are malnourished. Although irrespective of age, a woman who is raped by her husband often suffers from emotional as well as mental trauma. In such a case if a woman is also forced to bear a child, the injury and trauma would increase manifold and would reflect negatively in the way the child is brought up.

4. Protection of Children from Sexual Offences Act, 2012 (POCSO)

The POCSO was enacted as a result of the data collected by the NCRB which had indicated that there was an increase in sexual offences against the children. This data was later corroborated by the Study on Child abuse :India 2007 which was conducted by the Ministry of Women & Child Development of the govt of India.

The study does not only restrict its ambit to child sexual abuse but also discusses the ill effects of child marriage in India and considers it to be a form of violence against the children. If this issue is not addressed quickly it might affect the overall progress of the country. The Study also made a reference to gender equity highlighting the issue of discrimination against the girls that often lead to child marriages and the need to address such an imbalance urgently.

The Preamble of the POCSO act derives its source from Art 15(30 of the Indian Constitution as it is a legislation made for the benefit and welfare of the children. It defines a child as any person below the age of 18 years.[33] Securing the best interest of the child is a necessary obligation which has been cast upon by the Government by virtue of The Convention on Rights of the Child (CRC).

The Preamble also stresses on the fact that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development."[34]

Sec 3 of the Act defines "penetrative sexual Assault" whereas sec 5 mentions that if a person commits penetrative sexual assault with a child then he actually commits aggravated penetrative sexual assault, if that person is related to the child, i.e through marriage.[35]

Thus if the husband of a girl child commits penetrative sexual assault with his wife then he is actually liable under sec 5(n) of the act and is punishable for a rigorous imprisonment for a term of 10 years which may extend to life imprisonment.

Thus there existed a contradiction between the two legislations namely IPC and POCSO as under sec 375 exception 2 of IPC a husband can have non-consensual sexual intercourse with his minor wife between 15-18 years of age and still not amount to rape whereas under the POCSO act the husband shall be considered to have committed the offence punishable under sec 6 of the act.

In reality there exists no material difference between the definition of rape under IPC and penetrative sexual assault under POCSO act and the punishments for both the crimes too are same. However the only difference between the two offences is that the definition of rape is more elaborative and it considers under its ambit all women irrespective of age apart from the two exceptions provided.

The two laws are thus said to be inconsistent though the provisions of the POCSO act will override the provisions of any other law including that of IPC to the extent of inconsistency.

[33] Sec 2 (d), POCSO act, 2012
[34] Preamble, POCSO act, 2012
[35] Sec 5 , POCSO act, 2012

POCSO being a more recent act aims at the development of the girl child and thus there was a need for the provision under IPC to be amended in consonance with the POCSO act.

5. The Juvenile Justice (Care and Protection of Children) Act,2015

The act too derives its source from Art 15(3) of the constitution. It defines a child as someone who has not attained the age of 18 years.[36] Under this act a child is in need of protection and care if he/she is in imminent risk of getting married before attaining the age of majority and whose family members are likely responsible to solemnization of their marriage.[37]Such a girl child below 18 years must be produced before a Child Welfare committee constituted under sec 27 of the act so that she could be taken care of and given protection.

All such legislations mentioned above were enacted for the welfare of the girl child and to condemn the act of child marriage as being regressive and against the development of the girl child. But the exception 2 to sec 375 of the IPC was realized to be inconsistent with all these legislations as it was violative of the basic human rights of the girl child as well as it ended up validating the practice of child marriage instead of condemning it which was nothing but a social evil.

B. MARITAL RAPE EXEMPTION NOT UNCONSTITUTIONAL- ARGUMENTS BY THE RESPONDENTS

The respondents, in this case- the Union of India, had put forward their contentions as to why the present provision of marital rape exemption under sec 375 of IPC was not unconstitutional and thus justified the age limit as 15 years and not 18 years for non-consensual sexual intercourse by a husband with his minor wife.

The petitioners had called out the provision for creating an artificial distinction between married and unmarried girls between the age group 15-18. The respondents though gave justification for the said distinction through the following points:

- The educational and economic development in the country is not evenly distributed and the presence of child marriage still exists. Thus the retention of the age limit as 15 years

[36] Sec 2(12) , Juvenile Justice Act, 2015
[37] Sec 2(14), Juvenile Justice act, 2015

under exception 2 of sec 375 of IPC is made in order to provide protection to the husband and wife against the criminalization of sexual activity between them.

- In a country where 46% of women among the age group of 18-29 years in India were married before attaining the age of 18 as per the National Family Health Survey-III, and where 23 million child brides exist, criminalizing the consummation of marriage with a serious offence is considered as inappropriate and impractical.
- The age mentioned in the provision under IPC has been prescribed keeping in mind the basic facts of the evolving social issues and norms prevalent in the country, thus providing punishment for child marriage with consent seems to be inappropriate in view of socio economic conditions of the country.
- The exception 2 under sec 375 explains that if the marriage is solemnized at an age of 15 years due to societal traditions or customs, this should not become the basis to make the husband liable for the offence of rape under IPC.
- The Law Commission had sought to raise the age bar from 15 -16 years and was subsequently incorporated in the Criminal Law Amendment Ordinance,2013. However after making various deliberations with several stakeholders it was later decided to retain the age back to 15 years.
- The age thus is fixed at 15 years keeping in mind the social reality of the country.

The above explanations were given by the Union of India to justify the age limit under the sec 375 of IPC but they overlook the provisions of the Prevention of Child Marriage Act, The Juvenile Justice Act as well as the POCSO Act.

In the oral submissions given by the respondents, there were more justifications given for such distinction. One of this was that by getting married, the girl child is deemed to have given consent to sexual intercourse with her spouse either by express or necessary implication. Also that child marriage has been practiced as a part of the various traditions of the country and so must be respected.

Moreover para 5.9.1 of the 167th report of the Parliamentary Standing Committee of the Rajya Sabha in 2013 records that marital rape if criminalized ,possesses the potential of destroying the institution of marriage .[38]

[38] Independent thought v Union Of India, 2017, 10 SCC 800, para 81

Union of India was criticised to have being oblivious to the trauma faced by a girl child married between the age of 15-18years and for ignoring the pro child statutes and various other human right obligations. The distinction thus made is artificial and it makes the marital rape exemption provision as discriminatory and arbitrary. Also if the age of consent has been fixed by law at 18 years, then unless the parliament specifies any special rational reason, the age of consent cannot be deviated from.

Merely because such marriages have been practiced in various parts of the country as a part of our custom, this does not itself make these traditions acceptable or sanctified. With change in time, such traditions must change too.

The observation that concept of marital rape if recognized can potentially destroy the institution of marriage cannot be accepted . Marriage is something personal and not institutional. Thus nothing unless a statute making marriage illegal can actually destroy them institution of marriage.

C. DECISION

As observed by Justice Madan Lokur, in such a scenario striking down the exception 2 to sec 375 of the IPC as unconstitutional was not an option that was viable for the court since this relief was given up and the issue no raised regarding the same.

This left the court with only one legitimate option,that was to read this provision of the IPC in consonance with the POCSO act as well as other pro child statutes respecting the human rights of a married girl child, thus utilizing the tools of purposive and harmonious construction.

Thus the provision was altered by changing the age from 15 years to 18 years and the new amended section states- "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."[39]

The earlier provision violated the fundamental rights of art14, 15, 21 under the Indian Constitution thus questioning the constitutionality of the provision and it was also in breach of various other legislations. It was concluded that the distinction made between minor married and minor unmarried girls had no rational basis and was infringement of their right to privacy, dignity and life. Thus the Court adopted the principle of harmonious construction and made an attempt to remove the defects present in the provision by reading it down and amending it.

[39] Sec 375, exception 2(amended) IPC ,1850

It disregarded the contentions of the respondents as being outdated and not being able to adapt with the dynamic nature of society as with time the basic concept of marriage had evolved and the present day marriage wasn't so weak as could be threatened by the concept of marital rape.

This was a necessary step taken to preserve and protect the constitutional vision of the framers of the Constitution of India.

CONCLUSION

The case of Independent thought v Union of India was a landmark judgement as it took a major step towards protecting the girl child by criminalising the act of sexual intercourse of the husband with his minor wife. It stated that there was an artificial distinction that was being made between minor of 15-18 years and the unmarried minor girls without any reasonable nexus. It also stated that non criminalisation of such an offence was a direct attack on the right of the woman to live with dignity and was a breach of her privacy. A major part of the judgement also deals with the concept of child marriage and its ill effects on society and how the step taken by the court is an attempt to discourage such social practices which are unfortunately still prevalent in the country.

But the case does not take into consideration the scenario when the husband too is a minor whose interest is at stake, as being under 18 years, he too is presumed to be innocent. In such cases where the children elope and get married might also be generalised with other cases of child marriage and thus it might go against the interest of the male child.

The court also failed to address the issue of marital rape of women above 18 years citing the reason that the issue was not in question before the court in the instant case. The Supreme Court being the apex court has the inherent powers to extend their jurisdiction and discuss matters which are of public importance. When the constitutionality of the provision of sec 375 exception 2 of IPC had been challenged before the court, it should have addressed the issue of marital rape of adult women too instead of just partially discussing the scenario of married girls between 15-18 years of age as the fundamental rights that were held to be violative in this case were also applicable to a girl above 18 years as much as to a girl under 18 years of age.

NGO RIT Foundation and the All India Democratic Women's Association challenged the constitutionality of sec 375 through a PIL on the grounds that it wasn't successful in protecting the married women adequately from being sexually assaulted by their partners. According to

them, the exception to sec 375 violated Art 14 and 15 of the constitution, which prohibits discrimination without an intelligible basis; art 21 which guarantees the right to life and personal liberty and art 19 which guarantees the freedom to express or withhold sexual desire in all consensual contexts.[40]

The Delhi High Court bench on a subsequent hearing of the case on 17th July 2018 disagreed with the submission of NGO Men Welfare Trust which opposed the plea to make marital rape an offence under IPC. It also disagreed to the contention that physical force or threats to the physical being only constitutes as rape and an absence of physical force denies that rape has taken place.

The NGO representatives contended that a wife is already protected from marital sexual violence through provisions under Prevention of Women from Domestic Violence Act, and IPC provisions of cruelty as well as under 376 as rape by husband during judicial separation or unnatural sex under sec 377, to which the Court replied that in such a case there is no justification for the exception to sec 375 that specifically states that a husband cannot be framed for rape with his wife and so the exception should be done away with.

The Delhi High Court also observed that marriage does not mean that a woman is always consenting for physical relations with her husband. It held that physical force thus is not always necessary for constituting the offence of rape. A bench of the acting Chief justice Gita mittal and C Hari Shankar also went on saying that in a relationship like marriage, both man and woman have a right to say no to physical relations.[41]

The contention that complaint of marital rape could ruin the foundation of marriage cannot be given heed to as a complaint of domestic violence could also spoil a marriage. So if domestic violence could be penalized, why not marital rape? The law must uphold the bodily autonomy of all the women irrespective of the marital status.

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[40] RIT Foundation v Union of India, W.P (C) No. 284/2015

[41] Prarthana Mitra, Married partners can say "no" to physical relations, observes Delhi High Court, Qrius, July 21st 2018, 10:00, https://qrius.com/married-partners-can-say-no-to-physical-relations-observes-delhi-high-court/

The Delhi High Court has not yet decided the matter and the case is still sub-judice. But as far as the observations being made so far by the court are concerned, they seem to be in favour of criminalizing marital rape with adult women and thus declaring the impugned provision under IPC as unconstitutional on the whole and not partially.

Absence of a valid law creates conditions that lead to marital rape. It allows men and women to believe that such acts are completely acceptable in society thus degrading the social status of women by being indifferent to their problems.

Criminalising marital rape will remove the destructive attitudes that promote marital rape. An action like this would create a moral boundary that informs the public that if the boundary is transgressed in any manner, one shall have to face sanction.Recognition of the offence coupled with criminal punishment would deter husbands from crossing the boundary set by law. It would also sensitise him towards his wife's needs and hence improve their marriage.

A marriage can only be successful if the husband and the wife treat each other as equals and with respect. A boundary like this will act as a constant reminder that even within a marriage some amount of space must be given to the spouses, a space that shall only be entered into with consent.

Sensitisation of husbands to this issue would not only bring down the cases of marital rape in the country but would have a domino effect on other marriage related crimes. Given their due amount of space and freedom, marriages would last longer with happier spouses and the divorce rates would go down. A happy marriage is the foundation of a happy family which in turn affects the development of an individual in the society eventually leading to development of the country.

The total statutory abolition of marital rape exemption is the first important step in enlightening the societies that dehumanized treatment of women will not be tolerated at any cost any longer and that marital rape is not a husband's privilege, rather it is a violent act of injustice which must be criminalized at any cost.

At the end it is the women who could help save themselves from being a victim to this crime. Tolerating a crime is bigger than committing one. Many women consider marital rape as a part of their ordinary course of life and fail to raise their voice against it. Sometimes it's the fear of

going against the husband, sometimes it's the shame that they are afraid of that would bestow upon the family once a complaint is filed, or at times the women keeping in mind their children's fate upon such legal discourse, keep their family's needs above their own dignity and happiness. What they forget that by doing this they do not only encourage their husbands to continue with this crime, but they also end up teaching their sons and daughters that it is normal to commit or tolerate such an offence.

Thus criminalising marital rape would give confidence and support to these women to raise their voices and stand up for their dignity and respect, that they deserve in their families and societies.

DEATH PENALTY: SHOULD INDIA ABOLISH IT?

Adhish Anilkumar Kulkarni

INTRODUCTION

Capital punishment or the death penalty is a legal process whereby a person is, put to death by the state, as a punishment for a crime. Death penalty is one of the most debated, ancient forms of punishment in almost every society. Giving death penalty is legal in India. Crimes, which attract death penalty in India, are Murder, War against Indian government, Rape and Gang rape of a woman under 12 years of age, abetting the suicide of a minor etc. However, the death penalty is awarded only in rarest of rare cases. Different judges have handled the test of rare of rare case differently, thus this has led to many controversies. India has been following death penalty as a punishment since time immemorial. Eliminating the evils of society is considered as the responsibility of the state. However, the increasing issue of Human Rights is challenging the legality and morality of granting a death penalty. In the past 30 years, the number of countries implementing the death penalty has dropped considerably. According to Amnesty International Report by the end of 2018, out of 195 countries 106 have abolished the death penalty in law or practice for all the crimes. Many countries, which still allow for death penalty, have rarely used it. This shows that the mind-set of people towards death penalty is changing. However, India is among those few countries, which still practice death penalty. In the recent 42nd UNHRC session held in September 2019, India voted against the abolition of death penalty. By this move, India has made its stand clear about the capital punishment.

1.2 Evolution of Punishment System in India

India had a well-established legal framework right from the ancient era; we have a recorded legal history from Vedic ages. Law back then existed in the form of religious prescriptions and philosophical preaching. It was popularly known as *Dharma*. Originating from the Vedas, the Upanishads and other religious texts, Law was a fertile field enriched by practitioners from different Hindu philosophical schools and later by Jains and Buddhists. Judges back then were the Kings and they decided the case with proper interpretation of law and after due consultation with the experts. The main purpose of establishing the State and the authority of the King was the protection of person and property of the people, the King organized a system to enforce the law and punish those who violated it. This system is now popular as "criminal justice system".

1.2.1 Ancient India

The period between 1000 BCE to 1000 CE of Indian history is also known as Hindu period because of the prevalence and dominance of Hindu law. According to the Dharma sutras and the Arthashastra, it was the duty of the King to ensure the security and welfare of his subjects. The

Hindu legal system is embedded in Dharma as propounded in the Vedas, Puranas, Smritis and other works on the topic. The power of the King to enforce the law or to punish the wrong doer was recognized as the force/sanction behind the law, which could compel implicit obedience to the law.

1.2.2 Punishment System in Ancient India

The *dandaniti*, i.e. punishment policy of, is one of the elaborately dwelt upon subjects in ancient India as it was closely connected with the administration of the State. Manu emphasized the importance and utility of punishment saying: "Punishment alone governs all created beings, it protects them and it watches over them while they are asleep." The history of penal system states that during the ancient period the punishment were tortuous, cruel and barbaric in nature. The object of the punishment was the deterrent and retribution. Due to this Penal system, the crimes were less in numbers. Corporal punishments included death penalty, cutting off the limb with which the offence was committed, branding on the head some mark indicating the offence committed, shaving the head of the offender and parading him in public streets etc. Few common modes in which the death penalty was executed are:

i) Hanging:

ii) Stoning

iii) By throwing under the leg of Elephant

iv) Poisoning

v) Beheading

vi) Burning Alive

1.2.3 Medieval and Modern India

After Ancient period, the late medieval period and early modern period saw different laws and punishments governed my Muslim rulers. They too had the concept of death penalty, which they carried out in brutal ways. In the Modern era after the arrival of British, the laws were codified and punishments were given accordingly. At independence in 1947, India retained the 1861 Penal Code, which provided for the death penalty for murder. During the drafting of the Indian Constitution between 1947 and 1949, several members of the Constituent Assembly expressed the idea of abolishing the death penalty, but no such provision was incorporated in the Constitution. After Independence, the death penalty was awarded often and even to cases of simple murders.

Between, 1973 to 1980, the legislative dictate has changed from death sentence being the norm to becoming an exception, and now it is necessary to be accompanied by reasons. Bachan Singh v. State of Punjab[1], was a landmark in the escalating debate on the question of the compatibility of the death sentence with Article 21 of the Constitution. Article 21 says, "No person shall be deprived of his life or personal liberty except according to procedure established by law".

1.2.4 Rarest of rare case

The Supreme Court while holding the validity of the death penalty expressed the opinion that a real and abiding concern for the dignity of human life postulates resistance for taking a life through law's instrumentality[2]. That ought not to be done save in the *rarest of rare cases*, when the alternative option is unquestionably foreclosed[3]. The doctrine of rarest of rare case was for the first time introduced in the case of Banchan Singh v. State of Punjab; in this case, the constitutional bench of the Supreme Court discussed at length the question of whether the provision of death penalty as a punishment for murder is violation of Article 19 and 21 of the Constitution. In this judgement, While the four judges in majority said that death penalty is not in violation of Article 19 and 21 and it can awarded in rarest of rare cases, Justice P.N Bhagwati gave his dissenting judgment observing that the death penalty is violation of Article 19 and 21 of the Constitution.

If we go through the deep study of it, we find that the court wants to say that the death penalty should be awarded rarely and only in such cases which are heinous, affecting the humanity and are brutal. In other words, the death penalty is not a rule but an exception.

Mr M. Hidayatullah, the former "Chief Justice of the Supreme Court, observed that the 'doctrine of the Rarest of Rare' evolved in Indian Jurisprudence for use specifically with regard to the death sentence is capable of discounting the possible errors and abuse of the sanction".

The problem of Death Penalty is not big with respect of death sentences awarded by criminal courts because death penalty is being awarded in very few cases and in most of the cases; the alternative penalty of life imprisonment is awarded or it is commuted by the mercy of president.

The present position regarding Capital Punishment, as one might suppose of any system of law with claim of being considered civilised, is to use it sparingly as possible- i.e. in 'Rarest Of Rare' cases and this is the system as it stands in India. To have it in the statute book, but to use it as rarely as possible, this is the compromise that Courts, and we as a nation, adopt. In this way the

[1] Bachan Singh v. State of Punjab, AIR 1980 SC 898.
[2] Ranga Billa v. Union of India, 1981 SCR (3) 512.
[3] Sher Singh v. State of Punjab, AIR 1983 SC 365.

concept of death penalty evolved in India, from being often and gruesome to rare and unpainful. However, it is one of the most debated topic.

PROS AND CONS OF DEATH PENALTY

In this world with 195 countries, there can be barely any country, which never had a death penalty. All the countries at one point of time or the other had death penalty as a punishment in their criminal justice system. It is lately in the 20th century that the countries decided to abolish this practice. Whereas there are, still quite a many countries, which still use death penalty. To name a few, countries such as India, China, USA, Iran, Saudi Arabia, Egypt, Singapore etc., still award death penalty.

Through numerous mechanisms, the international community has become increasingly clear about its rejection of the death penalty. In 1966 for the first time nations, of the world adopted an international Convention seeking to regulate the use of the death penalty through Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Since the adoption of the ICCPR, steps have been taken to develop a legally binding instrument that requires the abolition of the death penalty. Accordingly, the UN General Assembly adopted the Second Optional Protocol to the ICCPR, which restricts countries from awarding death penalty. It entered into force in July 1991. Eighty-eight States have ratified the Second Optional Protocol as of October 2019.

Few other arguments for and against death penalty are:

2.1 Arguments for death penalty

Despite the overwhelming global trend against death penalty, many support it because of the belief that, it plays an important role in fight against crime and punishment of the perpetrators of those crimes. A number of arguments in support of death penalty are.

i) The Constitution Allows for the Application of the Death Penalty:

One of the basic argument in favour of death penalty is that the law of the land backs it. In many countries such as India, death penalty is the prescribed punishments for few of the crimes. Moreover, the supreme court of India upholds it. It is not unconstitutional to order for death penalty if your Constitution allows for the same. Though right to life is a fundamental right guaranteed to every individual, it can taken away by procedure established by law. The abolition of death penalty cannot be made universal it should be decided based on the geopolitical circumstances of each state. The death penalty in India has been challenged several times but every time it has been upheld. There is no reason, therefore, for the death penalty to be suspended.

ii) Act as a deterrent:

The fear of death punishment surely act as a deterrent on those who are planning to commit a heinous crime. The very fact that their action might cause their death will make the person rethink. Deterrence is one of the theories of Punishment; almost all the criminal justice systems of world consider deterrence as one of the motives of punishment.

iii) It is Just:

The death penalty is just. If a person kills another person in particularly heinous circumstances, that person deserves to die. No other punishment is strong enough for the worst crimes. The main aim of legal framework is to punish the wrongdoer and provide justice to the victim. The victim approaches the court with the belief that the guilty will be punished proportionate to the problem faced by him/her. In heinous crimes such as Rape of Child below 12, terrorist attack, brutal murder, treason etc. the only punishment, which will justify is capital punishment. If someone murders someone else, they have given up their human rights, including the one to stay alive themselves. The rape and murder rates are increasing and if all the guilty are pardoned from death penalty then society will lose trust from the judiciary.

iv) Boost people's Confidence on government:

The death penalty is necessary to make sure that civilians understand that government will protect them. People need to know that the government will protect their rights. This allows them to have confidence in government and keeps our society stable and coherent. If we let murderers live, our society will be weakened because people will no longer trust the government.

v) Saves money:

The death penalty is awarded to the criminal guilty of heinous crimes, it does not make any sense to pardon the guilty and keep him in prison for his whole life at the expense of taxpayer's money. According to the official statement given by Central government around 50 Crore rupees was spent on Ajmal kasab to keep inside a prison for 4 years. Imagine if he was not hanged in 2012 and given Life imprisonment. Taking care of Rapists or terrorist until he dies a natural death incurs heavy loss of the pocket of the government. Executing such criminals saves the hard-earned money of the people, which can be used by the government for welfare of public.

2.2 Arguments against death penalty

The moral foundation of judicial killing has been questioned and it has been judged untenable in many countries. People supporting the abolition of death penalty are increasing and countries are

inclining towards to ending the death penalty. There are solid arguments against death penalty, few of the arguments are:

i) Against Human Rights

One of the basic and strong argument against death penalty is that it goes against the human right of a person. The right to life is a fundamental right guaranteed to every individual and it is argued that it should not be taken away in any condition. Death penalty shows the revenge taking nature of the society, it gives more emphasis on retributive justice which is unfair, cruel and inhuman. It does not help the victims of the crime or their families in any way. It is revenge, cold and calculated.

ii) It cannot be reversed:

When someone is found to be innocent after a conviction they can be released, pardoned, given financial aid and live the rest of their lives comfortably. If they have been executed, a pardon is of no use to them at all. You can never be sure that someone is 100% guilty. Therefore, there is always the risk of killing an innocent man. It is popularly believed that, let 100 guilty be let free but not one innocent be punished. If a man is found to be innocent after being hanged it cannot be reversed. A life once lost will never come back. The death penalty is error-ridden. Between January 1, 2000 and June 31, 2015, the Supreme Court of India imposed 60 death sentences. It subsequently admitted that it had erred in 15 of them (25%). Can this system be trusted to take a life? And that too based on evidence collected, or fabricated, by a police force not known for its probity or efficiency?

SHOULD INDIA ABOLISH DEATH PENALTY

After looking at the evolution of the punishment System in India and after analysing the pros and cons of death penalty one question, which rises is, should India abolish death penalty. The question is highly debated and controversial, there are human rights activists who advocate for the abolition of death penalty for all crimes, at the same time there is large chunk of people who say death penalty should continue in India. The answer to this question is very subjective in nature; the answer depends on the beliefs and ideologies of the person. It is a hard call to make. In spite of having provision for death penalty, India is one of those countries, which uses it the least. The last person to be executed in India was convict of 2001 parliament attack Yakub Menon hanged in the year 2015. On the other, there are countries, which use this provision every now and then, china for instance executes 1000s of criminal every year, and in fact, china's execution rate is more than rest of the world. The best way to deal with the crime is still unknown.

Countries can be divided into 4 types based on their approach towards death penalty. The division is as follows:

i) Abolitionist for All Crimes:

Countries whose laws do not provide for the death penalty for any crime is called Abolitionist for all crimes. In these countries, the death penalty is completely abolished and is illegal. As of now, 105 countries in the world have expressly abolished death penalty as a whole. Australia, France, Bhutan, Norway, Venezuela, Turkey are few of the countries which are abolitionist in nature.

ii) Abolitionist for Ordinary Crimes Only:

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances are known as Abolitionist for Ordinary Crimes. There are seven countries of such nature and they are Brazil, Guatemala, Kazakhstan, Chile, Guinea, Peru El Salvador , and Israel.

iii) Abolitionist in Practice:

Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice because of the fact that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. The list also includes countries, which have made an international commitment not to use the death penalty. There are 29 countries in this category; few countries of such nature are Sri Lanka, Ghana, Kenya, Myanmar, and Mongolia.

iv) Retentionist:

Countries and territories that retain the death penalty for ordinary crimes are called as Retentionist countries. According to the latest data by Amnesty International, there are 56 countries in the world, which are Retentionist in nature. Few countries of such kind are India, China, Indonesia, Iran, Iraq, Jamaica, Japan, Singapore, USA, Qatar and many more.

COMPARING COUNTRIES

Now let us look at few of the countries and their approach towards death penalty.

A) United States of America

America is a Retentionist country, while some states in the U.S. retain the death penalty, not all state's criminal codes retain it, Within the limits defined by the Constitution, each state applies its

own criminal law. Twenty-one out of 50 states plus the District of Columbia has abolished the death penalty. Although 29 states retain the death penalty, only 19 of them have carried out executions since 2009. Further, 10 states, the U.S. federal government, and the U.S. military federal government are de facto abolitionist, as they have not carried out any executions in over 10 years.

Mode of execution

The most common mode of giving death penalty in USA is by lethal injection. All 29 states that retain the death penalty, the U.S. government, and the U.S. military provide for execution by lethal injection. Few other modes, which were used in USA, are Shooting, electrocution and gas chamber. As of October 30 of this year, 17 people were executed.

Crimes Punishable by death

Crimes in USA, which, are punishable by death, are Aggravated Murder, Terrorism related offences, drug trafficking, treason, war crimes, genocide etc. The most crime amongst this is the aggravated murder. 266 individuals were executed from January 2008 through February 2014 for aggravated murder.

International Commitments

US being one of the permanent members of UN has greater international responsibility. It became party to ICCPR on October 5 1977. Apart from this USA has neither signed the First Optional Protocol to the ICCPR, Recognizing Jurisdiction of the Human Rights Committee nor Second Optional Protocol to the ICCPR, which talks about the Abolition of the Death Penalty. US has always voted against the UN General Assembly Moratorium Resolution, which talks about general suspension (not abolition) of capital punishment throughout the world.

Significant changes in the application of the death penalty

In Recent years, USA has seen diminished numbers of executions and death sentences, with outright abolition in some states. Also, there has been some reduction in the scope of the death penalty. After the death penalty was reinstated in 1976, executions rose steadily until 1999, when they hit the high water mark with 98 executions in a single year. Since 1999, the rate of executions has fallen steadily. In 2009, 52 individuals were executed. In 2010, 46 individuals were executed. In 2011, 43 individuals were executed. In 2012, 43 individuals were executed, finally the number has gone low to 17 this year. One of the reason behind such decline can be In 2008, the order of Supreme Court which restricted the application of the death penalty for offenses against the person to those that result in death.

The death penalty is highly debated in US, but the rule in US is that States are free to abstain from using capital punishment within their own borders, but capital punishment is accepted for federal crimes and in the states that have not abolished it. Therefore, USA to a greater extent is one of those Countries which retains the provision to grant death penalty.

B) United Kingdom

Death penalty has a long history in United Kingdom; Capital punishment in the United Kingdom was used from ancient times until the second half of the 20th century.

Mode of Execution

Death sentences were carried out by such means as beheading, boiling in oil, burying alive, forced ingestion of poison, crucifixion, disembowelment, drowning, flaying alive, hanging, impalement, stoning, strangling, being thrown to wild animals, and quartering i.e., being torn apart. However most of these cruel forms of punishments were discarded in the later stage and only simple Hanging was widely followed.

Crimes punishable by death

Britain's 'Bloody Code' was the name given to the legal system between the late-17th and early-19th century, which made more than 200 offences punishable by death. Statutes introduced between 1688 and 1815 covered primarily property offences, such as pickpocketing, cutting down trees and shoplifting. Crimes eligible for the death penalty included shoplifting and stealing sheep, cattle, horses, murder, burglary, robbery, treason etc. Even Children above the age of 14 were given death penalty if found guilty.

Abolition of Death penalty in UK

In 1965 the Labour party MP Sydney Silverman, who had committed himself to the cause of abolition for longer than 20 years, introduced a Private Member's Bill to suspend the death penalty for murder. It was passed on a free vote in the House of Commons by 200 votes to 98. The House of Lords subsequently passed the bill by 204 votes to 104. The death penalty was scrapped by parliament in 1969 by, Murder (Abolition of the Death Penalty) Act 1965; public anger was one of the important factor, which led to the suspensions of executions in 1965.

International Commitment

The United Kingdom is a founding member of the United Nations and one of five permanent members of the UN Security Council. UK became a party to ICCPR in the year 1976 ratified

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty since 1999. UK is also the member of European Convention on Human Rights, which aims to protect the human rights of people in countries that belong to the Council of Europe. UK has signed the 13th Protocol of ECHR which provides for the total abolition of the death penalty.

Reintroduction of death penalty

Since the death penalty's suspension in 1965, there have been continued public and media calls for its reintroduction, particularly prompted by high-profile murder cases. At the same time, there have been a number of miscarriages of justice since 1965 where someone convicted of murder has later had their conviction quashed on appeal and been released from prison, strengthening the argument of those who oppose the death penalty's reintroduction.

Perhaps the first high-profile murder case, which sparked widespread calls for a return of the death penalty, was the Moors murders trial in 1966, the year after the death penalty's suspension, in which Ian Brady and Myra Hindley were sentenced to life imprisonment for the murders of two children and a teenager in the Manchester area. Later in 1966, the murder of three police officers in West London also attracted widespread public support for the death penalty's return. A November 2009 television survey showed that 70% favoured reinstating the death penalty for at least one of the following crimes: armed robbery, rape, crimes related to paedophilia, terrorism, adult murder, child murder, child rape, treason, child abuse or kidnapping. However if UK wants to bring back the death penalty then it should come out of international commitments of UN and ECHR. Which is not easily possible.

C) INDIA:

India is Retentionist country in true sense; Supreme Court of India has upheld death penalty in various instances. It has been carried out in five times since 1995, while a total of twenty-six executions have taken place in India since 1991, the most recent of which was in 2015. Section 53 of the Indian Penal Code, 1860 provides for a death sentence and section 368 of the Code of Criminal Procedure provides power to High Courts to confirm death sentences. Death penalty is handed out in cases known as rarest of the rare cases i.e. those cases in which the collective conscience of the community is so shocked that it will expect the judiciary to deliver death penalty on the accused. The Indian Supreme Court has stated that cases in which a murder is committed in its extreme state can be put under the purview of rarest of rare cases.

Modes of Punishment

In India, death penalty is handed out by the method of hanging by the neck. This method has been in practice ever since the British times. While hanging is the most common method of execution in India. Under the 1950 Army Act, hanging as well as shooting are listed as official methods of execution in the military court-martial system.

Offences Punishable by death

The offences which attract death penalty are Aggravated Murder, terrorism related offences, Rape amounting to death, treason and by the latest Criminal Law (Amendment) Act, 2018 rape of a girl child below 12 years is also made offence punishable by death.

LAW COMMISSION ON DEATH PENALTY

Law commission of India has twice given its report on death penalty in India. First was given by 35th Report in 1962, in this report the Law Commission supported the death penalty stating that India's particular circumstances were such that it could not "experiment" with its abolition. Later The Law Commission of India received a reference from the Supreme Court in Santosh Kumar Bariyar v. State of Maharashtra[4] and Shankar Kisanrao Khade v. State of Maharashtra[5], to study the issue of the death penalty in Indian to "allow for an up-to-date and informed discussion and debate on the subject." The law commission submitted 262nd report in 2015 in which it recommended that, the death penalty be abolished for all crimes other than terrorism related offences and waging war.

International Commitment

India is a part of UN and party to ICCPR since 1979, but it is not a party to the first and the second optional protocols of the ICCPR. Which Recognizing Jurisdiction of the Human Rights Committee and talk about the Abolition of the Death Penalty respectively. India has always voted against the UN General Assembly Moratorium Resolution which aims at general suspension (not abolition) of capital punishment throughout the world.

LANDMARK CASES

[4] Santosh Kumar Bariyar v. State of Maharashtra (2009) 6 SCC 498.
[5] Shankar Kisanrao Khade v. State of Maharashtra (2013)5 SCC 546.

There are many cases in India with relation to death penalty which are considered as landmark judgments. The important cases start from that of Bachan singh in which "rarest of rare" doctrine was given. Next, comes the case of Machhi Singh and others v. State of Punjab[6], the Apex Court while discussing the aggravating and mitigating circumstances laid down the principles, which would serve as guideline to the courts while deciding the sentence to be awarded in murder cases.

Later Mithu v. State of Punjab[7] was a historical judgment of the full bench of the Supreme Court, wherein the court declared Section 303 of the IPC, which is 'Punishment for murder by life-convict' as unconstitutional and violative of Article 14 and 21 of the Constitution.

In Smt.Shashi Nayar v. Union of India[8], the death penalty was again challenged for the reliance placed in Bachan Singh case in the 35th Law Commission Report but the court turned it down stating that the time was not right for hearing such a plea, also the plea to consider hanging till death as barbaric and dehumanizing was rejected.

In the recent judgment of Shatrughan Chauhan v. Union of India [9], the Supreme Court of India has laid down certain guidelines as to how death penalty can be converted into a life sentence. The same was implemented in the case of Union of India vs. Sriharan[10], popularly known as the Rajiv Gandhi assassination case whereby the Supreme Court of India reduced the death sentence of the killers of Rajiv Gandhi to a life sentence.

The trend in all these cases show that the Indian Judiciary is moving towards abolishing death penalty from its criminal justice system. Many of the retired judges have opined that death penalty should be put to an end.

ANSWERING THE QUESTION

After looking at the demerits of death penalty and looking from a human rights perspective one can say that India should also follow the international trend and abolish death penalty from our system. However, according to me India should not abolish the death penalty. Even the 262nd law commission report did not recommend on putting a blanket ban on death penalty. Comparing the legal system in other countries is a good way to improve ours but the comparison should not made in a universalistic manner. The law and legal system of any country is based on its history and sociological aspects. An alien law cannot be implemented in a country no matter how successful

[6] Machhi Singh and others v. State of Punjab, 1983 AIR 957.
[7] Mithu v. State of Punjab, 1983 AIR 473.
[8] Smt.Shashi Nayar v. Union of India 1991 SCR Supl. (2) 103.
[9] Shatrughan Chauhan v. Union of India, 2014 3 SCC 1.
[10] Union of India v. Sriharan, (2014) 4 SCC 242.

it is. It would be dangerous to imitate others without considering local conditions. Similarly, death penalty cannot be abolished in India because of the sociological circumstances at present. Abolishing death penalty would be going against the public opinion. I believe Convicts of Rape and terror attack do not deserve to live. Awarding terrorists with life imprisonment and taking care of him until he die is a costly affair. There would be constant threat to national security as long as he is alive, because there are all the chances that he escapes from the prison and do more harm to the nation. India is one of those states which rarely execute a convict. Most of the time the criminal's sentence is either reversed by Supreme Court or commuted by president. There has been no execution from past 4 years. With the inclusion of due process the procedure has become more fair than ever before, and due process along with test of "rarest of rare case" will ensure that no innocent is punished. Debating for abolition of the death penalty by saying that it is not acting as deterrent or it is against human rights is not satisfactory. A person who kills thousands of innocent humans or rapes a 2 year old child do not qualify to be called as Humans thus no human rights should be given to them.

CONCLUSION

To conclude I would say death penalty in India should never be abolished. The countries, which have abolished death penalty, do not have threats and problems as that of India. A comparison cannot be made with other countries. The best way to deal with death penalty is to have provision in hand but use it only in special circumstance. India at present is having the same approach and it needs no changes.

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A DETAILED STUDY OF DOMESTIC VIOLENCE AND LAWS FOR THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE

Yuvraj Gadhvi

A DETAILED STUDY OF DOMESTIC VIOLENCE AND LAWS FOR THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE

ABSTRACT:

The present article is based upon the study of term "Domestic violence" as embodied under various international and domestic laws. The expression Domestic violence is envisaged under an Indian law i.e. the Protection of women from domestic violence Act, 2005 (PWDV). Wherein, section 3 of the Act stipulates the definition of Domestic violence. Domestic violence against women is an act of any male partner or his relative which harms whether physically; mentally; economically or psychologically to any women who is in a domestic relationship with the respondent viz., the male partner/husband or any relative of her husband including women and any non-adult person[1]*. These violence's are hindrance for the development and freedom of women. The article further contains various forms of Domestic violence including physical, sexual, verbal, emotional and Economical abuse.*

INTRODUCTION:

"I'm the heaven-holding woman.

My eyes are running through the rainbow.

The sun makes path to my womb.

My thoughts are cloud shaped.

But my words are yet to come"

It is well known fact that still in 21st century women are treated as a second-class citizenry. And they are in back seat far from men. It is also a fact that half of the world's population is women, still they suffer from the course of discrimination. The women consist 66% of the illiteracy and 70% of the world's poor[2]. The Indian society largely follows strong patriarchal norms wherein women have little social status in society right from their birth. Sex specific premature birth of female babies and female child murder are generally worked on guaranteeing just male kids are conceived. Indian women additionally have lower life expectancy and less access to education (and therefore lower literacy rates) health care and work opportunity then Indian men. There is also a common belief that a woman is her father's and after her marriage her husband's property. This is

[1] Hiral P. Harsora and others V. Kusum Narottamdas Harsora and others (2016) SCC 165

[2] P.K Das, *Protection of women from Domestic violence, p* 3 (Universal law publishing co. Fourth edition., 2011)

represented by the customary endowment framework in which a Bride's family should give money, property or blessings to her spouse's family as a feature of the wedding.

Indian women face numerous problems pertaining to discrimination, dowry system bride burning, high percentage of illiteracy and many more. Earlier women were confronting issues like sati pratha, parda pratha, child marriage, confinement to widow marriage, and so forth. Practically all the old conventional issues have been vanished from the general public yet offered ascend to some other new issues. The women might be confronting brutality inside the family like endowment related provocation, conjugal assault, sexual maltreatment, and so on. Domestic violence is one of those problems which is faced by women within a wedlock or under the domain of domestic relationship.

DOMESTIC VIOLENCE UNDER INTERNATIONAL LAWS:

Domestic violence is a significant obstacle to a nation's growth as it is a matter of human rights. It has been recognized by the Beijing Declaration, the 1994 Vienna Agreement and the 1995 Platform for Action. In its General Recommendation No. 12, 1989, the United Nations Committee on the Elimination of All Forms of Discrimination against Women proposed that State parties shall act to protect women from domestic violence and to eliminate domestic violence in society.

Beijing Platform of Action[3]: -

It is a platform for women empowerment. It enumerates that violence against women is an obstacle for achieving development, equality and peace objectives. It also provides that women and girls are subject to physical, sexual and psychological abuse in all societies, to a greater or lesser degree, which cuts across income, class and culture lines. Women's low social and economic status can be a cause and consequence of Domestic violence[4].

India being a signatory of committee on the Elimination of discrimination against women (CEDAW) and the Beijing platform of Action, has accepted the definition of domestic violence against women as stated above[5].

[3] Beijing Platform of Action, 1995

[4] https://www.genderequality.com (last modified on March 16, 2019)

[5] N.A Zuberi, *The Protection of women from Domestic violence Act and Rules p 38* (Allahabad law Agency, Allahabd, First edition., 2008)

Convention on elimination of all form of discrimination against women: -

Article 1 of the International instrument embodies the term "discrimination against women". It provides that Any discrimination, limitation or exclusion on the grounds of gender that has the effect or intent of nullifying or impairing women's acknowledgement, enjoyment or exercise, irrespective of their marital status, on the grounds of equality of women and men with respect to human rights and fundamental freedoms in financial, political, civic or cultural spheres of any other sector[6].

Whereas, Article 2 of this international Instrument embodies the term "violence against women". It enumerates that violence against women includes Physical, emotional, psychological and sexual violence in the family, comprising sexual harassment and household violence, marital rape, dowry-related violence, female genital mutilation and other traditional practices detrimental to women, non-spousal violence and exploitation-related violence. Further, includes rape, sexual harassment and intimidation at in educational institutions, work and forced prostitution and trafficking in women[7].

The UN declaration on the elimination of violence against women (1993): -

In the First Article of the UN Declaration on the Elimination of Violence against Women (1993), the definition of domestic violence against women has been provided. It lists as follows: the term domestic violence against women means and includes any act of biological sex-based violence that results in, or is likely to lead in physical, mental or sexual harm or hardship to women, including threats to such acts, coercion or unreasonable deprivation of liberty, whether it be in private or public life[8].

New York State coalition[9]: -

[6] Article 1 of Convention on elimination of all form of discrimination against women, 1979

[7] Article 2 of Convention on elimination of all form of discrimination against women, 1979

[8] Article 1 of The UN declaration on the elimination of violence against women, 1993

[9] New York State coalition, 1978

The New York State Coalition describes domestic violence as abusive behaviour- emotional, psychological, sexual or physical-that one person uses to govern the other in an intimate relationship. It takes several multiple forms and involves actions such as threats, calling for names, preventing family or friend's interaction, withholding money, real or potential physical harm and sexual assault. Stalking can also be a form of domestic violence.[10]

The above Considerations of Domestic Violence against Women urged the Indian legislature to make a law that would take into account the rights guaranteed by Articles 14, 15 and 21 of the Indian Constitution of 1950 to provide cure under civil law to protect women from domestic violence.

DOMESTIC VIOLENCE UNDER INDIAN LAW:

Domestic violence could occur in people of all races, belonging to any culture or religions. Further any ethnicities can be a perpetrator of domestic violence. Domestic violence is perpetrated on and by both women and men and may occur between people of opposite sex or same sex.

In India for the very first time this term was embodied under the Protection of women from domestic violence Act, 2005. According to it, domestic violence is any act or conduct of the husband or his relative including any women which harms or endangers or imperils the health, safety, life, appendage or prosperity, regardless of whether mental or physical, of the aggrieved person (any women who is or has been in domestic relation with the perpetrator) or tends to do such act and incorporates causing physical maltreatment, sexual maltreatment, verbal and psychological mistreatment and financial maltreatment.

It is also a domestic violence if any husband or any relative thereof harasses, hurts, harms or imperils his wife with a view to coerce or compel her or her relatives to fulfil the unlawful dowry demand or demand of other property or valuable security.

Further, it would be a domestic violence if the husband or any relative of her husband threaten her or her relatives by any conduct of dowry demand or physical or mental torture as mentioned above.

Domestic violence is about one person getting and keeping control over another person in an intimate relationship. The victim of domestic violence might be current or former spouse or dating partner. According to Many Ann Dutton, a Psychologist who is an expert in violence has described

[10] N.A Zuberi, *The Protection of women from Domestic violence Act and Rules, p 39,* (Allahabad law Agency First edition., 2008)

it as a pattern of behaviour in which one partner uses physical violence, threats, coercion, intimidation, emotional and isolation, sexual or economic abuse in order to control and change the behaviour of the other partner. Domestic violence occurs between the people of all ages, races ethnicities and religions. It occurs in both opposite-sex and same-sex relationship.

About 95% of victims of domestic violence in India are women. Over half of all women will experience physical violence in the domestic relationship; and for 24-30% of those women, the battering or physical abuse will be regular and ongoing. It is also observed that in every 15 seconds the crime of battering occurs[11]. Most abusers are men. There is some evidence that shows that men who grow up in a house wherein domestic violence often occurs, that boys in future often become abusers as adults, however, many abusers are from non-violent homes, and many boys from violent homes do not grow up as abuser.

However, economic or professional status of any person does not make much difference on the commission of domestic violence because every section of the society is suffering from this evil practice and it is observed amongst rich as well as poor section of the Indian society. Whereas, the victims of domestic violence can be any women whether a labourers or college professors, Judges or Advocates, schoolteachers or staff, truck drivers, home makers or store clerks or doctors.

However, there are various causes of domestic violence including religious factor, sociological factors, aggressive attitude, poverty, dominating behaviour, drug addiction, extra marital affairs and many other of like nature.

In a Landmark judgment of ***Hiral P. Harsora and Others V. Kusum Narottamdas Harsora and others***[12], the supreme court acknowledged the definition of domestic violence under section 3 of PWDV, Act is sex-neutral (gender neutral). Therefore, it means that any physical, sexual, mental/psychological, economical and any liked abuse/malpractice would all be committed by a woman on another woman. Nevertheless, even sexual abuse may be by one lady on another in a given situation of reality. When an aggregated person goes to avail remedy given by the Act, things become much clearer. Section 17(2)[13] elucidates that, in compliance with the procedure laid down

[11] N.A Zuberi, *The protection of women from domestic violence Act and rules, p 46,* (Allahabad law Agency, First edition., 2008)

[12] Hiral P. Harsora and others V. Kusum Narottamdas Harsora and others (2016) SCC 165

[13] Section 17 of the protection of Women from Domestic violence (Act 43 of 2005)

by law, the aggrieved person cannot be prohibited or expelled from the shareholding or any part thereof.[14]

Further, the court held that if the respondents are to be interpreted as an adult male only, it is obvious that women who exclude or evict the aggrieved individual are not out of their jurisdiction, and if so, the purpose of the Act can indeed be easily defeated by an adult male person who is not at the forefront, but who brings forward female persons who can thus exclude or evict the aggrieved person from the shared home.

In this way, Section 3, in tune with the general purpose of the Act, attempts to prohibit domestic violence against a woman of any kind and is sexuality neutral.

FORMS OF DOMESTIC VIOLENCE:

The protection of women from domestic violence Act, 2005 enumerates various form of domestic violence. The following are the forms of domestic violence: -

1. **Physical Abuse: -**

   It means any conduct or act which is of such a nature as to cause bodily pain, harm, or danger to limb, life, health or impair the health or development of the aggrieved person and includes criminal intimidation, assault and criminal force. For instance, when a husband beats his wife, he commits domestic violence by physical abuse[15].

   This maltreatment is viewed as the most old and pervasive method of subordinating of a lady in a family, it is the mast common control mechanism applied by others against women within the domestic sphere.[16]

   Each 3rd woman in India suffers sexual/physical violence at home. As indicated by the report, 27 percent of women have encountered physical violence since the age 15 in India. This experience of physical violence among ladies is more typical in rural regions than among ladies in urban regions. Domestic violence cases, wherein ladies reported physical abuse in rural and urban territories, were at 29 percent and 23 percent, respectively.[17]

[14] Hiral P. Harsora and others V. Kusum Narottamdas Harsora and others (2016) SCC 165

[15] Explanation I (i) of Section 3 of the protection of Women from Domestic violence (Act 43 of 2005)

[16] https://www.allreasearchjournal.com (last modified on March 24, 2019)

[17] https://www.news18.com/news, (last modified on 20 March 2019)

2. **Sexual Abuse**: -

Sexual Abuse includes any act or conduct of a sexual nature that abuses, degrades, humiliates or infringes/violates the dignity of woman[18].

The sexual abuse has additionally been perceived under the International law with regards to Domestic violence. This type of Abuse is limited to the interpersonal relation between the man and ladies in the nature of Marriage as a couple. The men expect that a spouse is never expected to won't or disregard her obligations of having intercourse with her husband and approach has been broadly acknowledged and reasonable clarification for men's violence. The man utilizes this type of violence to declare and keep up their masculinity over women. 'This type of violence is exceptionally regular within the families where men are educated. According to a study it was found that 79% of men utilized sexual brutality to control their female partner and 57% of them had over 6 years of their formal education'.[19]

3. **Verbal and emotional abuse**: -

It includes any insults, humiliation, ridicule, insults or ridicule and name calling especially as to not having a male kid or a child. It further includes repeated threats to cause bodily pain to any person in whom the aggrieved person is interested[20]. This abuse is also known as psychological Abuse.

However, this type of abuse is one of the significant types of abuse faced by a woman. As indicated by the report by the 'United Nations World Population Fund (UNFPA) and the Washington-put together International Centre for Research with respect to Women polled 9,205 men, aged 18 to 49 across the state of Uttar Pradesh, Rajasthan, Punjab, Haryana, Odisha, Madhya Pradesh and Maharashtra found that men who had encountered discrimination during childhood were multiple times bound to be violent towards their accomplices. The most noteworthy reports of violence originated from Odisha and Uttar Pradesh, said the report, with in excess of 70 percent of men in these districts confessing to being abusive towards their wife and accomplices.

4. **Economic abuse**: -

[18] Explanation I (ii) of Section 3 of the protection of Women from Domestic violence (Act 43 of 2005)

[19] https://www.allreasearchjournal.com (last modified on March 24, 2019)

[20] Explanation I (iii) of Section 3 of the protection of Women from Domestic violence (Act 43 of 2005)

It includes the deprivation of financial resources or any economic resources to which the aggrieved person is entitled under any custom or law whether payable under a request for a court or which the abused individual requires out of need including, yet not constrained to, family necessities for the wronged individual and her child, assuming any, property, Stridhan, jointly or separately owned by the aggrieved person, payment of rental related to maintenance and the shared household. Further, it additionally incorporates transfer of family impacts, any distance of benefits whether steady or mobile, protections, assets, offers, securities or other property in which the distressed individual has an intrigue or is qualified for use by excellence of the local relationship or which might be sensibly required by the wronged individual or her kids or her Stridhan or some other property independently or together held by the oppressed individual Additionally, it includes restriction or prohibition to continued access to resources or facilities which the aggrieved person is entitled to enjoy or use by virtue of the domestic relationship including access to the shared household[21].

FLAWS OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT,

Appointment and number of Protection officer: -

Flaws in the appointment and number of Protection officer. Section 8 of the Protection of women from domestic violence Act, 2005 prescribed for the appointment of protection officer. His primary function and duties are to assist the magistrate, to make domestic incident report, to apply to the magistrate for refiles, to ensure that the wronged person would avail the legal aid, to maintain the list of service provider providing legal aid and all other functions as stipulated under section 9 of this Act[22].

However, limited number of protection offices in the Districts is a major hindrance for the proper implementation of this Act[23]. In order to overcome the above-mentioned obstacle, it is important to explicitly appoint a larger number of Protection Officers and further to formulate certain rules pertaining to how to proceed with the case and how to manage the offenses and how to effectively implement the other orders, otherwise the object of this Act may not be achieved.

[21] Explanation I (iv) of Section 3 of the protection of Women from Domestic violence (Act 43 of 2005)

[22] Section 9 of the protection of Women from Domestic violence (Act 43 of 2005)

[23] The protection of Women from Domestic violence (Act 43 of 2005)

Further, most of the protection office are males and the victim of domestic violence are females. Therefore, under many occasions it becomes very difficult for a female victim to express the nature of violence suffered by her to the office. Thus, she prefers to remain silent.

Appointment of service providers: -

Shortfalls in the appointment of service providers**.** Under Section 10 of the Act, the Service Providers shall be required to record the document of the domestic incident in the specified form if the person concerned so wishes and sends a copy of it to the Magistrate and the Protection Officer with jurisdiction in the area where the domestic violence took place. The Service Providers shall have the right to medically assess the aggrieved person and forward a copy of the medical report to the Protection Officer and also to the Police Station within the local limits of which the domestic violence occurred. The service providers are responsible for ensuring that the person concerned is housed in shelters.[24]

The state government also appointed numerous of Service Providers for providing counselling services, shelter homes and short stay homes. Every service provider has a counsellor to help the victim of domestic violence. However, the number of service providers are insufficient and there is need to appoint more Service Providers in each Mandal.

In disposal of the application by the magistrate within 60 days: -

As per Sub Sec. 5 of section 12 of Protection of Women from Domestic Violence Act, The Magistrate shall endeavour to dispose, within 60 days of the date of its first hearing, of every application. The Magistrate Courts have already burdened with numerous cases of the Penal Code and other statutes, and separate courts are required to enforce the Domestic Violence Act.

There has been delay in serving notices by the Protection Officers and if the Protection Officer does not take any interest, the court will serve the notice to the respondents by post or courier and it will take 15 days in notice service and if the respondent is unavailable it will take longer. There are some cases where cases are postponed due to a lack of notice service. After the Protection Officer has served the notice, the respondent will have an opportunity to file his counter.

[24] Section 10 of the protection of Women from domestic violence, (Act 43 of 2005)

Pursuant to Section 14 of the Act, the Magistrate may order the respondent or grieved person to attend counselling whether individually or jointly with any representative of the service provider who possesses such qualifications and counselling expertise as may be prescribed. Here therapy will take a lot of time and the Magistrate will set the next hearing date within a span of no longer than two months.

Therefore, to dispose the application U/s. 12 it is not practically possible to dispose the same without establishing of separate courts. The number of service providers is not enough and in Taluka level courts there're no service providers and the parties may not go to service providers who are often far away from the court. Service providers need to be appointed in the Court or in the areas where the courts work. After the matter has been submitted for counselling if the parties have compromised the matter, the settlement can be reported in court and a compromise case can be resolved.

If the parties do not choose to compromise, the request shall be disposed of by giving the parties the opportunity to be heard or to be prima facie satisfied that domestic violence has occurred in passing the order for protection or residence and other orders. Once the orders have been signed, the court shall give free copies of the order to the applicant parties and the police officer in charge of the police station and the service provider.

In providing training to, service providers, protection officers, welfare experts and police officers etc.:

In order to implement the Act[25] in an effective manner, it is just and necessary to provide periodical training to the officers concerned from time to time. The selection of counsellors and training to the counsellors is an important step in family disputes.

CONCLUSION AND SUGGESTION:

It may be concluded that the evil practice of domestic violence against women is still prevalent in the Indian society. Indian women are frequent victim of this evil practice. Whereas, domestic violence is observed amongst the rich as well as poor society of India and beside poverty and lake of education there are various other factors as well which give rise to domestic violence in India.

[25] Protection of Women from domestic violence, (Act 43 of 2005)

There is need to improve the Medical facilities and Shelter Homes, Sensitizing and Training the Stakeholders, Coordination among the Agencies or better cooperation among the agencies as Protection Officers, Service Providers, Police, Medical Facilities and Shelter homes etc as provided under the Act[26].

The supreme court has struck down "adult male person" portion from the definition of Respondent under section 2 (q) of the protection of women from domestic violence Act, 2005 as a result of which the Indian legislature may amend the Protection of Women from domestic violence Act, 2005.

It is further suggested to appoint a larger number of Protection Officers as well as Service Providers to assist the women suffering from domestic violence in India.

it will be very helpful if more women are appointed as protection officers, as a woman understands the other woman's problem in a batter manner and the aggrieved person being a woman can communicate batter to another woman.

It is also proposed that there is a need to improve the assistance of legal service authorities of India. Number of Paralegal volunteers and their proper training programs should be undertaken because they with the assistance of DLSA, TLSA, SLSA and NALSA will eventually help the public by providing free legal aid.

The government of the state as well as the central government should conduct more and more awareness programs with a view of spreading awareness among the people of India, particularly in India's rural area where women embrace domestic violence as their DHARMA.

It is also recommended to increase the percentage of society's education and literacy in order to understand the extent and gravity of domestic violence against women.

Domestic violence is a problem which is widely ignored by the people of India. Most people deny it or are too afraid and ashamed to discuss it. If you are a victim of domestic violence or know someone who is experiencing this type of violence, please seek help immediately. Support is there, and people are willing to hear and support you. Do not wait for it to be too late, don't ever be a target to yourself!

domestic Abuse weakens women's empowerment and is undoubtedly an obstacle to socio-economic and demographic growth in the nation. In order to improve the problem effectively and

[26] Protection of Women from domestic violence, (Act 43 of 2005)

efficiently, it is suggested that programs take into account community participation and, in particular, male participation.

DOMINANCE OF FACEBOOK ON NETWORK MARKET AND THE DECISION OF GERMAN COMPETETION AUTHORITU WITH REGARD TO ITS ABUSE OF POSITION

Afraa Momin & Krisha Kamal

INTRODUCTION
FACEBOOK AND ITS ACQUISITIONS
GERMAN COMPETITION AUTHORITY ON FACEBOOK
REACTION OF FACEBOOK
CONCLUSION

INTRODUCTION

The competition act, 2002, received the assent of the president of India on 13th January 2003, and over the period many provisions have been brought into force. The key sections 3 to 6 regulates anti-competitive conducts, the object of the act is to provide for a competition commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in Indian markets. The basic objective is to provide a law relating to competition among enterprises that will ensure that the process of competition is left free without stronger trading enterprises manipulating the market to their advantage. The need for evolving and starting the competition policy of India had been long overdue. What has pushed it to the forefront by the government is the entry of multinational industries which have significant positions in international markets. For a long time, services provided by online platforms like Google, Facebook and Amazon were cheered for being useful and innovative. But now, times and moods have changed. The same platforms are today among the most valuable and powerful companies in the world.[1]

Section 4 of the Competition act, 2002 deals with the abuse of dominant position. It states-

Abuse of dominant position.—

1. *No enterprise shall abuse its dominant position.*
2. *There shall be an abuse of dominant position under sub-section (1), if an enterprise,—*
   a) *directly or indirectly, imposes unfair or discriminatory—*
      i. *condition in purchase or sale of goods or services; or*
      ii. *price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or*
   b) *limits or restricts—*
      i. *production of goods or provision of services or market therefor; or*

[1] 3 T. RAMAPPA,COMPETETION LAW IN INDIA

ii. technical or scientific development relating to goods or services to the prejudice of consumers; or

c) indulges in practice or practices resulting in denial of market access; or

d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation .—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

i. operate independently of competitive forces prevailing in the relevant market; or

ii. affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors[2].

The abuse of dominance position is another way of interfering with competition in the market place. In simple terms, it refers to the conduct of an enterprise that enjoys a "dominant position". Dominant position means that position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market. Such an enterprise will be in a position to disregard market forces and unilaterally impose trading conditions, fixed prices etc. The abuse may result in restriction of competition or elimination of effective competition. The forms of abuse are:-

i. Price fixing
ii. Imposing discriminatory pricing
iii. Predatory pricing
iv. Limiting supply of goods and services
v. Denial of market access

[2] Central Government Act, Section 4 in the Competition Act, 2002
https://indiankanoon.org/doc/1780194/

The Competition Act, 2002 displays a market shift from the Monopolies and Restrictive Trade practices Act (MRTP) which earlier governs the competition regime in India. [3]

FACEBOOK AND ITS ACQUISITIONS

Facebook, founded by CEO Mark Zuckerberg and fellow Harvard students in 2004, has grown exponentially to become the world's top social network and is valued on the stock market at $525 billion. It has done so by providing free access to users while analysing their online behaviour to target advertising, where its revenues rose by half in the third quarter to $10 billion. Instagram has become a key fixture of Facebook's growth. Facebook bought the photo-sharing start-up for $1 billion in 2012, Facebook's Instagram acquisition has been a stellar success, later Facebook acquired Onavo and turned it into a private tool, the company took away one of the best avenues for understanding mobile trends outside of Facebook's ecosystem. The social network was then free to track app usage and trends even at very early stages. If a potential Facebook killer was on the rise, Facebook could hypothetically spot it before anyone else. 5 months later in February 2014, Facebook bought the messaging service WhatsApp for $19 billion. Facebook was tracking the growth of WhatsApp and was impressed therefore decided to acquire WhatsApp, this was not the only reason WhatsApp was also being a rising competitor as well as a potential Facebook killer which led to Facebook buying WhatsApp. WhatsApp was largely popular outside the United States. Through Onavo data it was shown that WhatsApp was outpacing Facebook messenger and several other messaging apps in certain areas. It was said that WhatsApp was sending 8.2 billion messages a day while Facebook messenger was sending 3.5 billion. [4]

GERMAN COMPETITION AUTHORITY ON FACEBOOK

After an investigation of three years into the practice of social network, the German competition Authority (Bundeskartellamt) issued a decision which was supposed to have an impact on Facebook's Data Policy as well as the competition issues related to social networks.

[3] 2 ABIR ROY, JAYANT KUMAR, COMPETETION LAW

[4] Salvador Rodriguez, As calls grow to split up Facebook/Instagram acquisition, CNBC (Sep 24, 2019, 12:32 PM), https://www.cnbc.com/2019/09/24/facebook-bought-instagram-because-it-was-scared-of-twitter-and-google.html

Concerning the data processing practices of facebook, far-reaching restrictions has been imposed by the German Competition Authority. Earlier facebook users were allowed to use the platform only if they were agreeing with the terms and conditions that says that the user data can be collected outside the platform. This outside platform includes the websites and applications owned by facebook and third party websites and smartphones. The purpose of gathering user data was to enable facebook to build a unique database on each individual user by combining and assigning all data to the account of each user.

The third party sources from which facebook obtains user data are:-

1. Services owned by facebook such as WhatsApp and Instagram
2. Websites and applications which are considered as Facebook Business Tools such as facebook Analytics, Facebook login etc.

The moment the user opens a website or installs an application for the first time, all the data are being transmitted to facebook instantly through application programming interfaces. The terms and conditions of facebook enable the platform to club all the data with the facebook account of user and use it, even if the web tracking in the browser and device settings has been blocked by the user.

Since it has been observed that there is a difference in the types of sources, the German Competition Authority provides the following decision[5]:-

1. The services owned by facebook such as WhatsApp and Instagram may continue to collect data. But the assignment of these data with the facebook account of user will only be possible if the user voluntarily consents such assignment. When there is no consent by the user, the data must remain to the respective service and cannot be clubbed with the facebook data.
2. The user has to give a voluntarily consent for the collection of data from the third party websites and assigning them to the facebook account of the user or else it is not permitted to gather data from third party website and combine it to the facebook account.

In case if the user does not gives the consent for assigning data to its facebook account, the platform should not refuse to provide the services to the user. This requires facebook to make

[5] German Competition Authority: Facebook is a dominant company in the social networks market, GECIC Law, (Feb. 7, 2019) https://www.geciclaw.com/german-competition-authority-facebook-is-a-dominant-company-in-the-social-networks-market/

suitable changes in its terms of service and data processing policy. The collection and use of data from other websites and apps has to not to be made as necessary requirement for using the platform.

The relevant market of the social networks was also assessed by the German Competition Authority and it was concluded that more than 90% of user-based market share is held by facebook. Hence, it has a dominant position in the network market. Whatsapp, YouTube, Snapchat, LinkedIn, Twitter, Instagram and all other such services were not included in the relevant product market. The fact that made these services irrelevant market product is that, that these services only partly overlap Facebook and not its direct competitors. It was also suggested that, since almost all the popular services belong to Facebook group, so, the market share would not change significantly even if these services were included in the relevant market product.

According to the survey by social media agencies Hootsuite and We Are Social, 41% of Germans have active facebook accounts, whereas United States have 66%, Britain 64% and France with 56%. Federal cartel officers recognized that the antitrust regulator had liaised with EU privacy authorities during their investigation on facebook and its data gathering activities lead it to conclude that facebook is in abuse of dominance in the German market where it holds a monopoly position.

The German Competition Authority reached to a conclusion that the conduct of Facebook essentially presents a so-called "exploitive abuse" where it is using exploitive practices to detriment both consumers and competitors on the market.

REACTION OF FACEBOOK

A blog post was published by the facebook as a reaction to the decision of the German Competition authority. It stated that, "*the Bundeskartellamt's decision misapplies German Competition law to set different rules that apply to only one company.*" It also announced that facebook will go for an appeal with respect to the decision.

Following are the counter arguments emphasized by the facebook:-

1. The German competition authority found that 40% of social media users in Germany don't even use facebook, and its applications compete directly with YouTube, Twitter, Snapchat and other such services

2. Facebook is accountable for protecting the information of users as it complies with the General Data Protecting Regulation (GDPR)
3. The use of information across services is helpful in making them better and protect safety of people

CONCLUSION

On May 25, 2018 of General Data Protecting Regulation came into effect as it was observed that data privacy has been an important issue for European policymakers.

The global tech companies for which data are one of the essential part of their business models are the main focus of the national watchdogs. The companies like facebook and others which has a huge set of consumers in the global market shall make the required alteration in the terms and conditions of the company in order to comply with state of art data protection standard.

Recently Google had to pay an amount of Euro 50 million and set a classic example of the consequences which a company can face because of the non-compliances with the GDPR.

Cases like Facebook and google are quite specific in a way that they present a point where there is an intersection of data privacy and antitrust. The abusive practices of Tech giants with respect to data privacy affect directly to the other competitors on market and also raises significant antitrust concerns.

With the decision passed by the German Competition Authority in case of abuse of dominance position by facebook in the network market, we can expect that the coming future will bring new important developments to both data privacy and protection of competition as well.

DRUGS, LAWS, SOCIETY

Divya Chellam P.

DRUGS
THE SOCIAL CONTROL
POLY DRUG
DRUG TESTS IN LEGAL AND MEDICAL CASES
LEGAL SANCTIONS
ROLE OF NARCOTICS CONTROL BUREAU
THE SANCTIONS AGAINST USERS OF ILLEGAL DRUGS
PUNISHMENTS AND PENALITIES
SOCIETY DEALING WITH DRUG USERS
PRESCRIPTIONS IN DRUG ABUSE

DRUGS

A drug is a substance,[1] when taken into the body, alters the functions of the body physically, psychologically, mentally.

Psychoactive drugs affect the central nervous system and alter a person's mood, thinking and behaviour. Psychoactive drugs may be divided into four categories: depressants, stimulants, hallucinogens and 'other'.

FRAMEWORK OF DRUGS

India is one of the top countries for synthetic drug markets in the world. The drugs which are used in the pharmaceutical industry are considered as prescription drugs. There are around 2 million deaths every year, due to substance abuse of drugs, stated by the Youth ki Awaaz report in the society. The drugs which are consumed for other than medicinal purposes are used for recreation or for enhancing ones physical and mental capacities in the form of smart drugs. Drugs like Heroin are derived from the plants, while others are created synthetically in laboratories. The traditional drugs in the Indian markets are arising more in the laboratory manufacture of drugs as ephedrine.

LEGAL AND ILLEGAL DRUGS

Drugs like alcohol, caffeine, nicotine and medicinal drugs are legal, yet subjected to restrictions and modifications, based on the factors of age, location, driving and sale regulations. The active ingredients in legal drugs can be regulated and controlled, the alcohol content of drinks or the milligrams of nicotine in cigarettes.

Other drugs such as cannabis, amphetamines, ecstasy, cocaine and heroin, are illegal. They are not subject to quality or price controls and the amount of active ingredient is not consistent. A person using illegal drugs can never be sure of how strong the drug is, or what is actually in it. Different batches of an illegally manufactured drug may have different amounts of the drug and other unidentified additives.

THE SOCIAL CONTROL

There is a greater impact with behavioural channel as embedded in relationships, friends, teachers, employers also other social groups and organisations, with exceptions over the lives and society. There are social groups implemented for the development of social discipline, such as private sanctions enforced by law. The law is governmental in social control. The law plays a role with direct interventions with society for their welfare.

SOCIAL INTERFENCE AND EFFECTS WITH DRUGS

1. The person – depending on his mood, physic, gender, health, previous experience with drug, expectations of drug, personality, with food.
2. The Drug – It determines the type of drug being used, its purity, the time duration, how often been consumed, the method of use will all taken into account.
3. The place – specifies with the social background, by won will or not, interest, the time of consumption, with whom will be categorized.

IMPACT OF DRUGS

The drugs impact the day to day aspects of the victim in health, emotion, mental, legal, social, financial related problems. A person who is convicted with the drug offence will receive a criminal record which can also lead the victim in accessing to credit or visas for overseas travel. The cost of purchasing drugs, also have a greater impact leading to financial problems, emotional connect with the society, affecting relationships at home or surroundings.

[1] Robinson V. California, 370 U.S. 660 (1962).

EMOTIONAL ISSUES

1. Lack of tolerance
2. Excessive dependency
3. Withdrawal
4. Psychological imbalance
5. Extremely violent
6. Depression.

HEALTH ISUES

1. Hyperactivity
2. Difficulty in passing urine
3. Rapid breathing
4. Trembling
5. Chest pain, heart problems
6. Raised temperature with chilling body effect
7. Headache and Vomiting

It is not necessary that one person with suffer with all these issues, but in circumstances of over dosing, it leads to trouble and seek for emergency measures. Police will not attend unless the paramedics are threatened or there is death.

POLY DRUG

Polydrug use, also known as mixing drugs, occurs when two or more drugs are used at the same time or on the same occasion. Mixing drugs can also occur when the manufacturer combines different drugs to achieve a specific effect or to save money by mixing in cheaper chemicals. This results in users combining drugs unintentionally.

There is a greater chance of harm if more than one drug is used at a time, especially when drugs of unknown content and purity are combined. This includes mixing over-the-counter drugs, prescription drugs and illegal drugs.

DRUG TESTS IN LEGAL AND MEDICAL CASES[2]

The types of drug test include

1. Saliva Test

It is one of the quick and reliable methods, It can be found even in normal roadside drug testing procedures, It is used to detect the presence of active component in cannabis and amphetamine type stimulants, including methylamphetamine and ecstasy with speed or ice, which is considered that after alcohol, the drugs are the greatest concern for the road safety.

The road side saliva test takes not more than 5 minutes. If the result is positive, the driver is required to undertake a second saliva test or provide blood sample to conform the presence of drug in the body of that person, the confirmatory test takes around 30 minutes.

2. Blood tests

[2] Abbott Laboratories V. Gardner, 387 U.S. 136 (1967).

Blood test, which is tested by the accredited laboratory, is often used for testing the recent drug been used, recent here specifies within hours duration. This test is expensive and not commonly used.

3. Urine test

The urine test is the common forms of test, as it deducts the drug use for longer period of time, which is longer than blood, but not as long as hair tests, which is easier to administer and accurate.

4. Hair test

Hair testing provides a history of drug use as the traces of drugs would accumulate in the hair. The length of the hair will determine how far back drugs are traced back. It is considered as the only reliable method used to deduct drug use beyond couple of days or weeks, but does not deduct drug use past to 3 months. This procedure of testing is also expensive. For the hair test, nearly 40 – 50 strands of hair will be taken as strips of hair, from the scalp line.

LEGAL SANCTIONS

Sanctions against drug use are predominant features of policy on illegal drugs, There is more independence in the effects of social control. There are also cases of drugs with social disapproval systems, yet the rules are manifested as laws.

DRUG TYPES INCLUSION TO LAWS[3]

Psychoactive drugs are controlled through regulation process, depending on the legal perspective, of the particular substance being upheld.

Licit drugs are made through a process of regulatory scheme of the medical prescription with legal field. Health is protected through the process of licensing, monitoring, investigating the procedures, qualities, quantities of the drugs, and the aspect of consumption.[4]

Illicit drugs are forbidden by the criminal statutes, which creates offenses in possession, trafficking, importing, when there is no legal source of supply. There are specified agents of control as physicians, scientists, health bureaucrats. There are also agents of enforcement in the illicit drug laws including the police, prosecutors, courts, custom officials.

ANTI DRUG PROGRAMS

The drugged driving is one which is targeted by the drug abuse policies. These policies are in the process of help in creating the anti – drug media campaigns and Drug free community programs for awareness and wellness. There are also various Anti policies and programs for drug free youth with funding schemes.

DRUGS LEGALIZED IN INDIA

1. EPHEDRINE – It is derived from the plant Ephedra, a necessary component in the Chinese medicines. This drug forms a chemical composition similar to methamphetamine, which is the most dangerous. This drug helps in the treatment of asthma and bronchitis, helps in weight loss, controlling nausea. There also arises side effects with delusions, paranoia, hallucinations, dry mouths, gastrointestinal problems, skin problems. This drug also has the capacity of producing meth, by altering the former's chemical structure. This drug is manufactured in India, albeit under Government regulations, and leaking to the international market in high prices.
2. KETAMINE – This drug is used medicinally in anaesthesia. It results in hallucinations, and extended to emergency cases when there is no reliable ventilator back up. It is also considered as a solution to

[3] State OF Punjab V. Balbir Singh., 1994 AIR 1872, SCC (3) 299.
[4] Webb V. United States, 249 U.S. 96 (1919).

heroin and alcohol addiction. The after effects of this drug includes nausea, dizziness, hypertension, memory problems, psychomotor retardation. This drug is known as date - rape – drug. The restrictions have been laid up in export, and not banned. Ketamine has a unique factor of separating from other anaesthetics.

3. METHAMPHETAMINE – Is considered as baap of all drugs, this is easily manufactured from Ephedrine and Pseudoephedrine. Meth is extracted from tons of latter in drugs. This drug is successful in treating obesity, as advantage and dis advantage it increases anxiety, self - confidence, concentration, with over dose leading to strokes, even deaths.

ROLE OF NARCOTICS CONTROL BUREAU

As per the terms of section 4(3) of the Narcotic Drugs and Psychotropic Substances Act, 1985, which envisages an authority for measures with the matters specified by Central Government. It sets charter for the Bureau as follows

1. Coordination of actions by officers, State Government, other authorities for the law being in force for time being with connection to the principal act.
2. Implementation of obligations with respect of counter measures against the illicit traffic in international conventions.
3. Provides assistance to authorities in foreign countries and international organisations, in illicit traffic in narcotic drugs and psychotropic substances.
4. Coordination in the actions taken by the Ministry of health and family Welfare, relating to the matters of drug abuse.

The functions of the Board are as follows:

1. Preparing National Drug Enforcement Statistics
2. Collection and dissemination of intelligence
3. Assisting the state enhancing their drug law, with enforcement effort.
4. Acts as a national point for intelligence and investigation of drug procedures.
5. Coordinating among various Central and State Agencies engaged in drug law enforcement.

THE SANCTIONS AGAINST USERS OF ILLEGAL DRUGS

Basically, there are 2 prongs of drug control policies, which access in forms of supply reduction and demand reduction. It functions to the broad framework of social control.

Supply reduction is with the enforcement of drug law prohibitions and International interdiction activities.

Demand reduction is to encompass the clinical treatment with abuse of drugs and the spectrum of activities, for the purpose to protect children and teenage from drug addictions.

Awareness programs through media campaigns, school - based education programs. The drug law usually focuses directly with the reducing of demand, then the standard menu of demand reduction activities to oversee with the social control against illicit drug use with legal control procedures.

PUNISHMENTS AND PENALITIES.

There implies the procedure of zero tolerance by the law, when there are strong penalties laid up, with criminal punishments, which clauses in deterring the drug use, for facilitating the treatment of drug users, with social disapproval. The punishments are not only in penalty form, also declarative, deterrent, therapeutic effects.

There are state and federal laws for the distribution of illegal drugs for nonmedical, non-scientific purposes. There are also great opposition to the non- medical use of drugs, even with legitimate access with confining drugs to illicit market.

The preventive effect interlinks with the prohibitions process against trafficking in illegal drugs. As per society interest, there arises question of interest about the added preventive effects achieved by prescribing and enforcing sanctions against users.

Possession of any amount of illegal drug is considered to be a crime in both state and federal laws, punishable by incarceration, it can also a small amount of fine ranging till heavy amount of penalties. All states punish possession of drug paraphernalia, including the syringes, which are related to consumption behaviour. The possession offences are typically prosecuted as misdemeanors, punishable up to year time in the local jail. Therefore, there are nearly 30 states which classify possession of opiates or cocaine as felony, including the loss for occupational license and the right to vote, with imprisonment in punishments.

SOCIETY DEALING WITH DRUG USERS

The main aim laid here is to bring out drug free society. Yet, all of us knowingly or unknowingly take drugs every single day like Caffeine, sugar, alcohol. Marijuana, Prozac, opiates, nicotine. Drugs are extremely popular for the purpose of both pleasure and pain throughout the society. It is just by the way of altering the consciousness to fall asleep, wake up, stress relief, spiritual upliftment. The fundamental ways of dealing people in drugs are:

1. Offer compassion and treatment, both of this should be given simultaneous to the patients, single process does not give much effect.
2. Free the victims or patients who doesn't need treatments.
3. Promote free treatments on demand for the betterment of the society.
4. Holding of criminals liable and responsible for causing harm to others.
5. Observing the diagnostic criteria for substance dependence.
6. Reduce drug deaths by overdose intake, and bring out awareness without fear.

PERSONS RESPONSIBLE FOR THE DRUG CRIMES COMMITTED

The people who harm others, on drugs, people who are responsible for crimes harming others, need to be held responsible. An innocent simply using or possessing drugs should not be a clause arrest, but the permanent solution to the society would be done only by getting behind the wheel impaired, and finding the root of the drug, the leader of the drug circulation, should be held accountable. There should be an end towards arrest of innocents for the clause of drugs.

UNITED NATIONS OFFICE ON DRUGS AND CRIMES

It was established in 1997 as a part of United Nations reform combining the UN Drug Control Programme with the centre for International Crime Prevention. It focuses on the protocols of trafficking in persons, on smuggling of migrants by land, sea and air on the illicit manufacturing of and trafficking in firearms, the Un convention against corruption, the universal instruments against terrorism and the UN standards, norms in crime preventions and criminal justice systems. Therefore, the UNODC helps the member states address the issues of illicit drugs, crime and terrorism.

LEGAL HIGHS

In this contemporary era, there are new upcoming drugs in the market, advertised as legal highs, despite it is not legal. These are marketed as synthetic drugs, party pills, research chemicals, plant foods. They are mostly

used as substitutes for other illegal drugs, which is sold as legal and safer ones, which includes the ingredients which are illegal and potentially dangerous.

PRESCRIPTIONS IN DRUG ABUSE[i]

1. EDUCATION - Education not only in the common society, specifically made to parents, youths, patients about the dangers of the prescription drugs.

2. MONITORING - Prescriptions in drug monitoring programs (PDMPs) should be in place to help monitor doctor shopping, a term for when patient sees more than one doctor for obtaining multiple prescriptions. This program helps doctors to share their files across states in access.

3. PROPER MEDICATION DISPOSAL - Prescribers must also be educated as the appropriate and safe use of drugs by the way of disposal of the drugs. The disposal of drug should be in environment friendly manner, which helps to r[ii]educe the quantity of unused drugs, the drugs kept in home and reducing the livelihood of abuse.

5. ENFORCEMENT - It will help to provide the law enforcement agencies with the tools, needed to eliminate the improper practices regarding the pill mills and prescription. The key policy question is whether the incremental preventive effect of enforcing these has impact to the reduction of drugs.

[i] Blanc C, Prescription in drug abuse, (1976).
[ii] Taubert K, Significance, causes and prevention of drug residues, 98 (1976).

DUGUIT'S LEGAL PHILOSPHY: A CRITICAL ANALYSIS

Deepak Goyal

INTRODUCTION

Leon Duguit was a French jurist who made substantial contribution to the sociological jurisprudence in early twentieth century. He was a professor of constitutional law in the university of Bordeaux for many years. During his time individualism was crumbling in Europe giving way to collectivism in which state's role extended to public service. The reflection of collectivist ideologies could be found in the writings of Durkheim, Piaget, Max Weber etc. Duguit was much influenced by Auguste Comte's theory of *law as a fact* which denounced individual rights of men and subordinated them to social interest. Comte pleaded that 'the only right which man can possess is the right always to do his duty.' This formed the basis of Duguit's legal theory.[1]

Duguit was also influenced by Durkheim's work 'Division of Labour In Society' which was published in 1893. Durkheim made a distinction between two kinds of men in society. Firstly, the common needs of individuals which are satisfied by mutual assistance, and secondly, the diverse needs of individuals which are satisfied by exchange of services. Therefore, the division of labour is the most important fact which Duguit's called as social solidarity.[2]

[1] PARANJAPPE, N.V. STUDIES IN JURISPRUDENCE & LEGAL THEORY, CENTRAL LAW AGENCY, 2019
[2] Id.

DEFINITION OF LAW

Duguit defines "law as essentially and exclusively as social fact. It is in no sense a body of guidelines laying down rights. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. Therefore, the most important fact of social life is the interdependence of men (this Duguit calls as 'social solidarity')." The aim of the social institution is to safeguard and further it. Only those rules can be called law is the popular acceptance and not the will of the sovereign. The sovereign is not above the law but is bound by it. The law should be based on social realities.

CRITICISMS:

- He excluded the notion of 'right', from law. This is not a correct view.
- Because he relegated the sovereign to the status of an agency, simply endorsing the popular acceptance,

  Whereas in reality the sovereign is still the 'electron' in the atom of the state.
- Because the term 'social solidarity' is very vague and it can be interpreted to serve almost any end (as was done by fascists.)

There are no rules or tests to determine the 'social solidarity'. It involves a question of 'justice' and ultimately it turns into a principle of 'natural law'. Thus, the definition of law as a 'social fact' is vague and confusing. The merit of this definition (which entitles it to be called 'sociological') is that it emphasizes the fact that law is essentially the product of social facts.

INTERDEPNDENCE OF MEN IN THE SOCIETY

Duguit manufactured his hypothesis on 'social solidarity'. He demanded the need of seeing public activity as it is really lived. The most significant truth of the general public is the reliance of men. In the present-day society, man exists by his enrollment of the society. Each man can't make and obtain the necessities of life himself. Capacities are particular to the point that each in his turn relies upon other for his necessities. The part of the bargain exercises and associations ought to be to guarantee the relationship of men.

DOCTRINE OF SOCIALSOLIDARITY

The doctrine of mutual interdependence is the core of Duguit's theory of law and society which unite individual members of a social group by the sheer force of their common needs and interests. For men live together in groups and societies, they are dependent upon, solidarity with another. They have common needs which they can satisfy only by common life and at the same time, they have different needs to satisfaction of which they assure by exchange of reciprocal services. The progress of humanity is assured by continuous growth, in both directions, of individual activity. Man is so placed in society has the obligation of realise this progress because in doing so he realises himself.

Duguit was also influenced by Emile Durkheim's work 'Division of Labour in Society' (1893). Durkheim distinguished between two types of social solidarity, what he calls mechanical solidarity and organic solidarity. Within early, undeveloped society, men recognised the need for mutual assistance and the combining of their aptitudes. People are bound together by the fact that they have shared a common conscience. Cohesion of a kind existed which is called mechanical solidarity or solidarity by similitude. In such a society because of the collectivist attitude, individualism would exist only at a low level. In more advanced societies in which the division of labour was widespread, collectivism was replaced by individualism. A strong social conscience would produce an organic solidarity or solidarity by division of labour which reflected the functional interdependence of men. Law is an index of social solidarity. Because law tends to reflect different types of social cohesion, different types of solidarity produced their own forms of law.[3]

According to him, the outstanding fact of society is the interdependence of the people. This interdependence has always been there, but it has increased in modern times on account of the increasing knowledge of man and his mastery over the physical world. In modern society we cannot live without the services provided to us by our fellowmen. Our food, our housing, our clothing, our recreation and entertainment are always dependent on the activities of other people. Specialization has increased to such an extent that we can exist only by virtue of our membership of a community. Social interdependence is not a theory or a conjecture but a fact. It is an all-

[3] ARTICLE 100, DUGUIT'S SOCIAL SOLIDARITY THEORY https://article1000.com/duguits-social-solidarity-theory/

important fact of human life. All human activity and organization should be directed to the end of ensuring the harmonious working of men with man. Duguit calls it with a principle of social solidarity.[4]

As all human activity and organizations are to judge from the manner in which they contribute to social solidarity, the state can claim no special position or privileges. It is only one of the various human organizations which are necessary to protect the principle of social solidarity. It can be justified so far as it defends and furthers the principle of social solidarity. It is nothing more than organization of a men who issue commands backed by force. If the state acts in a way which promotes social solidarity, it is entitled to be upheld and encouraged. If it does not perform that function, the people have a right to revolt against it meaningless. All power is limited by the test of social solidarity. Every men and grouping of men is under a duty arising out of the facts of social existence. That duty is to further social solidarity. To quote Duguit: "Man must so act that he does nothing which may injure the social solidarity upon which he depends; and more positively, he must do all which naturally tends to promote social solidarity.[5]

[4] V.D. MAHAJAN, JURISPRUDENCE & LEGAL THEORY (5TH ED., EASTERN BOOK COMPANY) (2016)

[5] Supra note 4

THEORY OF JUSTICE

It is interesting to note that Duguit's version of social solidarity appears as a peculiar version of natural law. For, he emphasizes the social development of all on the basis of mutual co-operation and co-existence. Like the naturalists and unlike the positivists Duguit is more concerned with law what ought to be rather than what the law is. To Duguit, law must articulate and carry forward the goal of social solidarity which is the sole criteria for judging law's validity and raison d'etre'. It is in this fashion that he attempts to define justice in terms of fulfillment of social needs and obligations.

Duguit defines justice in terms of fulfilment of social needs and obligations. According to him, law must seek to promote social solidarity so as to attain maximum good of the society as a whole. State regulations should be directed towards achieving the ends of social and economic justice for common good. He considers 'justice' as a social reality its roots being in the society itself and not in the will of the sovereign.[6]

The law, to Duguit must guarantee to all people the fulfillments of their interests furthermore, needs who thusly release their obligations based on fall back on toleration when in doubt. In this manner, the establishment of law is the reality of social solidarity which tries to accomplish greatest great to all. This fundamentally is the hypothesis of equity which ought to be implemented in the enthusiasm of the network. State guideline of social and financial existence of the people for normal great is an occasion of social great and financial equity which law must provide food if co-activity is to be advanced and social clashes and strains are to be limited. The notion of equity is a social reality like the reality of social solidarity. Equity, along these lines, does not rely upon the desire of the sovereign but rather it is a premise of social life and law. His cases on law as a result of public activity made a significant commitment to the advancement of sociological school of statute.

[6] Supra note 1

IMPLICATIONS OF DUGUITTHEORY

Social solidarity is the touchstone of judging the activities of individuals and all organizations. The state is a human organization whose duty is to ensure social solidarity. Duguit was in favour of strong checks on the abuse of state power through the establishment of the strict principles of state responsibility. To quote him: 'the state is sovereign, determination of these limitations are found, according to the individualistic doctrine, in the existence of the natural rights of the individual anterior to the state, which the latter must respect and guarantee, but to which it can add limitations to the extent necessary to protect the rights of all" again, 'either the autonomy of the individual comes to limit the power of the state, to determine the extent of the restrictions which it can bring to bear upon the individual activity of each in which case the state ceases to be sovereign, since there is a will other than its own which comes to determine the limitation upon the manifestation of its own will, and so the sovereignty of the state disappears.[7]

Duguit's disbelief in all-powerful state, combined with his belief in the greatest possible division of labour, leads him to put much stress upon decentralization and group government. The different classes cooperate with each other and defend individuals belonging to them against the excessive claims of other classes as well as against the arbitrary actions of the central power.[8]

Another implication of social solidarity is his rejection of the intervention of the state as the decisive factor in turning a social into a legal norm. the conclusions of Duguit in this connection resemble very much those of the historical and some of the sociological theories. He writes: "but it is not the intervention which gives the character of a juridical norm to the rule; it would be powerless to prove it if the rule becomes a juridical norm when there has penetrated into the consciousness of the mass of individuals imposing a given social group, the notion that the group itself, or those in it who constitute the greatest force, can intervene to repress violation of this rule.

[7] Supra note 1 pp. 610-612

[8] Id.

In other terms, a rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organized."[9]

Another implication of social solidarity is that law is a spontaneous product of individual consciousness, inspired at the same time by social necessity and the sentiment of justice. This and only this can be the norm of the law. That being so, legislation can only be conceived of as a means of expression of the rules of law. The legislator does not create it; he defines it. Legislation imposes itself only in proportion as it is in conformity with this rule. Obedience is not owed to laws as such but only to those laws that give expression to or put into practice a juridical norm. likewise, Duguit does not conceive of justice as a rational, absolute ide, revealed by reason. It is a sentiment belonging to human nature. The activity of a man is always dominated by the double sentiment of his social character and his individual autonomy. That is the sentiment of justice. Every act which attacks it directly, attacks at the same time social solidarity and is contrary to fundamental social norm.[10]

Another implication of social solidarity is the denial by Duguit of any distinction between private and public law. According to him, both must serve the same end of social solidarity. There is no difference in their nature. Such a division will elevate the state above the rest of the society which is not accepted by duguit. The concept of public service unsettles the concept of sovereignty as the foundation of public law. The position of duguit in this respect is very much akin to Kelson as both of them as shown deep distrust of public law and both have deprecated the distinction. There is another way where Duguit seems to follow Kelson in his rejection of the concept of private rights. In his view, the idea of social function "crowds out" the concept of subjective right. The necessity of individual rights disappears with the absence of anyone that can exercise it. As all the governors and governed cooperate for the common end by discharging certain functions, the concept of subjective rights either of the state or of the individual becomes superfluous. According to duguit, "the only right which any man can possess is the right always to do his duty. [11]

[9] Id.
[10]Id.
[11]Id

CRITICISMS AGAINST DUGUITTHEORY

Though Duguit is a positivist and excludes all metaphysical consideration from law, his principle of social solidarity itself is a natural law ideal. His special emphasis is n the valuation of aw on social plan. The facts of social life to which he confines his study, tend to become a theory of justice a practice. Duguit wants to establish an absolute and uncontestable rule of law. Like natural law theories, he establishes the standard of social solidarity to which all positive law must conform. It is nothing but natural law in a different form. It has rightly been said that Duguit pushed natural law out through the door and let it come by the windows.

If a question arises whether a particular act or rule furthers social solidarity or not, the matter has to be decided by judges and that might prove to be dangerous. Judges have their weaknesses and limitations and that may lead to judicial depotism.

The idea of social solidarity can be differently interpreted and used to serve divergent purposes and actually that has been done. Duguit's insistence on the identity of interests of the various groups in society and the minimization of conflicts was used by the fascists to serve an absolutely different end. They used it to glorify the state by giving it a towering personality. They also used it to suppress trade unions. Duguit himself would not have approved those interpretations. The jurist of the Soviet Union has used the theory of Duguit to establish that individuals have no rights. His denial of the distinction between private and public law, his idea of minimizing state interventions were welcomed by the jurist of the Soviet Union.

While defining law, duguit confused it with what law ought to be. His view ws that if law does not further social solidarity, it is not law at all. His definition of law onfused it as was done by the advocates of natural law.[12]

Duguit advocated the minimization of state intervention at a time when the state was becoming all important. He overlooked the fact that the social problems of a modern community were becoming complex and could be tackled only by the state. With the development of society, the sphere of

[12] Supra note 1 pp. 613-14

state activity has expanded tremendously and instead of the state withering away, it has become stronger.

Duguit was inconsistent at many places. On the one hand, he expressed faith in the biological evolution of society. On the other hand, he attacked the idea of collective personality. He denied any personality to state or groups distinct from the individuals who constitute it.

After recognizing the services of Duguit to jurisprudence by emphasizing that law is essentially the product of social form.

Paton point out that solidarity may be filled with any content we desire. It is not an end in itself but a mere means to the purposes which man wishes to achieve. Men may join together to collect the scalps of their neighbors or to preserve the peace of the world. A community of masers and slaves may have greater cohesion than a democracy. While law is based on facts it is created only when men use their wills to choose between one set of facts and another. Rules are created because men mays say that "his is better than that" and because they agree to place their wills at the service of the chosen end. No theory is satisfactory which divorces law from the wills of men.[13]

[13] Id.

CONCLUSION

"Man must so act that he does nothing which may injure the social solidarity upon which he depends and more positively, he must do all which naturally tends to promote social solidarity."

His legal philosophy may be summarized as follows:

- He refutes the doctrine of state sovereignty and considers the state merely as an expression of the will of individuals who govern.
- The unity of state is not inconsistent with the collectivist associations.
- Law is only an embodiment of duties which an individual is supposed to perform as apart and parcel of the social organization for further once of social solidarity.
- He contemplates gradual withering away of the state and its replacement by groups or associations which are engaged in the service of the society.

Duguit contribution:

In spite of various defects in his theory, the contribution and influence of Duguit were great. His approach was comprehensive and sincere. Though his theory ultimately became a theory of natural law or theory of justice, the idea of justice we find in him is in perfectly social terms and was derived from social facts. He shaped a theory of justice out of the doctrines of sociology. Though proceeding from different premises, many later jurists reached similar conclusions as Duguit had reached, particularly about the state, rights and public and private law. Both the national socialists and the soviet jurists adopted many of the principles from the theory of Duguit, but they interpreted it in such a way as to suit their purpose or took only such part of the theory which supported their activities. Though Duguit theory holds good on hardly any point, he is given the credit for his original and comprehensive approach which inspired many jurists to propound new theories.

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GEOGRAPHICAL INDICATIONS
INDIAN PERSPECTIVE AND ECONOMIC OUTLOOK
GEOGRAPHICAL INDICATIONS

Shubhsmita

LITERATURE REVIEW

The topic at hand pertains to the situation of geographical indications, a form of Intellectual Property protection in India. A major portion of research was law based, a look into what the law has prescribed, how the protection can be filed, what are the provisions of protection. Major legal controversies and the structure of legal protection in other countries especially the United States and the European Union, both of which follow a different approach, is examined. Statistical analysis of the GIs registered in India is also done.

RESEARCH QUESTIONS

- What is the structure of Legal protection given to GIs in India?
- What is the Judicial outlook and major controversies?
- What is the approach followed by the United States and European Union in protection of their GIs?
- How can one get their GI registered in India?
- What are the statistics of GIs registered in India?

CHAPTERIZATION

- Introduction
- Economic Significance of GIs
- Nationalization of GIs
- Socio-Economic Advantages of GI
- Judicial and Legal Outlook
- How are GIs given in India
- Foreign Perspective
- Statistical Analysis
- Conclusion

GEOGRAPHICAL INDICATIONS
INDIAN PERSPECTIVE AND ECONOMIC OUTLOOK

I. INTRODUCTION

Geographical Indications is one of the swiftly prospering forms of Intellectual Property. This Concept of IP protection was primarily introduced to help discern the characteristic goods of one geographical area, so as to add onto the significance of these products. The Legal recognition provided by GI's to such goods assists in distinguishing such goods from their unlikely imitation and additionally gives the local community to label their products in a divergent manner. GI registration prevents unsanctioned use of the product, promotes financial gain to the producers by exporting the products and also legal protection in other World Trade Organization countries.[1]

WIPO defines GI's as

> *"A geographical indication (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production."*[2]

GI's confers upon an entity the right to use that particular GI and prevent any other person or party to use that GI if their product doesn't fall in conformity with the prescribed standards. This prevents the dilution of their product and also averts the economic hazards caused by such dilution. The introduction of Geographical Indications of Goods (Registration and Protection) Act, 1999, set out the legal regime for GI's in India. However, the act was enforced in Sept 2003.From its inception GI's are protected for an initial period of 10 years and then there is scope for renewal.

Indian Jurisprudence is not as well developed as that of many European Countries and can benefit immensely if it extracts several fragments of European Model, the European models of protection

[1] Kangabam, Rajiv. (2013). Importance of Geographical Indication for Conservation of Traditional Products. NeBIO. 4. 55-58.

[2] http://www.wipo.int/geo_indications/en/ last accessed on 31st oct. 2018 02:07 A.M.

emphasize quality control, supply chain integrity and enforcement by way of continuous policing of the market.[3] India however follows a separate sui generis structure of GI protection. Adoption of pre-tested EU models is a sure shot way of successful GI legal scenario.[4]

II. ECONOMIC SIGNIFICANCE OF GIS

Development of GIs in the Indian market was fueled by the International Competitiveness, where countries against one another so as to have a more substantial share in the world economy and enjoy the economic advantages as per[5]. Strong economic justification can be provided for GIs warranting economic protection. Economic significance of GIs can be bracketed into major categories Property Rights, enhancement of Individual identity and as tool for development.

- Products produced in a specific geographical region which has unique geo-climatic characteristics and uses traditional skills renders a product liable of legal protection as a GI.[6] Property rights provide for the equity considerations to the owner of that GI that are merited for commercial profit which are appropriated from the imports of these GIs. Also these property rights enable the owner against the misuse of these GIs, they give the owner a right of remedy against the infringer thus avoiding any potential economic loss to the proprietor.
- Enhancement of Individual Identity, this economic importance in terms of the living standards of the populations. Being able to afford such products which have the tag of GI attached to them increases the sense of self of their person.
- Tool of Economic development, GI's through their reputation mechanism provides for a non-breaking source of income to the locals, especially the producers. GI as a tool for development curbs migration, spurs tourism and supports the local units significantly in a financial manner.[7]

[3] Kartik Chawla, *Guest Post: Geographical Indications in India and Beyond* (Aug 10, 2015) https://spicyip.com/2015/08/guest-post-geographical-indications-in-india-and-beyond.html.
[4] *Id.*
[5] Supra note 1.
[6] Jena, Pradyot & Grote, Ulrike. (2010). Changing Institutions to Protect Regional Heritage: A Case for Geographical Indications in the Indian Agrifood Sector. Development Policy Review. 28. 217-236.
[7] *Id.*

III. NATIONALIZATION OF GIs

The purpose at the inception of GI legislation was to empower local communities with the best utilization of their home grown product. However, the present scenario portrays a different picture where the state owns more than 57% of the Registered GIs. This Nationalization of GIs was primarily powered by the controversy of Basmati and Darjeeling. The following is an odd list of GIs filed by governmental bodies[8]

- Basmati by Agricultural & Processed Food Products Export Development Authority (APEDA)
- Kolhapuri Chappals by Central Leather Research Institute Chennai
- 'Firozabad Glass', Kannauj Perfume, Kanpur Saddlery, Moradabad Metal Craft, Varanasi Glass Beads, Khurja Pottery, Saharanpur Wood Craft by Export Commisioner of Uttar Pradesh Government.
- 'Central Travancore Jaggery' by Kerala Agricultural University
- Gir Kesar Mango by Junagadh University in Gujarat
- Bhalia Wheat by Anand Agricultural University
- Wayanad Jeerakasala Rice by Kerala Agricultural University and the Wayanad Jilla Sugandha Nellulpadaka Karshaka Samithi
- Tangaliya Shawl by Tangaliya Hastkala Association, the National Institute of Fashion Technology (NIFT) and the Ministry of Textiles.
- Sankheda Furniture (Gujarat), Agates of Cambay (Gujarat), Datia and Tikamgarh Bell Metal Ware (Madhya Pradesh), Kutch Embroidery (Gujarat) by Development Commisioner, Ministry of Textiles.

IV. SOCIO - ECONOMIC ADVANTAGES AND GIS

GIs not only serve as a medium of providing a sense of identity to the locals which provides for an economic boost but they also aid in strengthening cultural ties and maintain the treasures product.[9]

[8] Supra note 3.
[9] Felix Addor and Alexandra Grazioli, 2006, Federal Institute of Intellectual Property available at http://www.ige.ch/e/jurinfo/j110110.shtm.

They provide for a strong social framework that helps in strengthening the ties of the community. The major role of GIs in the socio-economic backdrop is[10]

- Competitive edge over others
- Added valuation of the product
- Recurring Opportunities of export
- Solidifying brand value

A product when associated with a particular place gets added commercial value thus garnering the status of Intellectual Property Right.[11] The indicative power being associated with a particular area gives the GIs the power which attributes it to being capable of protection in the legal scenario.[12]

➢ CHALLENGES POSED BY GIs

One of the major challenges posed by GIs is that of Exclusion. Many stakeholders in this whole framework will cede the realization of various benefits from these GIs, this will usher the system into a tricky management of fair-share distribution of benefits occurring from GIs, and this will prevent the prospects of exploiting the potential benefits embedded in GIs.[13]

V. JUDICIAL AND LEGAL OUTLOOK

India being a member of the WTO countries is a signatory to TRIPS Agreement. This Agreement lays down the basic framework of IP Jurisprudence, which are then subjected to the treatment of the local body. Before the emergence of the Indian Legislation there were three alternative ways in which the then existing legal systems regulated GIs. (a) under the consumer protection laws; (b) through passing off action in courts; and (c) through certification trademarks, which was the most preferred way of protection.[14] The Indian Legislation has been based upon the guidelines setup by TRIPS, other than that it was owed to an institutional commitment. India then introduced its Geographical Indications of Goods (Registration and Protection) Act, 1999 and enforced it in 2003. Geographical Indications since then have been governed by the same. The concept of identifying

[10] http://www.wipo.int/geo_indications/en/ last accessed on 31st oct. 2018 02:07 A.M.
[11] Parwar, Amikar, Importance of Geographical Indication in the Growing IPR World (August 5, 2009).
[12] *Id.*
[13] Das, Kasturi. (2010). Prospects and Challenges of Geographical Indications in India. The Journal of World Intellectual Property. 13. 148 - 201.

[14] Das, Kasturi. Socio-Economic Implications of Protecting Geographical Indications in India, August 2009, Centre for WTO Studies, 6.

GIs and getting them protected is still a new field here and has a huge scope of development. However, the Indian legal setup was shocked into action owing to the Basmati controversy.

- **BASMATI CONTROVERSY**

Basmati is respected as one of the most distinguished variety of Rice. It is a soft textured, lonmg grain, aromatic rice. This makes Basmati a premium product in the international market and the uniqueness needs to be preserved and protected.[15] The income brought in by Basmati forms a substantial part of the Indian Exports. The conflict started when AEPDA found out that Rice Tec a US based body has applied for registration of Basmati trademark. This was the beginning of a long legal dispute. During the course of the dispute it was contended by Rice Tec that Basmati was a generic name and cannot be safe guarded as a GI. Additionally the company was using various other linguistic versions of Basmati in association with their products. This posed an imminent danger to the market value of Basmati, and robs India of its one of the many major Income source.[16] This incident spurred the action of Basmati being registered as a GI all around the world, and one of the most defining moments of GI Jurisprudence in India.

- **DARJEELING CONFLICT**

Darjeeling Tea is another distinguished Geographical Indication, it is one of the most aromatic and different flavors. This has lead to the gain of Darjeeling Tea as an international brand which brings in huge amounts of business and employment.[17] The economic issue than arose when thousands of tons counterfeit tea flooded the international market especially from Sri lanka, Kenya and Nepal. This adversely affected the economy of India in multiple folds. This instigated the Tea Board of India into actively seeking IP protection of the product. Initially the protection was obtained under the Trademarks Act, 1958, later with the introduction of Geographical Indication of Goods Act, 1999 the protection was gained under it.[18]

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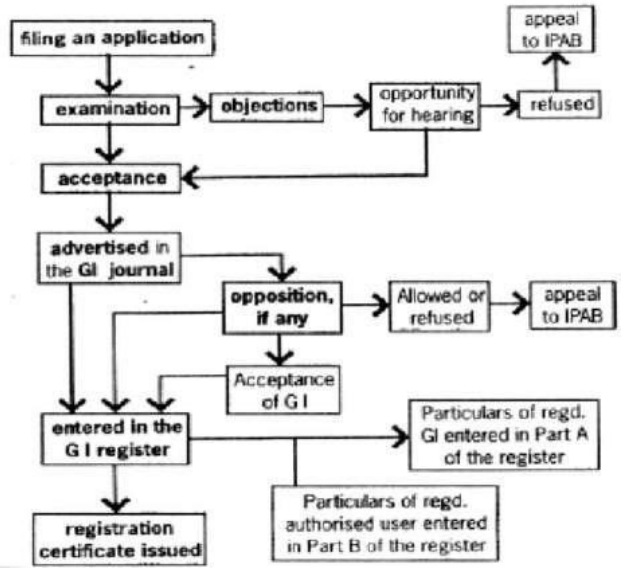
[15] Chandar M. Lal and Gayathri Jambunathan, India and Pakistan Geographical Indications the Basmati issue. Submitted to the International Trademarks Association (INTA) Annual Meeting, Seattle May 1999, http://www.iprlawindia.org.doc.

[16] https://spicyip.com/2013/03/auditing-worldw*Id*e-litigation-involving.html

[17] https://spicyip.com/2012/05/gi-registry-dragging-its-feet-on.html

[18] Niranja Rao, "Geographical Indications in Indian Context: A Case Study of Darjeeling Tea, Sept.2003, working paper No.110, Indian Council for Research on International Economic Relations, p.13.

VI. HOW GIs ARE GIVEN IN INDIA



Source: GI Registry, DIPP

1. The application is made to Registrar of Geographical Indications.
2. Application for Registration can be made by
    - any associate of persons;
    - producers; or
    - any organization or authority established by or under any law representing the interest of the producers of the concerned goods.
3. Application can be constructed to the GI Office in whose territorial limit the related GI is situated.
4. The Application must necessarily must hold[19]
    - Duly filled application Form A
    - 3 certified copies of Map of Geographical area of production
    - List of members of the association of producers
    - Two additional representations as required under rule 27.
    - An Affidavit, as required under rule 32(6)(a). No affidavit is required to be submitted if the applicant is an association of producers of goods

[19] Notification no. 03.08, MGIPP, Office of the controller general of Patents, Designs & Trademarks & Registrar of Geographical Indications.

- Registration certificate from the competent authority along with the bye-laws / articles of association / memorandum of association clearly describing the objectives of association.
- In case of Convention Applications, a Certificate shall accompany the application.

5. The Application if accepted[20] after examination[21] is then advertised[22] by the registrar.
6. If any opposition[23] is not filed, the registrar deems the application registered[24]. However, if there is opposition, the due process takes place and then the registrar hears the case[25] and decides the case accordingly.

VII. FOREIGN PRESPECTIVE

➢ UNITED STATES AND GI TREATMENT

In the absence of a sui generis system, the US protects GI in the form of trademark, collective marks.[26] US doesn't go for protection of generic terms under the ambit of GIs. However, a geographic indication when is widely accepted as generic, any producer is free to use those terms without any legal implication.[27] The Lahman Act, 1946 lays down provision that targets for the stability between protection and access, i.e. it enables the consumers to separate certain marks with certain producers and producers able to bracket their goods differently via geographic terms.[28] The protection of GIs under the US IPR regime can be done under the purview of trademark law. However, these GIs cannot be registered as trademarks if they are geographically misdescriptive of the origin of goods and services as this would lead to the consumers being deceived and a wrong belief that the goods have originated from an identified place and this belief would settle.[29] Other than that GIs can be registered as trademarks. The US legal system provides for a provision of various producers being allowed to use the GIs as long as they clarify the originating place of that

[20] *Id.* at Notification no. 04.05..
[21] *Id*. at Notification no. 04.03.
[22] *Id*. at Notification no. 04.06.
[23] *Id*. at Notification no. 06.01.
[24] *Id*. at Notification no. 07.01.
[25] *Id*. at Notification no. 06.09.
[26] Bruce A. Babcock and Roxanne Clemens, 'Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products MATRIC Briefing Paper 04- MBP7, May 2004.
[27] United States Patent and Trademark Office, 'Geographical Indication Protection in the United States' http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf.
[28] Joseph C. Daniels, *The Branding of America: The Rise of Geographic Trademarks and the Need for a Strong Fair Use Defense*, 94 IOWA LAW REVIEW, 1703-1742 (2009).
[29] Overview of Trademark Law, available at http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm

good, so that it is easily understandable by the consumers. This has ushered the use of various terms being used as semi-generic.[30]

- **EUROPEAN UNION AND GI TREATMENT**

The approach of protection of GIs in US is seen to be somewhat lenient and treats GIs as another form of trademark, this is strongly in contrast to the regime followed by EU. A strong apparatus has been established via sui generis form of GI protection. GIs are better supported in EU against the international scenario various simultaneously many violations are taking place. European Union takes an active stake in multiple bilateral and multilateral agreements, which serve in protection of GIs. EU seeks to provide a TRIPS plus protection to its GIs.

To be able to avail GI protection in EU a product must have atleast one of the stages of production taken place in the place whose name it bears, additionally there must be a link between the product and geographic location it can be in the form of a certain quality, reputation or in a characteristic feature which is easily attributable to that particular geographic location.[31] Foreign GIs must be necessarily be protected in their home turf only then it is eligible for protection in EU. EU has yield a structure of protection of PGIs and PDOs which provide protection for agricultural and food related stuff, a new criteria has been instituted for protection of wines and spirits.[32] The European Commision contents that safe guarding of GIs in essential for shielding local culture and their diversity. EU relies of the idea that at stake is of vital importance which is an array of indications such as Swiss chocolate, bottle shapes, and images of the Eiffel, champagne, camembert, bud, sherry.

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[30] Carsten Fink and Keith Maskus, *The Debate on Geographical Indications in the WTO,* at http://www.ppl.nl/bibliographies/wto/files/6531.pdf.

[31] 'Protection Of Geographical Indications, *Designations Of Origin And Certificates Of Specific Character For Agricultural Products And Foodstuffs*', WORKING DOCUMENT OF THE COMMISSION SERVICES, GUIDE TO COMMUNITY REGULATIONS, 2ND EDITION, August 2004 at http://ec.europa.eu/agriculture/publi/gi/broch_en.pdf

[32] 'European legislation on protection of Geographical Indications: Overview of the EU Member States' Legal Framework for Protection of Geographical Indications' Compiled by Irina Kireeva at http://www.ipr2.org/storage/European_legislation_on_protection_of_GIs1011.pdf

VIII. GIs REGISTERED IN INDIA AND STATISTICAL ANALYSIS

In the data table represented below the GIs registered in India are arranged in systematic form of data representation, where the distribution is made according to the sector in which the GI is registered and the state which has registered that particular GI. Later in the paper the data is analyzed via the help of various graphs and smaller data tables.

STATE	AGRICULTURAL	HANDICRAFT	MANUFACTURED	FOOD STUFF	NATURAL GOODS	
WEST BENGAL	6	11		4		
KERELA	13	15				
TELANGNA		13		1		
TAMIL NADU	8	23	2	2		
MADHYAPRADESH		8		2		
MAHARASHTRA	25	5	1			
ORRISA	2	13	1	1		
KARNATAKA	15	23	3	1		
RAJASTHAN		12		1	1	
HIMACHAL	2	5	1			
ANDHRA PRADESH	1	14		1		
BIHAR	4	8		1		
ASSAM	6	2				
UTTARAKHAND	1					
UTTAR PRADESH	3	20	2		1	
CHHATTISGARH	1	5				
GUJARAT	2	13				
JAMMU KASHMIR		7				
NAGALAND	2	1				
GOA	1		1			
PUDUCHERRY		2				
MANIPUR	2	3				
ARUNACHAL	1	1				
MEGHALAYA	2					
SIKKIM	1					
MIZORAM	1	5				
TRIPURA	1					
INDIA CO-OWNED	8	3				
PERU			1			
ITALY			3	2		
FRANCE			1			
UNITED KINGDOM			1			
THAILAND		1				
MEXICO			1			
IRELAND			1			
USA			1			
PORTUGAL			2			
TOTAL	108	213	22	16	2	361

Source : Tabular Distribution of the Registered Geographical Indication taken from IP India Website

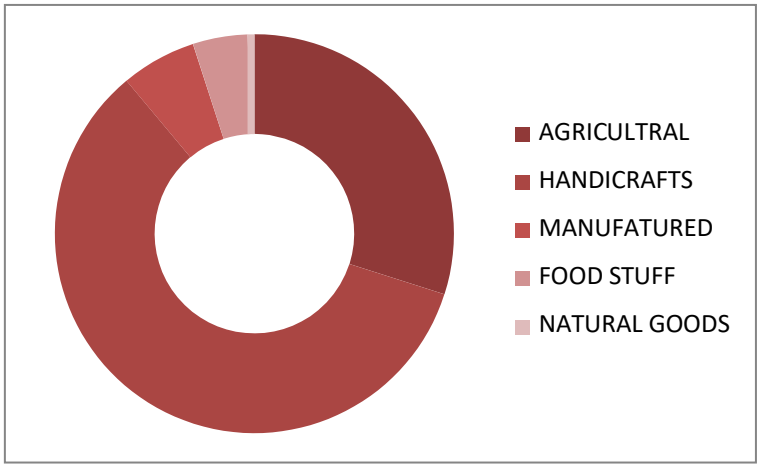

Figure 1 : Sector wise Distribution of GI's

- **SECTORS WISE SHARE GIs**

The Handicraft sector of GI has seen most registrations at 213 out of 361. This followed by Agriculture at 108, manufacturing at 22, Food sector at 16 and Natural goods at 2. Small scale industries being the primary occupation scheme adopted in India widely provides for the provision of Handicrafts being most protected commodity. And agriculture which assists in subsisting most of the household income in rural areas has also seen protection under the IP regime. However, the most shocking inference can be drawn that Natural Goods have seen only two registrations. Even though India being a very naturally prosperous country and has well placed natural resources all through its terrain. Another thing that can be asserted is that various products that have a strong reputation in the international scenario aren't protected under GI. For example 'Petha' from Agra or 'kanpuria' Bangles have no protection under the GI regime.

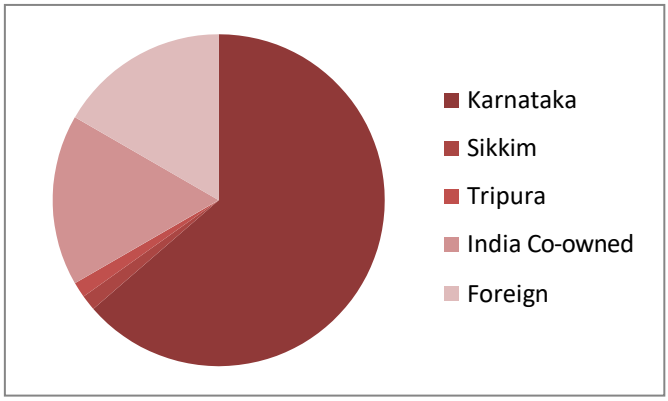

Figure 2: Share hold by different Entities

- **SHARE HELD BY DIFFERENT ENTITIES**

The data represented in the above graphs depict the entities and their share of ownership of Registered GI's. Karnataka holds the highest number of GI's especially in the sector of Handicrafts at 42 and contrary to it Sikkim and Tripura even though geographically well placed depict only ownership of 1 GI each. This disparity can be very well attributed to the lack of IP awareness in certain Regions. Further, the Indian co-own some GI's at a meager number of I, whereas there are multiple objects which are made in contribution of more than one state. Similarly, many such natural goods are there which are found in more than one state. This minimal number can either be prescribed to the lack of initiative or the fact that co-ownership may also pose problems at a later stage when the semantics of such sharing are in debate. Moreover, it is seen that only 11 Foreign GI's are registerd in India illustrating the lower status held by IP protection in the global scenario.

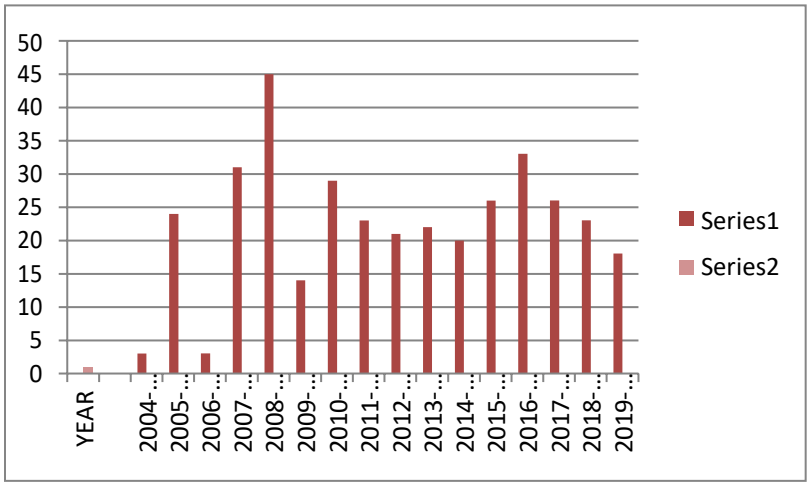

Figure 3 : Annual Distribution of GI's

- **ANNUAL DISTRIBUTION OF GI DISTRIBUTION**

The above chart sets out the high variation in the annual distribution of the Registered GI's. The highest number was registered in 2008-09 at 44 and then forward there have been a minimum difference of one third on the least. Further, the recent years show lower level of Registration, this decreasing level narrate the sad state of the IP Protection and sever lack of knowledge of such protection and their advantages.

IX. CONCLUSION

The Indian legal structure provides protection in the embodiment of Geographical Indications in the ambit of Intellectual Property, to products which have gain distinctiveness owed to the geographical location of these products. However, the Indian jurisprudence has yet not gained momentum which is at par with other countries. India in all of the 15 years since the Geographical Indication of Goods Act, 1999 was introduced India has witnessed merely 361 registrations. This can be attributed to the lack of education and awareness the Indians suffer from. India even though being a naturally rich country and having multitudes of industries and human resource doesn't lack geographical indications, although it does lack in getting them registered. The precarious situation of the Intellectual Property Rights is clearly visible via the statistical data given above. India needs to pick up the pace so it can stand at par with other International regimes, which have already well developed fabric of IP Protection. This will also minimize the risk India runs of losing the IP protection on things which are well deserved. The major issue that was identifiable in the course of research in this topic was the lack of recognition this form of protection is given. This problem can be ascribed to low education levels and the interest of people in knowing the law, even though it is advantageous for them. Another issue that caught attention was that GIs are not given to individual persons rather to associations. Taking initiative and getting GIs registered for the benefit of a group of people may seem to intervene with the people's approach of 'Why me?' which is one of the biggest hindrance on the pathway of development. GIs are one of the most undiscovered instruments of development and the economic advantages they offer aren't recognized and appreciated, if knowledge regarding these GIs is put to good use it will result in rapid economic

development and a rise in IP protected Assets which will put India at an advantage over countries it trades with.

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STATUTE REFERRED

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IDENTITY THEFT IN CYBER SPACE: WHITE COLLAR CRIME

Vaishali Singh

INTRODUCTION

Cyber Crime attracts all such crimes that are internet borne and there is no explicit definition for it. Identity Theft is one the major frauds committed in the Cyber Space and now a matter of global concern. Going by the INDIA Risk Survey Report of 2014, Ransomware and Identity Theft have increased to almost 11% along with an increase of 10% in the Phishing attacks alone.[1] With a very low conviction rate India is counted among the 5 top countries in the race of Cybercrime.[2] A few common examples of Cyber Theft or crime include Identity Theft, Password Theft, Internet time theft, etc. Identity Theft can be understood as the crime of the developing world in Cyber Space which is mostly used to commit fraud. The evolution of the Internet not only led to the creation of an atmosphere to nurture the growth of business ideas, knowledge, etc. While the lacunae gave birth to crime, frauds which is now a challenge at a universal level. A few common examples of Cyber Crime include Identity Theft, Password Theft, Internet time theft, etc. Identity Theft can be understood as the crime of the developing world in Cyber Space which is mostly used to commit fraud. How is Identity Theft a threat? How can we deal with it? What is the major concern to be addressed? These are some of the questions and concerns that need a concrete solution.[3]

[1] India Risk Survey, 2014, (1 ed. 2014), http://www.ficci.com/Sedocument/20276/report-India-Risk-Survey- 2014.pdf, last seen on September 20, 2019.
[2] Rajlakshmi Wagh, Comparative Analysis of Trends of Cyber Crime Laws in USA and India, International Journal of Advanced Computer Science and Information Technology pp. 42-50 (2013), Sep.23,2019, 1:10pm) Sephttp://technical.cloudjournals.com/index.php/IJACSIT/article/view/Tech-160.
[3] NS Nappinai, Cyber Laws Part II: A guide for victims of Cyber Crime, The Economic Times (2017)(Sep.22,2019,1:45pm) https://economictimes.indiatimes.com/tech/internet/do-you-know-how-to-report-a-cyber-crime-heres-a-guide-for-victims/articleshow/61464084.cms?from=mdr,

IDENTITY THEFT: DEFINITION

Identity Theft is a fraud in which the accused derives the sensitive personally identifiable information primarily for economic benefits.[4] It is a class of data theft. In this, the personal information is used to take advantage of the name and details of the victim. Stealing details to commit bank frauds using cyberspace and sending messages on mobile phones, emails, calls to extract sensitive pieces of information are the elements used in it to gain the trust of the target making it the most common type of crime under Identity Theft.

TYPES OF IDENTITY THEFT:

1. Criminal Identity Theft

This occurs when a person impersonates himself with the help of stolen sensitive information. Resulting in the filing of criminal records against the person who is now a victim and is unaware of the crime so committed and would learn only when the court summons him.

2. Financial Identity Theft

It refers to the crime committed by criminals getting a hold over the bank accounts of the victim using his personal information. Financial Identity Theft is resultant to Identity Theft. Here, the aim is to get the credit card details of the victim or take financial advantage by withdrawing the amount from the bank account of the victim so targeted. It includes taking a loan, writing cheques, transferring money or using services or goods in the name of a targeted person whose details have been obtained fraudulently.

3. Synthetic Identity Theft

Synthetic Identity Theft is the most common Identity Theft and it refers to a crime in which original identities are partly or completely forged wherein a combination of fake credentials and the legitimate

[4] Berni Dwan, Identity theft, 2004 Computer Fraud & Security 14-17 (2004)

sensitive personal information is used to create a fabricated document. This fabrication aims to get an easy application for duplicate licenses, apply for loans, credit cards by the criminals.

4. Identity cloning and concealment

It committed when a person uses the personal information of another to conceal his original identity. Mostly used to apply for a visa by using such falsified information by concealing identity. Immigrants use this widely. Identity cloning is used by terrorists to impersonate someone else to live his life instead of just financial gains.

5. Medical Identity Theft

When the information of a targeted person is used by the criminals to take medical benefits such as prescription drugs, taking appointments of a doctor, claim insurance, etc. the Medical Identity Theft is said to have been committed.

6. Child Identity Theft

When the identity of the child is used by the criminals for illegal gains, then the theft so committed is termed as the Child Identity Theft.[5]

[5] Securitas, Identity Theft is the largest contributor to fraud in India (2015)(Sep.22, 2019, 2:20pm) https://www.securitas.in/globalassets/india/files/about-us/news---related-documents/identity-theft-is-the-largest-contributor-to-fraud-in-india.pdf,

EXAMPLE OF IDENTITY THEFT:

Stolen Cheques- One must keep an eye on his/her bank accounts if anything suspicious is found the bank must be informed on priority to protect oneself from becoming a victim of bank fraud.
ATM Cards- Details of ATM cards be used by criminals.
Passports- The Identification office must be informed to be watchful if somebody is trying to apply for a visa falsely.
Driver License Number can also be misused

METHODS OF IDENTITY THEFT:

There are various methods of Identity Theft, some of them are as discussed below-

Phishing: In this, the deceptive emails are used to gather sensitive information about the recipients. Here trust is built upon them showing that the emails are sent through some authentic and legitimate source.

Vishing: Represents the combination of "Voice" and "Phishing", here the Voice Over Internet Protocol is used to derive pieces of information.

Smishing: In this, the cybercriminals derive the personal data of the victims through text messages. In many of the cases, it has been observed that social engineering techniques are used wherein the targeted ones are directed to link or telephone calls requesting immediate action in order to derive the sensitive information from them.

Pharming: It is the scamming practice wherein codes are installed on the server or the personal computer of the user without their consent, impersonating fraud, data grabbing websites as the authentic and legitimate ones.

Malicious software: It is a program installed on the computer designed, only to harm the computer of the targeted person. Often installed at the time of downloading free movies or games.[6]

Unsecured websites: It is necessary to make sure that the website being used is the secured one. For instance, website used is "https" and not "http".

Weak passwords: Strong passwords hold the key to safety and digital security. It is always advisable to use combination of alphabets, numbers and special characters. Sharing password with others is a big no.

Hacking: Refers to getting authorized access to someone's computer after which the cybercriminals control the activities of the targeted person.

[6] S.S.Rana &Co, Cyber Theft- A serious concern in India (2019), (Sep. 22,2019 3:00pm) https://www.lexology.com/library/detail.aspx?g=4af6c044-dc77-4b1a-9288-986395eff8d1

WHETHER IDENTITY THEFT IS THEFT WITHIN THE MEANING OF IPC, 1860[7]

The provisions covering Theft[8] under Indian Penal code,1860 does not govern Identity Theft. Reason being it deals only with the movable property which can be severed from the earth and possess tangible characteristics.[9]

Indian Penal Code is not umbrella legislation. It contains similar provisions to misrepresentations, fabrication and impersonation, which before administered such wrongdoings as for false archives, were altered by the Information Technology Act, 2000 to incorporate electronic records. Forgery and making false documents[10] and its punishment[11], falsification for motivation behind tricking[12], phony for reason for hurting notoriety[13], utilizing as authentic a produced record[14] and ownership of a report known to be manufactured and aiming to utilize it as certified[15] can be read with the provisions of Information Technology Act,2000. On the Changes to the Information Technology Act, 2000, the Master Board of trustees had prescribed certain revisions in the IPC to incorporate Section 417. A benefiting three years of discipline for tricking utilizing any one of a kind distinguishing proof component of another person. Till now the proposals have not been added to the Indian Penal Code, doing so would give a through look of law on the frauds committed and to be committed.

IDENTITY THEFT: PUNISHMENTS

Under Section 66 of the IT Act, 2000, whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.

Provisions in the Information Technology Act, 2000

[7] Indian Penal Code, 1860
[8] Indian Penal Code, 1860 S.378
[9] Indian Penal Code, 1860 S.22
[10] Indian Penal Code, 1860 S.464
[11] Indian Penal Code, 1860 S.465
[12] Indian Penal Code, 1860 S.468
[13] Indian Penal Code, 1860 S.469
[14] Indian Penal Code, 1860 S.471
[15] Indian Penal Code, 1860 S.474

The main law governing cyber-crime in India is the Information Technology Act, 2000. Some important sections dealing such type of Theft are:

- Section 43 of the Act imposes civil liability with compensation not exceeding one Crore for unauthorized access to a computer system or network[16] and for providing assistance to facilitate such illegal act.[17]
- Section 66 of the Act is all about hacking wherein some destruction, deletion, alteration or reduction in the value of computer resource attracted penal sanctions.[18] The term Identity Theft itself was used for the first time in the amended version of the IT Act in 2008. Section 66 criminalizes any fraudulent and dishonest conduct with respect to Section 43 of the same Act. Phishing is covered under Section 66 (A). Section 66 B pertains to dishonestly receiving any stolen computer resources. Section 66 C specifically provides for punishment for Identity Theft. Section 66 D punishes cheating by impersonation using computer resources.
- Section 67 A and 67 B of the Act provides protection to Women and Children.
- In exceptional cases only such data can be revealed to authorized agency named by the State or Central government for surveillance, monitoring or interception, under Section 69 of the IT Act. The ambit of sensitive personal data is defined by the IT Rules, 2011 to mean password, financial information, physical, physiological and mental health condition, sexual orientation, medical records and history, and biometric information. Hence, depending upon the method using which Identity Theft has been committed, the laws can be applied.

[16] Information Technology Act, 2000 S.43(a)
[17] Information Technology Act, 2000 S.43(g)
[18] Information Technology Act, 2000 S.66(D)

IDENTITY THEFT: PREVENTIONS

- Look for the origin
- Change your passwords regularly
- Contact your institutions
- Never share personal information
- Maintain distance from shady websites
- Check computer for a virus

There are some warning signs or indicators that people must know and should always keep in mind to prevent themselves from Identity Theft:

- Unexpected verification call from the bank
- A warning or notice from the bank
- Small debits in the bank statement
- Unfamiliar purchases in the card statement
- Receiving any receipt or bill for a service you don't have availed.

CASES ON IDENTITY THEFT

1. **Bazee.com Case**

In December 2004, the CEO of bazee.com was arrested because his website sells a CD with questionable content. The CD was also available in the markets of Delhi. This case leads to a question about who is liable here, the Internet Service Provider or the Content Provider. The CEO was later released on bail to prove that he was the Service Provider, not the Content Provider. This case raised a lot of questions on handling cybercrime cases.[19]

2. **The Bank NSP Case**

[19] (2005) 3 CompLJ 364 Del

This is one of the leading cybercrime cases where a management trainee of a bank broke up with the girl he was about to get married. Later, the girl created a fraudulent email id and started sending emails to the boy's foreign clients from the bank's computer. This resulted in the loss of the clients of the company. The company took the bank to court and it was held liable for sending emails through the bank's server.

CYBER POLICING: INDIA

Cyber Crime in India is one of the biggest threats and increase can be very well observed after demonetization as this resulted in more number of online transactions. The massive increase led to the establishment of the Cyber and Information Security Division (C&IS), deals with the matters related to Cyber Security, Cyber Crime, National Information Security Policy & Guidelines and implementation of NISPG and NATGRID, etc.[20]

Crime and Criminal Tracking Network and Systems (CCTNS): It was in the year 2009 that CCTNS was established as a specialized department under C&IS meant to create a nationwide networking infrastructure for an IT-enabled criminal tracking and crime detection system. 1500 Police stations have been included. Cyber Police Station includes a trained officer and equipment to track and analyze digital crimes.

PREDICTIVE POLICING

It uses the concepts of data mining, statistical modeling, and machine learning on datasets related to crimes to get to know about likely locations for police intervention. In 2013, *Jharkhand Police* in collaboration with the National Informatics Centre started to develop a data mining software to study criminal attempts by scanning online records.[21]

[20] Jayadev Parida, Policing Cyber Crimes: Need for National Cyber Crime Coordination Centre (2016), Digital Frontier, (Sep.23,2019, 5:00pm) https://www.orfonline.org/expert-speak/policing-cyber-crimes-need-for-national-cyber-crime-coordination-centre/

[21] National Informatics Centre, (Sep24, 7:00pm)https://www.nic.in/

The Delhi Police along with the Indian Space Research Organisation (ISRO) is making efforts to develop a predictive tool in the name of CMAPS[22] or Crime Mapping, Analytics and Predictive System. With the help of CMAPS, Delhi Police has reduced its analysis time from 15 days to 3 minutes.

On the similar lines, The Hyderabad City Police is trying to come up with a database known as 'Integrated People Information Hub' which will provide "360-degree view" of the people of the state including their names, family details, addresses, and other important document information including passports, aadhar card, and driver's licenses.[23]

Anyone can file a complaint through the online crime reporting system known as Digital Police controlled by the Ministry of Home Affairs, Government of India. This is a SMART police initiative that provides a platform for citizens to file complaints online.

HOW TO PROTECT BANKS FROM IDENTITY THEFT

- Multi-Factor Authentication protecting the valuable information from fraud
- Monitor Transactions setting limits for suspicious transactions
- Controlling Transactions with multi party approvers
- Awareness creation and Campaign
- Encouraging Digital Banking

How to Prevent Frauds in Social Media

1. Use every security settings provided by media platforms.
2. A big no to sharing login credentials with anyone.
3. Be aware of information sharing on platform of social media.
4. Never reuse your passwords.
5. Always add known people.

[22] From the Commissioner's Desk, (Sep24, 8:00pm) http://delhipolice.nic.in/CP%20Forword2015.pdf
[23] Srinivas Kodali, Hyderabad's 'Smart Policing' Is Simply Mass Surveillance in Disguise, (Sep24,2019 8:42pm) https://thewire.in/government/hyderabad-smart-policing-surveillance,

STEPS TO FILE CYBER CRIME IN INDIA

Where to file a Cyber Crime complaint? What are the steps to register a Cyber Crime FIR? These are some of the obvious questions that come up in mind of a person when one has to deal with it either for himself or for any person known to him/her.

To get a grip on the dispiriting situation of cybercrime, one must follow these simple steps to file Cyber Crime complaints to avoid further damage/loss without delay.

a) With the Cyber Crime Cell

- Register a written complaint with the Cyber Crime Cell of the city.
- The written complaint needs to be addressed to the Head of the Cyber Crime Cell of the city where the complaint is being filed along with the name**,** contact details, and address of the victim.

b) With the Local Police Station

- A Cyber Crime First Information Report (FIR) can be lodged at the local police station in case he/she does not have access to any of the cyber cells in India. As certain Cyber Crime offenses come under the purview of Indian Penal Code, 1860. Most of these offenses are classified as cognizable offenses the one in which a warrant is not required for an arrest or investigation. In this case, a police officer is bound to record *a* Zero FIR from the complainant. He must then forward it to the police station under the jurisdiction of the place where the offense was committed.
- In case the complaint is not accepted there, he/she can approach the Commissioner or the Judicial Magistrate of that city**.**

c) Registering of Cyber Crime complaint online[24]

- The Ministry of Home Affairs has launched a centralized online Cyber Crime registration portal where such complaints can be online registered without paying a visit to the police station.
- The Cyber Crime Cell of two cities Delhi and Indore have a running online portal for educating the public on Cyber Crimes and are also accepting online Cyber Crime complaints

[24] Ministry of Home Affairs, National Cyber Crime Reporting Portal,(Oct9, 2019,7:58pm) https://cybercrime.gov.in/

making it convenient for the complainants. The links to file a Cyber Crime complaint in India through an online portal are:

1) http://www.cybercelldelhi.in/

2) http://www.indorepolice.org/cyber-crime.php

CONCLUSION

Identity Theft can be seen as the fastest growing White-Collar Crime. Current technological evolution has enhanced the count of crimes related to cyberspace. Although this trend is not new, the Internet has increased its scope and paved innovative ways of committing it, as a result, new variants have emerged leading to the birth of cyberspace Identity Theft.

In the cybercrime, there is no widely accepted definition of Identity Theft in cyberspace. A clear crisp definition would play a crucial role in combating Identity Theft helping in the investigation, prosecuting and punishing the wrongdoers.

Indian Penal Code deals with issues like Cheating by impersonation but has no catch to the discussed issue and does not addresses it directly. A widely accepted definition is equally needed to come up with an unambiguous law. Certain laws have been provided to protect 'sensitive personal data' using 'data protection and privacy policy' to beat Cybercrime. The present law governing Cyber Crime needs to strengthen along with basic cyber hygiene and treat the lacunae underlying to have the cyberspace even more safe and healthy. The government is working to protect the public interest at large by helping them against any infelicity online.

IOT AND LAW: COLLATION OF LEGAL ISSUES AND IMPLICATIONS

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ABSTRACT

Rapid technological change and development is slowly leading us to an era of interconnected devices capable of storing and transferring titanic amounts of data, so as to create an interactive and interpolated digital environment. The advent of IoT devices has resulted in gargantuan growth of the amount of consumer data organizations gather, use, analyze, and store Approximately 50 Billion devices are deemed to be connected by the end of 2020. It is imperative to scrutinize the interaction of such a concept with existing legal principles and legislations. This research paper seeks to understand the limitations of protective legal and regulatory frameworks, in dealing with IoT. It traces the need for a legal evolution in the understanding of IoT enabled devices by preparing a collation of all the legal issues and implications pertinent to the functioning of IoT devices and it's various applications. It also culls out any discrepancies present in the application of existing legal principles to it. The research is intended to examine these issues from an international perspective; however certain sections also address the issues present in the Indian context.

KEYWORDS: Internet of Things; Data Privacy; Data Protection; Cybersecurity; Data Ownership; Dataflow; Europe, General Data Protection Regulations (GDPR), Data Breaches, Patents, Standard Essential Patents, Consumer Protection, Network Nodes, Interconnectivity, Interoperability, Interpolation.

INTRODUCTION

"The practice of law requires both continuity and growth - a deep understanding of legal principles born of reason, tradition, and experience and tested by time, but also a mind alert to present needs and the future consequences of public and private legal decisions."

-Diane S. Sykes[3]

The body of legal principles governing various statutes around the world need to be dynamic so as to adapt to the changing times. With the advent of disruptive technology and a robust cyber space, it has become imperative to scrutinize the applicability of these age old principles. The sustainability of legal policies and principles in this regard would depend on their ability to mitigate the potential risks associated with Innovation Culture. The development of legal principles regarding disruptive technology advancement is a story of abutting scattered transformations until an incumbent power unifies the hashed farrago into a predisposed assortment of unified code or regulations. Separate legislations must be drafted to address these issues, or amendments must be bought about in existing legislations to iron out any discrepancies present in the interaction of existing legal principles and the usage of such technology. This can only be done when the ethical and legal ramifications of using such technology are identified.

IoT is the latest addition to technical jargons. The Internet of things refers to a type of network to connect anything with the Internet based on stipulated protocols through information sensing equipment, to conduct information exchange and communications in order to achieve smart recognitions, positioning, tracing, monitoring, and administration.[4] This emerging ubiquity of network-enabled computers raises a host of wide spread implications pertinent to Cyber Security, Data Protection and Privacy, Intellectual Property Rights, Competition Law, Consumer Protection and Liability. It is not a single technology per se, but is rather a new era of internet technology which advocates the interconnectivity of various systems to create a vigorous digital environment. The paper will first establish baseline knowledge on what IoT is, and will then explore the legal issues arising from its

[3] A judge of the U.S. Court of Appeals, spoke at the Marquette Law School's Hooding Ceremony on May 19, 2012, in the Milwaukee Theatre.

[4] Keyur K Patel & Sunil M Patel, *Internet of Things-IOT: Definition, Characteristics, Architecture, Enabling Technologies, Application & Future Challenges*, 6 International Journal of Engineering Science and Computing 6122 (2016).

realisation. The paper will also examine any piece of legislation exclusively dealing with IoT technology.

WHAT IS IOT?

The Internet of Things (IoT) is defined as a system of interrelated computing devices, mechanical and digital machines or objects that are provided with unique identifiers and the ability to transfer data over a network without requiring human-to-human or human-to-computer interaction[5]. The basic idea of this concept is the pervasive presence around us of a variety of *things* or *objects* – such as Radio-Frequency IDentification (RFID) tags, sensors, actuators, mobile phones, etc. – which, through unique addressing schemes, are able to interact with each other and cooperate with their neighbours to reach common goals.[6]

For example, in a smart home, various devices monitor your physical movement and behaviour so as to create a functional and efficient environment: Alarms would be linked to coffee machines and toasters, so that breakfast could be served immediately after waking up; the garage would have sensors detecting the release of greenhouse gasses by cars, so that the garage door would automatically open when the car is switched on; bathroom doors would have sensors so as to lock the door on the entry of an individual; etc.

A majority of IoT enabled devices have sensors, which collect real life physical data. This data is then converted into computer recognizable information (binary code). This information is then shared amongst various other devices present on the network so as to creat a robust and interoperable domain. Therefore, IoT enabled systems are very data hungry systems. In an IoT ecosystem, enormous amounts of data would be collected and transferred amongst various devices. This raises a few legal complications and challenges, which would be addressed by the subsequent section of this paper.

[5] Margaret Rous**e,** *What is internet of things (IoT)? – Definition*, TECHTARGET (Oct. 4, 2019, 4:00 AM), https://internetofthingsagenda.techtarget.com/definition/Internet-of-Things-IoT.
[6] Daniel Giusto, Giacomo Morabito & Luigi Atzori, The Internet of Things (2010).

LEGAL IMPLICATIONS

This section of the paper will address all the legal implications and issues pertinent to the functioning of IoT devices. The following issues have been collated from an international perspective.

1.1. Cybersecurity Law

Cybersecurity Law is a recent global development, and it has been fulfilling its purpose as a fiery source of beacon by illuminating the technological jurisprudence. Countries such as Albania, Estonia and china have enacted separate cybersecurity. Due to the interconnected nature of digital technology, which IoT culture promotes, any attack would have widespread consequences. As data breaches, denial-of-service attacks, and other cybersecurity incidents lead to extraordinary economic and national security consequences, it has become necessary to take a pragmatic approach towards this problem.

Cybersecurity law promotes the confidentiality, integrity, and availability of public and private information, systems, and networks, through the use of forward-looking regulations and incentives, with the goal of protecting individual rights and privacy, economic interests, and national security.[7] The purpose of this body of law is to achieve a high level of cyber security by defining security measures, rights, obligations and mutual cooperation between the entities operating in the digital realm. Under various legislations, such as those enacted by Estonia and Albania, a service provider must take reasonable and appropriate organisational, physical and technical measures to protect the integrity, confidentiality and availability of IT system, infrastructure, communications network, device or data from unlawful destruction, alteration, disclosure, access, and other unlawful processing.

Various nations have drafted legislations which mandate the maintenance of certain Cybersecurity measures, the non-compliance of which would have punitive consequences. Organisations are required under Applicable Laws, or otherwise expected by a regulatory or other authority, to take measures to monitor, detect, prevent or mitigate incidents.

[7] Jeff Kosseff, *Defining Cybersecurity Law,* 103 IOWA Law Review, 985 (2017).

1.1.1. Cyber-Risks exclusively associated with IoT

Due to the very nature of IoT, the security measures mandated by legislations must have special provisions for devices based on IoT. A minimum security standard must be maintained with all IoT enabled devices. The main reason is that it creates new opportunities for all that information to be compromised. An increased amount of data is shared across numerous devices in an IoT environment. Such data and information is also of sensitive nature. Due to the aforementioned reasons, the risk associated in operating IoT enabled devices increase exponentially. A latest research[8] claims that by 2020, 25% of cyber-attacks will target IoT devices.

- Malware infiltration: 24%
- Phishing attacks: 24%
- Social engineering attacks: 18%
- Device misconfiguration issues: 11%
- Privilege escalation: 9%
- Credential theft:6%

The broad spectrum of connected devices such as TVs, smart home assistants, temperature regulators, garage doors, etc. present a multitude of access points for hackers to gain entry to the entire eco-system. This gives them the opportunity to access anything present on the ecosystem, including customer information and source systems of the manufacturers. For Example: Imagine a smart home assistant which controls the garage door of the house. This assistant also controls the home alarm. Gaining access to the garage door system may enable a burglar to disable the home alarm also, and gain access to the home.

The specific problems associated with IoT security can be examined by breaking down the two important aspects of it, namely, 'Internet' and 'Things'. Here, 'Internet' refers to the transfer of data across several nodes (present in devices), while 'Thing' refers to the device itself. Both the concerns have been highlighted below.

[8]Ritika Sharma, *Top 10 Challenges Enterprises Face In IoT Implementation – Finoit,* FINOIT TECHNOLOGIES (Sept. 29, 2019, 11:53 PM), https://www.finoit.com/blog/enterprise-challenges-in-iot/

Domino Effect: Gaining unauthorized access to any IoT enabled device results in a Domino/Cascading Effect. This is mainly due to the fact that once an unauthorized entity gains access to any one of the systems present in the IoT ecosystem, he automatically gains access to all the other systems present on the ecosystem, due to the interoperable and interpolated nature of IoT. Therefore a weakness in the security protocols of one device might inadvertently lead to the exploitation and compromise of other connected devices. The security problem for the "Things" is created by vulnerabilities produced by careless program design; this creates opportunities for malwares or backdoors installation.[9]

Insecure Data Transfer: The network gateways serve as the mediator between different IoT nodes by aggregating, filtering, and transmitting data to and from different sensors.[10] Many IoT vendors and service providers ensure the secure storage, but overlook secure transfer of data. Since the frequency of data transfer is high in an IoT ecosystem, it is imperative to come up with separate security measures for the same. Encryption of data transferred from one device to the other must be statutorily mandated.

1.1.2. Proposed IoT Cybersecurity Legislations

Traditional cybersecurity measures are not adequate to deal with the complex nature of IoT devices, since existing devices are limited at their low levels of scalability, integrity, and interoperability.[11] Therefore, new methodologies and technologies should be developed to meet the security, privacy, and reliability requirements of IoT.[12]

As cybersecurity legislations have already been, or are in the process of being, enacted all over the world, it is imperative that separate legislations are drafted to address the vulnerabilities present in IoT devices. Currently there is a lack of security in current IoT applications; a lack of detailed, special IoT guidelines in present IT security standards; and a lack of IoT laws and regulation at the country and international level.[13] A few states have already recognized the dire need for separate IoT cybersecurity legislations and have taken

[9] Zhi-Kai Zhang et al., *IoT Security: Ongoing Challenges and Research Opportunities*, 2014 IEEE 7th International Conference on Service-Oriented Computing and Applications (2014).
[10] Yang Lu & Li Da Xu, *Internet of Things (IoT) Cybersecurity Research: A Review of Current Research Topics*, 6 IEEE Internet of Things Journal 2103-2115 (2018).
[11] See, Luigi Atzori, Antonio Iera & Giacomo Morabito, *The Internet of Things: A survey*, 54 Computer Networks, 2787-2805 (2010).
[12] Debasis Bandyopadhyay & Jaydip Sen, *Internet of Things: Applications and Challenges in Technology and Standardization*, 58 Wireless Personal Communications 49-69 (2011).
[13] Matthew Ahlmeyer & Alina M. Chircu, *Securing The Internet Of Things: A Review*, 17 Issues in Information Systems, 21-28 (2016)

long strides towards developing an adequate regulatory framework. Given below are a few legislations which have been drafted. These legislations have focussed on 'Security by Design', which seeks to make systems as free of vulnerabilities and impervious to attack as possible through incorporating safety measures in the product design itself.[14]

Nos.	***STATE/ COUNTRY***	***Name***	***Key date***	***Key features***
1.	California	*Senate Bill No. 327. Information privacy: connected devices*	Chaptered by Secretary of State. Chapter 886, Statutes of 2018 on 28/09/18[15]	This legislation creates an obligation on 'Manufacturers'[16] to equip the device with 'reasonable security features'[17]. If the device has means for authentication outside a local area network, then it shall be considered as a reasonable security feature, provided that a particular set of requirements[18] are met.
2.	United States of America	*S.734 - Internet of Things Cybersecurity Improvement Act of 2019*	Bill reported to senate with an amendment on 23/09/19[19]	The bill establishes minimum cybersecurity standards for government purchased and operated IoT devices. The main features of the bill have been listed below • The National Institute of Standards and Technology (NIST) is required to issue certain recommendations before 31/03/2020 regarding

[14] See Margaret Rouse**,** *Security by Design*, TECHTARGET (Oct. 7, 2019, 7:21 AM), https://whatis.techtarget.com/definition/security-by-design
[15] *SB-327Information privacy: connected devices,* CALIFORNIA LEGISLATIVE INFORMATION (Oct. 5, 2019, 5:37PM), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB327
[16] TITLE 1.81.26. Security of Connected Devices**,** Section 1798.91.05. (c)
[17] Ibid. Section 1798.91.04. (a)
[18] Ibid. Section 1798.91.04. (b)
[19] *S.734 - Internet of Things Cybersecurity Improvement Act of 2019,* CONGRESS.GOV (Oct. 6, 2019, 3:32PM), https://www.congress.gov/bill/116th-congress/senate-bill/734/text

				secure development, identity management, patching, and configuration management for IoT devices.[20] • The Office of Management and Budget (OMB) is then required to issue guidelines consistent with these NIST recommendations.[21] Any internet-connected devices purchased by the federal government must comply with those recommendations. • The NIST is also required to work alongside several cybersecurity researchers and experts so as to produce guidance relating to the reporting and resolution of security vulnerabilities discovered in federal government IoT.[22] • Vendors and Contractors are required to adopt coordinated vulnerability disclosure policies, and comply with the procedure laid down in this regard under section 6(b).[23]
3.	United Kingdom	*Unnamed, based on the*	Digital Minister	The announcement lays down a few principle characteristics of the

[20] Internet of Things Cybersecurity Improvement Act of 2019, Section 3.
[21] Ibid. Section 4.
[22] Ibid. Section 5.
[23] Ibid. Section 6(c).

		voluntary guidelines[24] *issued by the Department for, Digital, Culture, Media and Sport*	Margot James announced on 01/05/19, that a specific legislation is being conceptualized, which makes compliance with the voluntary 'Code of Practice for Consumer IoT Security, 2018', mandatory for all vendors. Consultation for the same is currently taking place.[25]	soon to be drafted bill, which are as follows: • Mandatory Labeling: A labeling scheme may be enforced wherein; all IoT enabled devices will have a label depicting the level of security present in the pro ducts. The security rating may be done by a certification body authorized in this behalf. • Consultation mandates the maintenance of the following 3 security measures: 1. Passwords for IoT devices must be unique and must not be resettable to any factory setting.[26] 2. Manufacturers of IoT products provide a public point of contact as part of a vulnerability disclosure policy.[27] 3. Manufacturers explicitly state the minimum length of

[24] Code of Practice for Consumer IoT Security, 2018
[25] Department for Digital, Culture, Media & Sport, *Plans announced to introduce new laws for internet connected devices*, GOV.UK (Oct. 5, 2019, 6:31 PM), https://www.gov.uk/government/news/plans-announced-to-introduce-new-laws-for-internet-connected-devices
[26] Ibid.
[27] Ibid.

				time for which the device will receive security updates through an end of life policy.[28]

1.1.3. Indian Context

The "*Reasonable practices and procedures and sensitive personal data or information Rules, 2011*" drafted under Section 43A of the *Information Technology Act, 2000* provides for the maintenance of 'reasonable security practices and procedures' in relation to any 'sensitive personal data or information'. This small piece of legislation however cannot deal with the complexities of IoT technology. A more well-rounded and holistic approach is required to address the aforementioned issues.

1.2. Privacy and IoT

The main purpose of IoT is to establish a network of interoperable devices, which collect data with “minimal human interaction”. The information collected by IoT devices can often be sensitive information, which can lead to the identification of an individual, and their behavioral patterns which is a great concern in the modern world. Furthermore, since an IoT Ecosystem allows its devices to interact through M2M communication, the aforementioned sensitive data may be processed by various service providers which may lead to additional vulnerabilities and to wide spread distribution of information amongst the service providers

IoT is expected to grow exponentially in the future and soon is expected to be used in all fields of daily life such as health care sector, has a great amount of private information which is stored and recorded. With the growth in these technologies, there is a need for a proper regulatory framework, which specifically deals with the maintenance of privacy by IoT enabled devices.

In a world where data has become a valuable asset, IoT may pose a threat. Uncontrolled collection of information can lead to disastrous outcomes, and to avoid such unforeseen

[28] Supra. at note 25.

events, there is strong requirement of data protection and privacy laws pertaining to IoT. To create a proper legislation in concern with privacy there will be a number of challenges that need we need to overcome a few of which are mentioned below.

1.2.1. Consent

Privacy in compliance with an IoT Ecosystem comes with various challenges. The first is 'consent'. Online services usually have their respective 'Privacy Policies' that state the kind of data they collect and for what purposes. Accepting these documents may be compulsory for utilizing the services, and is considered as consent. However these traditional documents may not fit the dynamic nature of IoT. This leads to the questions at hand:

- Whether there is a way to control the flow of data collected?
- Which data is supposed to be collected?
- Can a third party forbid collection of his/her data while in vicinity of IoT enabled devices, which are collecting sensitive and physical data?

Current IoT systems struggle to provide this kind of control, and M2M communications are based on the very fact that human input isn't necessary for the system to work.

Another big issue with IoT is that the data which is being processed might not be provided on a first hand basis, i.e. the person whose data is being processed might not have knowledge of the data being processed as he might not have an active role in providing such data. Since IoT enabled devices transfer data to all the other devices with minimal human intervention, the said transfer may not be in knowledge of the consumer. At present the customers have to physically consent to the installation of IoT devices monitoring them. However, in an IoT rich future, giving consent to collection of such information to one device might lead to sharing the same information with many other devices that are interconnected. Furthermore many IoT enabled devices lack a proper Graphical User Interface (GUI). Due to this shortcoming, new innovative ways of addressing notice and consent issues must be statutorily recognized.

1.2.2. Data Minimization

'Data minimization' refers to limiting the collection of data to what is necessary. Data minimization has been made a huge principle under the GDPR, which states, that the data

which is not relevant anymore for the purpose of processing should be removed with immediate effect.

It is expected that 50 billion devices will be connected through IoT by the year 2020.[29] The continuous increase in the number of IoT devices makes the size collected data increase exponentially. In an IoT ecosystem, data is transferred from one device to the others for varied purposes. Data which may not be useful for one device and hence manufacturer, may prove to be useful for the other. This results in data hoarding, and hence results in transferable data silos. It would be difficult to enforce data minimization regulations in an IoT rich environment due to the heterogeneity of devices and their purposes. This is a concept derived from the European Union which shows great potential for better processing and transparency of data.

1.2.3. Data Repurposing

Data Repurposing is referred to the data that is provided by the individual consensually but is used for some purpose other than what the consumer might have consented for. – '*Due to the proliferation of increased amounts of data in an IoT environment, the existing challenge that data will be used for purposes in addition or other to those originally specified becomes even more serious to consider'.*[30] The data being collected by one device might transfer the same to other IoT devices connected to it, without being in the knowledge of the consumer. This might lead to the other devices repurposing the data received for their own functionality which might not be consented by the user. The interconnected nature of an IoT Ecosystem can, as a result, lead to the magnification of the infringement of one's privacy. Due to the increased complexity of IoT systems it would be difficult to keep track of the purposes for which the data is being processed. This issue can only be overcome, by a holistic and interconnected framework of Privacy Policies.

1.2.4. Transparency Processing

As mentioned above, data being transferred from devices or applications may not always be in the knowledge of the user. On this basis, the collection and processing of enormous amounts of data might not be transparent to the subjects, leading to consumers feeling a sense of loss of control. Data Transparency has already been acknowledged as one of the most

[29] Dave Evans, *The Internet of Things: How the Next Evolution of the Internet Is Changing Everything,* CISCO (2016)
[30] European Commission, *IoT Privacy, Data Protection, Information Security* (2015)

important factors of Data Privacy and Data Protection in the *Mauritius Declaration on the Internet of Things. "Transparency is key: those who offer Internet of Things devices should be clear about what data they collect, for what purposes and how long this data is retained"*[31] It is to be ensured that the people have control over their data that is being processed by the companies.

In the European Union, the citizens even have the *'Right to be forgotten'* according to which, personal data must be erased immediately when the data is no longer needed. According to Article 17, the consumer has the right to request the companies or the controller to erase all personal data that the company has on the individual, it says that search engines (like Google) have to delete personal that comes up publically in search results if requested by the user.

1.2.5. Data Brokers

Data brokers are a group of people that covertly sell the sensitive data collected through various projects to interested parties. A common consumer is unaware of the fact that the data his IoT device collects can be misused by selling it for really high prices. A recent GAO report states that at least one data broker includes in its profiles about consumers information about 28 or more specific diseases, including cancer, diabetes, clinical depression, and prostate problems.[32] Highly sensitive data such as health care, allergies or other information has a huge market of its own with company paying high prices to learn this information to target their products on their prospective consumers. These kind of malpractice is another challenge for the future of IoT.

1.2.6. The Indian Context

With the recent growth in the number of devices in IoT, and the growth in technology in India, it can be estimated that there will be a massive growth in the coming future in relation to IoT. According to a report from Statista, India is considered to be an emerging market to lead the Tech Sector with $4.8 billion market[33]. With the development in the different laws of Data Privacy in other countries India has also brought forward its bill for the same, which

[31] Jacob Kohnstamm & Drudeisha Madhub, *Mauritius Declaration on the Internet of Things*, 36th International Conference of Data Protection and Privacy Commissioners (2014)
[32] Govt Accountability Office, *Information Resellers: Consumer Privacy Framework Needs to Reflect Changes in Technology and the Marketplace*, at 52, GAO-13-663, (2013).
[33]Felix Richter, *Emerging Markets to Lead Tech Sector Growth*, STAISTA (Sept. 24th, 2019, 3:12 PM), https://www.statista.com/chart/2799/emerging-markets-to-lead-tech-sector-growth-in-2015/

was formed by the Sri Krishna Committee[34]. As mentioned before, it is expected that 50 billion devices will be connected through IoT by the year 2020[35]

Recently the CEO of Hero Moto Corp addressed the use of IoT in his sector, and how the company is at a testing stage, for using IoT based applications in different sectors of the company. This shows that soon India will also be using IoT extensively in the upcoming years.

With this expected extensive growth of IoT in India, the potential of data security breach and misuse of personal data will increase exponentially, and this would lead to more complications. Section 72 of the *Information Technology Act, 2000* states the penalties for breach of any confidential or private collected information. However, these provisions are not adequate to address the issues and legal implications presented by the utilization of IoT devices.

1.3. Intellectual Property Rights

The functioning of IoT device also present certain IPR related challenges. For IoT to work properly, standardized technology is required to be used, due to the interconnected and interoperable nature of IoT. This utilization of standardized technology is crucial for IoT functionality since heterogeneous devices from different commercial sources have to connect with each other.[36] This means a uniform system of network nodes must be present across the devices. For example, to facilitate a connection between a Fitness Monitoring Device such as Fitbit and medical systems such as Automatic Insulin Injectors, it is imperative for them to have the same technology for sending and receiving information.

Thus, it is a must that the standard setting bodies take these factors into consideration while setting a standard and declare such patents as standard essential patents ("SEPs").[37] With increased use of IoT, standard setting organizations need to impose certain conditions on the SEP owner to license their patents to third parties on fair, reasonable and non-discriminatory ("FRAND") terms.[38] Therefore it is crucial for policy makers and legislators to lay down provisions and mandatory guidelines regarding standard essential patents.

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[34] Personal Data Protection Bill, 2018.
[35] Ibid.
[36] See Paul England and Kathleen Fox Murphy, *Patent issues and the Internet of Things* (2016)
[37] Nisth Desai, *Internet of Things Legal and Tax Issues* (2017)
[38] Ibid.

1.4. Liability

Liability of manufacturers of IoT devices may arise in the following cases:

- Bodily Injury, caused due to malfunctioning of IoT devices. Example: In a smart city the traffic lights are operated by IoT based technology. Due to shortcomings present in the product designs, accidents are caused. Failure of medical and healthcare devices would also have dire consequences.
- Data Breaches and Financial Harm caused in lieu to the breach.

Product liability is generally based around negligence across various jurisdictions. In Europe, strict liability is imposed on manufacturers for any harm arising out of deficient designs.[39] Due to the large amount of players acting in an IoT system such as software developers, device manufacturers and connectivity service providers, acting in unison, it will be difficult to ascribe liability to any one player. Since in an IoT ecosystem, numerous devices work collectively, the issue of liability may not be ascribable to a single party. A distributive approach might be required and certain parameters may be required to determine which player would be liable.

1.5. Jurisdiction

Since, in an IoT network, data flows through many jurisdictions with different legal environments; it becomes difficult to determine the jurisdiction of courts. Data collected by devices of varying manufacturers, may be processed at a different geographical location. The devices themselves may be located in different locations. Therefore there is an urgent need for an international convention, which would impose certain guidelines regarding the determination of jurisdiction. Traditionally, courts have jurisdiction over transactions which occur within the boundaries of the nation. Certain jurisdictions also have recognized a 'Long Arm Jurisdiction' wherein the operation of such local laws have extra-territorial application if an act or omission has resulted in some illegal or prejudicial effect within the territory of the country.

[39] Product Liability Directive 85/374/EEC

CONCLUSION

A latest research claims that by 2020, 25% of cyberattacks will target IoT devices.[40] This shows how IoT related laws are need of the hour, while we also need to build a proper system to prevent such attacks from happening at the first place. The legal wisdom regarding IoT is inadequate due to lack of awareness for the same. With the upcoming years, IoT is expected to grow at exponential rate and the legal acumen cannot lag behind for long. California, UK, and the United States have already embraced the legal implications of IoT Ecosystem and it's about time that the world follows suit. Separate legislative principles need to be enacted urgently to mitigate the risks associated with IoT functioning.

As elucidated earlier, the interaction between IoT and privacy principles must be regulated by a separate, special and holistic body of provisions, which would address the concerns mentioned therein. Cybersecurity Laws also need to give special regard to IoT devices due to their enhanced vulnerability to attacks compared to normal systems. Another solution which could be implemented to tackle both of the aforementioned issues is to bring about a proper certification authority. Certification, which consists of the formal evaluation of products, services and processes by an independent and accredited body against a defined set of criteria standards and the issuing of a certificate indicating conformance, plays an important role in increasing trust and security in products and services.

Patent law must also accommodate certain conditions regarding standard essential patents, to ensure proper functionality of IoT devices. Liability and Jurisdiction issues may be addressed by an international convention on the same. International recognition and uniformity is a must for realizing a proper liability framework for IoT devices.

IoT is no longer a distant reality. It is a concept which is already present all around us. Regulatory measures and policies should already be put into place. However, due to expeditious development, legislators have been outpaced, which has resulted in the failure to mitigate the harmful potential of misuse of such a vast space. The issues mentioned in this paper would serve as a starting point for policy makers and legislators, to tackle the discrepancies present in todays' laws, in addressing disruptive technology such as IoT.

[40] Supra. at note 8.

MARGINALIZED: A RESPONSIBILITY OF INDIA AND THEIR ACCESSIBILITY OF ADEQUATE MEANS TO JUSTICE

Deepshikha

ABSTRACT

The functioning of constitutional mechanism indicates that although our democratic society is based on rule of law and the concept of justice, liberty and equality, all the members of the society are not equal at least, so far, their economic resources are concerned. This inequality becomes more conspicuous in matters of court litigation where economically disadvantaged people are often deprived of their right to justice against the wealthy dominant adversaries.

"Equal opportunity means everyone will have a fair chance at being incompetent"- LAURENCE J. PETER

Despite the existence of a number of statutory rules and regulations and judicial precedents, courts have remained inaccessible not only for the financially poor but also to those who are illiterate or unlettered about laws and procedure. Earlier, state provided legal aid services of a lawyer to the indigent accused only in criminal cases whose remuneration was paid by the state exchequer.

Justice, means to justice, rapid accessibility, factors responsible to injustice, these are some terms directly or indirectly related to marginalized people of India. Access to justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances. There is need to find the way to walk upon to reach the door of justice. There are several barricade to reach the legal institutions and some of them are-1. Justice system is financially inaccessible. 2. Individual has no lawyers. 3. Lack of information or knowledge of rights. 4. Weak justice system etc.

"The forgetting of the history of marginalised groups is both a cause and effect of their marginalization"-Susan Jacoby

Who are Marginalized group? What is Marginalization?

In general marginalisation can be understood as the process whereby someone is pushed to the edge of a group and accorded lesser importance. This is predominantly a social phenomenon by which minority or sub-group is excluded, and their needs are ignored.

Peter Leonard defines marginality as,. ...being outside the mainstream of productive activity and/or social reproductive activity.

Various marginalised group in almost every society are:-

Schedule castes, schedule tribes, elderly or aged people, people with disabilities, gender discrimination in access to justice.....

"Injustice anywhere is threat to justice everywhere"-MARTIN LUTHER KING.

No doubt, marginalised people are facing injustice somewhere in this country and the constitution provides substantive basis for this by guaranteeing certain fundamental rights such as equality of status and opportunity, right to life and personal liberty to all its citizens and equality of status and opportunity. Supreme courts and many other legal institutions are also there to make access to justice easier to poor and underprivileged, however the real experiences show that access to justice has become inaccessible.

ACCESS TO JUSTICE

Access to justice defined in the *black's law dictionary* as the ability within a society to use courts and other legal institutions effectively to protect one's rights and pursue claims. It considers a potential system acquiring appropriate legal remedies within the civil and criminal justice fields. Judiciary play an important role in ensuring access to justice.

"Denying access to justice, is injustice".

The Department of justice, Ministry of Law and justice, Government of India has been implementing a project on 'Access to justice for Marginalised people' with UNDP Support. The interventions under the project are focused on strengthening access to justice for the poor, particularly women, scheduled castes, scheduled Tribes, and minorities. The project seeks on the other hand, to improve the institutional capacities of key justice service providers to enable them to effectively serve the poor and disadvantaged. On the other hand, it aims to directly empower the poor and disadvantaged men and women to seek and demand justice services.

Here we see the role of Public Interest Litigation and Legal Aid Services in providing an access to justice to marginalized groups of the country:-

A TWEAK BY MEANS OF PIL

"The genesis of Public Interest Litigation is listening to the voice of the voiceless and giving access to the poor, the marginalized, and the weak is unique experiment to be lauded"

In general parlance the expression "public interest" means something in which some interest of the people in general or their rights and liabilities are affected. According to stroud's judicial dictionary 'public interest' means "a matter in which a class of community have a pecuniary interest or some interest by which their legal rights or liabilities are affected." [1] The Supreme Court in *Janta Dal v. H.S Choudhary,*[2] interpreted the term 'public interest litigation' to mean "the legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. Such litigation has hitherto been entertained by the Supreme Court under Article 32 and by high courts under Article 226 of the Constitution of India, not only from the associations or organisations, but also from the individuals interested in common cause.[3]

The rules of locus standi have been relaxed and a person acting in bona fide manner and having sufficient interest in the proceedings of an Public Interest Litigation will alone have the requisite locus standi and can approach the courts to wipe out any violation of fundamental rights[4] and genuine infraction of statutory provisions, but not for personal gain, or private profit, or political motive, or any oblique consideration.

ROLE OF PIL IN ACCESS TO JUSTICE OF MARGINALIZED PEOPLE OF INDIA

Public Interest Litigation has been innovative judicial procedure for enhancing the social and economic rights of disadvantaged and marginalized groups in India. In fact, a PIL is generally instituted for enforcement of the constitutional and legal Rights of poor and excluded groups as well as ensuring accountability of concerned government and public authorities towards issue of public importance. Persistent efforts by the NGOs and social action groups through PIL has, in many occasions, prompted the High Court Division to issue directives and orders that in turn addressed the socio-economic concerns of the poor and the marginalized groups.

Marginalised people have right to raise any issue through PIL, this is the means, this is way to reach the door of justice. PIL has an important role to play in the civil justice system in that it affords a ladder to justice to disadvantaged sections of society, some of which might not even be well-informed

[1] Stroud's Judicial Dictionary
[2] AIR 1993 SC 892(Para 52)
[3] Vedire Venkata Reddy v. Union of India, AIR 2005 AP 155.
[4] Ashok Kumar Pandey v. State of W.B.,(2004) 3 SCC 349

about their rights. Furthermore, it provides an avenue to enforce diffused rights for which either it is difficult to identify an aggrieved person or where aggrieved persons have no incentives to knock at the doors of the courts. PIL could also contribute to good governance by keeping the government accountable.

"Public Interest Litigation is the one space within the law in which you can shape the law to ensure that ultimately justice is done."

Public Interest Litigation hence may play an important role in achieving the justice among marginalized people of India.

LEGAL AID SERVICES

An impressive stride in increasing celerity of justice

"Constitution is not a mere lawyers document, it is a vehicle of life, and its spirit is always the spirit of Age"-B.R AMBEDKAR

The constitution of India has gone through several developments from time to time but what is the authentic meaning of the term "development"? What is the scope of such development? Is that development adequate? What is the value of mere existence of such development to be only written as a document? Are citizen of India enjoying such development? Are citizens of India are aware of such development? If not then is that "development" in the sense we expect from a democratic nation?

Yes, here is one issue and that is "Legal Aid Services". The scheme no doubt, aims at strengthening the state's commitment to democracy. Article 39A of the constitution of India provides for free legal aid to the poor and weak sections of society.

As political philosopher; Charles de Montesquieu said that "*In the state of nature…all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of law."* The protection of law to poor, illiterate and weak sections is important to ensure equal justice. Legal Aid is one of the means to ensure that opportunities for securing justice.

WHY LEGAL AID??

Justice P.N.Bhagwati has rightly said that *"the poor and the illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts".*

Poverty and illiteracy is the bitter truth of our Nation, no doubt, country took several steps to eradicate poverty and enhancing illiteracy but in between the process there must be some protection, some rights given to those sections to animate their existence. But our constitution of India has included the rights of free legal aid since a time ago but till now in 21st century too, several citizens are in a daze for sure. If the citizen for whom the scheme is added is unaware of his/her legal entitlement then how can it be considered as a contemporary development in the field of constitutional law in India……yes it is the step towards development but there is need to build a path or a track to make that step, a fruitful or a productive step…..

HISTORICAL BACKDROP

The origin of concept of legal aid may be traced back to the historic *Magna Carta* of 1215(Article 41). Thereafter, with the socio-economic developments, many welfare schemes were introduced for the benefit of the poor and downtrodden to provide them access to justice and legal aid was one of such social-service oriented schemes which received attention of legal fraternity around the world.

A resolution was passed by Human Rights conference held in Tehran in 1968 under the auspices of United Nations which emphasized the need for free legal aid and assistance to poor and indigent litigants for the protection of their human rights. The United Kingdom adopted a legislation called the Legal Aid and Advice Act, 1948 for providing free legal Aid and assistance to poor persons.

It is well known that system adopted in law courts for dispensation of justice is somewhat time consuming particularly because of frequent adjournments on flimsy grounds. Therefore there was dire need for an alternative disputes solving mechanism for providing speedy and inexpensive justice. Even the noted jurist H.L.A Hart exhorting the lawyers to actively participate in legal aid and advice schemes commented that the useful function of the lawyers is not only to conduct litigation, but to avoid it wherever possible by achieving settlement or withholding suit.[5]

POST-INDEPENDENCE SCENARIO

[5] Carter C.W.: Ethics of Legal Profession , p. 125

Taking inspiration from the Rushcliffe Committee Report of England, the first Committee on "Legal Aid and Legal Advice" was appointed in India by the then Bombay state in March 1949 under the chairmanship of Natwarlal. H. Bhagwati, the then judge of the High court of Bombay. The committee submitted its report in October 1949 underlining the need for legal aid to poor who could not have access to the law courts due to the lack of financial resources.

The law commission in India in its Fourteenth Report[6] of 1958 outlined a detailed scheme of legal aid to poor. Responding favourably to the suggestions made by the Law Commission in its 14th Report, the Central government prepared a draft scheme for legal aid in 1960 and sent it to various states.

The Legal Services Authorities Act, 1987

The Legal Service Authorities Act, 1987, which owes its origin to Article 39-A of the constitution was passed by the parliament with a view to ensure free and competent legal aid services to the weaker sections of society.

The Orissa High Court in its landmark judgement in *Ellanath Sahu v. State of Orissa,*[7] ruled that free legal aid at the state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of a reasonable, fair and just procedure prescribed in Article 21 of the Constitution.

Need for Realistic Approach

Legal Aid Programme in its generic sense should not only limited to the assistance or services provided during litigation, but a variety of other legal service activities such as-

1. Representation by lawyer in civil, criminal and administrative proceedings.
2. Educating the poor and rural masses of their rights and entitlement under law.
3. Organising and mobilising voluntary social action groups to assert the rights and entitlements on behalf of poor and indigent persons.
4. Affirmative state action to achieve effective equality.
5. Making or conducting socio-religious surveys to highlight the problems of the poor for legal solution.

[6] This report was related to Reform of Judicial Administration in India and was submitted in two volumes consisting of 1282 pages
[7] 1990 CLT 358(Ori).

6. Conducing PIL and innovating new tools for cheap, expeditious justice to poor.[8]

The major drawback of legal aid movement in India is the lack of legal awareness. Citizens are unaware of rights and protections available under the law. It needs to be realised that the promoting advertency regarding legal aid is not sole responsibility of Legal fraternity but it is equally the concern of society at large. Constitutional commitment for legal aid can only be cherished if citizens themselves come forward to see the air full of equality….!!

ANALYSIS

- Although the service offer by LAC (legal aid counsel) are absolutely free, but 16.30% beneficiaries claimed their LAC often demand money before or after court hearing.
- Also, around 33% of the judicial officers said complaints were received against LACs for demanding money from beneficiaries.
- The survey found that 56% of LAC spends an average of 1 to 10 hours per week on legal aid cases. On the contrary, around 58% LAC spend an average of 20 hours and above per week on private cases.
- The study also found that 60% of women, who were aware of free legal aid services, chose to opt for private legal practitioner because they have better control over their lawyer.
- About 22.6% beneficiaries responded that they won't opt for free legal aid services for the second time.

Based on the analysis regarding legal aid services, we may arrive at a judgment that till now, Indian citizens are unable to full access of this legal Aid and what our constitution tried to cherish is not fully utilised. So there must be some measures in the field of such constitutional development.

Any change, step towards change or development, steps towards development is considered to give a successful outcome only if the particular motive behind it is utilized. But is that easier to bring into force than to think so easily? Can it be made possible? What role can constitution play again? Are citizens that much responsible? What is the main reason behind the lag?

"Access to legal aid in India: An Unfulfilled promise"?

[8] N.R Madhva Menson's article "Legal Aid and Justice to poor" published in Law and Poverty 1988

I am giving my own opinion regarding all these issues….

The main reason behind failure of the National Legal Services Authorities to deliver legal aid in real are:-

- There are not enough lawyers delivered by the Legal Service Authorities.
- There is a lack of awareness of the availability of Legal Aid.
- There is a perception that free service is incompatible with quality service.
- Lawyers generally are uninterested in providing competent legal assistance because of financial constraints.
- Growing population of the nation can be one of the reasons.

Here are some measures which can be useful in further access of Legal Aid Services:-

- DUTIES TO BE IMPOSED ON THE BENEFICIARIES OF THE LEGAL AID: - "*With great power comes great responsibilities"*. Apart from the fundamental duties, there must be some other set of duties to be imposed on the beneficiaries of the legal aid services. Duty to be updated, duty to respect the legal aid lawyers, duty to be honest, duty to avoid misuse of the services etc.
- TECHNOLOGICAL DEVELOPMENT:-*"Technology is not just a tool. It can give learners a voice that they may not have had before"-George Couros.* It is obvious that our constitution believes in bringing change as per the need of the society but there is further some responsibility to take steps towards its utility. Here we can think about taking help from the technology. There can be online details of lawyers of different field so that the beneficiaries can easily find out them, through technology there will be possibility of direct contact of lawyers with their clients, proper notifications could be given to update the beneficiaries and there are so many ways in which technology can help in further development.
- NON GOVERNMENTAL ORGANISATIONS:- It is well known fact that NGOs do contribute in various social activities, social development and so NGOs set up can also further help people to access legal aid services.
- SPECIAL FUNDING TO LAWYERS:- One of the reason behind the lag was financial crisis of lawyers. And this is the true fact everybody needs economic

balance to sustain their life and hence government must take step to provide some special fund to legal aid lawyers. And hence there will be win-win situation.

- MASS COMMUNICATION:- Mass communication can also help in taking this constitutional development to a next level. Awareness can be made through simply giving guidelines but it won't be that much effective. There must be some other process to make people aware about the legal aid through different TV shows, dramas, reality shows, shows related to legal field and so on.
- EDUCATION:- *"Education is not the learning of the facts, but the training of the mind to think"*. Yes and so we need it right here. Our constitution has framed so many provisions, has given various rights and gradually developing time to time but what we really need is to be active and aware and education is one of the factor to improve our thinking ability. Indian courts are open to everyone residing in India equally and legal aid is that tool available to the poor and backward citizen. Education will definitely help them to a better access to this service.
- DIVISION OF LAWYERS:- Sometimes it is seen that one particular lawyer face burden for providing free legal aid due to lack of lawyers giving the service. There is need to divide the lawyers according to the number of beneficiaries in particular area. This will enhance the motive of the free legal aid services given by our constitution.

RESPONSIBILTIES OF MARGINALIZED GROUPS

Now here comes the role which can be played by the marginalized groups itself to improve their means in access to justice. There are so many rights are given to the marginalized sections but what is needed is to follow up some duties too. "*with great power comes great responsibility"*, so there is need to regulate certain duties which must be followed by them. Some of the duties that must be followed are:-

Strive towards education:- There are some people who do not even think about getting education and educating their children. Their motive is to earn their living only. But if the marginalized groups want a means to get justice then they must follow their duty to educate themselves and their children. They must follow up any opportunity given to them for getting education. They do not just sit and beg about justice.

Keeping updates:- updating themselves must be regarded as an important duty. Living inside the wall will not help the marginalized groups and they must follow the duty of getting updates of new scenario, new laws, new economy, new rules, etc.

Respect the law:- This is the foremost duty of every citizen to respect the law. The marginalized groups too must follow this duty to maintain peace and order.

Spreading awareness:- a single person must have this duty to spread information. Suppose if one person come to know about certain law or any information then it must be his or her duty to spread it all around the group.

SOME PROJECT ACTIVITIES ARE:-

1. **Judges training manual on laws related to marginalized people**

   A judges' training manual on laws and issues relating to marginalized communities was prepared and draft version of manual was shared with senior academicians and judicial officers for review. Draft manual was successful pre-tested at the Odisha Judicial Academy.

2. **Delegation visits to study good practices on legal aid and legal empowerment**

   Legal empowerment of marginalized groups through the provision of justice services has been the focus area of Access to Justice Project. With the Project moving onto its next phase (2013 – 2017), a critical on-going initiative is the compilation of good practices on legal aid and legal empowerment which will be beneficial as learning and educational tools for justice delivery in India. Towards this end, field missions were facilitated to 4 countries with the objective of studying good practices and creating learning platforms. Delegates from NALSA, State Legal Services Authorities, Department of Justice (DoJ), UNDP and the Access to Justice Project visited Sierra Leone, Indonesia, South Africa and Malawi.

3. **Study on law school based legal service clinics**

   "Study of law school based legal service clinics" was conducted in seven Project States. This study assesses the state of legal services clinics, including whether they exist, the kind of activities they undertake, the frequency of such activities, the quality of the services rendered, the percentage of the students population that participates in these clinics and frequency of interaction with the community outside the college.

4. **Justice Innovation Fund (JIF)**

   JIF was created for implementing innovative activities on legal empowerment of marginalized people and for developing capacities of intermediaries who assist them. 15 projects in the 7

Project States reached out to approx. 20 lakhs people, over 7000 paralegals and 300 lawyers have been trained and sensitized through series of capacity development events. Quality knowledge products on legal empowerment have been created; innovative IEC materials and community radio spots were also developed and disseminated to raise legal awareness of marginalized communities.

5. **Legal literacy trainings of Sabla girls:**

   Need for providing legal literacy to Sabla (adolescent girls covered under the Sabla scheme of WCD) came up as a result of convergence between the two central ministries - Ministry of Law and Justice, and Ministry of Women and Child 7 Development. Decision was taken to train Sabla girls of Madhya Pradesh and Rajasthan as a pilot. A Rajasthan based organisation CECOEDECON was selected and they successfully conducted 4 trainings in 2 States where 200 Sabla girls were provided legal literacy trainings and exposure of justice sector institutions.

6. **Young lawyers for justice fellowship programme**

   A programme for training and sensitisation of young lawyers was launched in 3 States - Chhattisgarh, Jharkhand and Odisha with a view to encourage them to assist marginalized people in accessing justice. 60 young lawyers were selected, 20 each in Chhattisgarh, Jharkhand and Odisha through a competitive selection process. Series of training programmes were successfully conducted by 3 partner organisations (CLAP, ELDF and Manthan). Fellow lawyers were trained and sensitised on rights and laws related to marginalized sections, they were also provided inputs on developing their lawyering skills such as drafting, legal counseling , mediation and conciliation. Programme received active support from Legal Services Authorities, and with the help of mentors young lawyers were supported in taking up community level activities such as conducting legal awareness camps, providing legal advice, counseling and conducting action research on specific topics etc.

CONCLUSION

Basically, we may conclude that citizens of India are itself harbinger of change and they themselves are responsible for access of their justice. Law provides them the protection and now somewhere it's their responsibility as well to be aware and inculcate a culture of responsibility throughout the community. Marginalized groups through Public Interest Litigation and Legal Aid Services are benefitted by the constitution of India for their right to access for justice throughout the country yet they should be aware of their rights and their duties to.

MOB LYNCHING: POLITICS, LAW AND SOLUTIONS

Aashima Raj Trivedi & Pallavi Singh

ABSTRACT:

In India, lynching may reflect internal tensions between ethnic communities. Communities sometimes lynch accused or suspicious. It is a planned extrajudicial murdering by a group of people . Mob lynching simply means when a mob gives a death penalty to a person without a fair trial or any legal authority It is most often used to characterize informal public executions by a mob in order to punish an alleged transgressor, convicted transgressor, or to in country. The word "mobocracy", is a satire on democracy within which the messages are sent across that law cannot protect those who didn't agree to the general populace. The lynching, is the "New Rule of LAW" and the defacto "Command of new mob sovereign". The authors emphasize on the theory that lynching doesn't only threaten the minority but later gives rise to 'Anarchy'. It violates the basic principle of 'State and Sovereignty' and not only questions the State on its most important duty, which is to protect the rights, life and property of its citizens'. This is political reality which needs the equal attention of the legislature, executive and judiciary. This minority today has just not been limited to any religion, but also the people who form minority due to their caste, intellectual level, sexual preference .There are certain recommendations and measures given by Supreme Court that will be discussed in the essay.

KEYWORDS : Bill passed by the Parliament , Command of sovereign, Citizens , Mob lynching, New rule of law and the defacto.

INTRODUCTION AND HISTORY :

Lynching is also known as vigilante violence refers to the hate inspired violence against the people .It is an extrajudicial punishment to punish a person alleged to have committed a crime. **Mob lynching** simply means when a mob gives a death penalty to a person without a fair trial or any legal authority. This can be done through beating, stabbing, setting fire to the person or hanging. This type of punishment is not accepted in any kind of civilized society.

The **History** of Mob lynching started from America ,where the word lynch originated after the American Revolution . The word came from the term Lynch law which means a term for punishment without trial . Charles Lynch and William Lynch were the two who found out the phrase in 1780s .

In those earlier periods **Lynch law** means assumption of extrajudicial authority came into common parlance of United States . Lynch was not accused of racist bias and indeed acquitted blacks accused of murder on three separate occasions , as dictated by facts brought before him . He was accused , however of ethnic prejudice in his abuse of Welish miners . Inside this period around 2400 black men , ladies and youngsters were murdered . [1]

This type of lynching was not just confined to the USA on the basis of race but can find its traces from ancient casteism in India . In Hindus , caste based violence is nothing new . In the past , Dalits and Shudras were treated like slaves and severe punishment were given to those who to change their profession , other crimes .[2]

In India, Lynching generally reflects the inner tension between the varied communities within the country. In the democratic country of India, in recent years, these types of incidents have risen to an alarming extent and the failure of the state to prevent the victim from these, coupled with an alarming rise in the numbers of such cases has forced the Hon'ble Supreme Court to term it as "horrendous act of **Mobocracy**".

Mobocracy, although doesn't have a legal definition until now, it can still be understood by this that when in a democracy a mob punishes a person by killing him on suspicion or rumor. We need to understand that this type of lynching conveys a very disastrous message to society and destroys the pluralistic social fabric of a civilized society. In a simple definition, we can understand that Mob lynching is a punishment to those minorities who disagree or have non-conformity with the way of ruthless, vengeful mass.

In India, lynching may reflect internal tensions between ethnic communities. Communities sometimes lynch accused or suspicious convicts. An example is **the 2006 Kherlanji massacre**, where four members of a Dalit caste family were slaughtered by Kunbi caste members in

[1] Michael Pfeifer ," At the hands of Parties unknown The State of the field of Lynching scholarship " 101 JAHIST ,P.42

[2] Vithal Ranjan . Dalits and the Caste System in India (2010) p.4

Kherlanji, village in the Bhandara district of Maharashtra. Though this incident was reported as an example of "upper" caste violence against members of a "lower" caste, it was found to be an example of communal violence. It was counter against a family who had contradicted the Eminent Domain seizure of its fields so a street could be fabricated that would have profited the gathering who killed .

The ladies of the family were strutted exposed openly, before being damaged and killed. Sociologists and social researchers dismiss ascribing racial segregation to the standing framework and credited this and comparative occasions to intra-racial ethno-social clash. In connection to cow vigilante various lynching happened in 2014 in India , essentially including hordes lynching Indian Muslims and Dalits Some outstanding instances of such assaults incorporate the 2015 Dadri crowd lynching, the 2016 Jharkhand crowd lynching and the 2017 Alwar horde lynching.

Crowd lynching was accounted for the third time in Alwar in July 2018, when a gathering of bovine vigilantes killed a multi year old Muslim man named Rakbar Khan. Since May 2017, when seven individuals were lynched in Jharkhand, India has encountered another spate of horde related brutality and killings known as the Indian **Whatsapp lynching** following the spread of phone news, basically identifying with youngster snatching and organ collecting, through the Whatsapp message administration. In June 2019, in the state of Jharkhand , bike thief Tabrez Ansari was beaten by a mob after getting caught stealing a motor bike. Later he died due to stress and following cardiac arrest in the hospital 5 days after the incident. .

MOB LYNCHING AND COMMUNAL POLITICS :

One of the purported faced currently are the lack of education within the general masses . This lacks the education in spite of literacy is the one who fans the fire of partial support and victim blaming . . The most recent case of **Kathua Rape case** [3] where an eight year old girl was raped and murdered inside religious premise and the mob supported the rapists and threatened the female lawyer and the administrative fraternity to protect the offenders by giving it a communal outlook . the media too enjoyed the sensation and published the photographs and the name of the victim . Later media was fined [4] By the Hon'ble High Court for misconduct and revealing the victim's identity . This is an another type of mob that lynches people passively .

The mob also forms the people of society who do not accept the social change and killing young people .This can be seen in the form of honor killing mostly in Haryana . The Law enforcement has too take up these matters seriously and aim to solve such matters as efficiently as possible . Also, law alone is not a solution and there is still need for the social change .

Mob lynching initially backed by the politics later itself becomes a political question . If the political class has to stand up against these monsters then the politicians have to do the politics on the issue rather than the politics of hate .[5]

Though a bitter truth and also considering that there is no separate law against mob – lynching ,lynching is a way to tell the minority that law cannot protect them and they will have to obey and adopt the way of mass or get lynched by the mob . It becomes a **political reality** .

REASONS AND CAUSES OF MOB LYNCHING :

SOCIAL CAUSE :

1) Prejudices/inclination dependent on different characters like rank, class, religion, and so on (for instance : Majority v . minority)
2) Rise of dairy animals vigilante,etc.
3) Differences in the convictions among the individuals/narrow mindedness towards one another and so forth.

INNOVATIVE CAUSE :

1) No information guideline law ,
2) Spread of bits of gossip by internet based life .
3) No legitimate laws on counterfeit news and so on.

[3] Mohd. Akhtar v. tate of Jammu and Kashmir , AIR 2018 , SCC 85
[4] Court on its Motion v. Union of India and others , AIR 2018 DELHI HC 3725/ 2018
[5] Aditi tyagi , "Mob –Lynching the new normal in India '

POLITICAL CAUSE :

1) Political assembly of periphery bunches .
2) Politicization of lynching and vital quietness and so on.

WHAT IS THE NEED OF SEPARATE LAW FOR MOB LYNCHING ?

Presently there is no special provision or law to punish mob lynching or hate violence in India but there are some other provisions related to such violence.**The Code of Criminal Procedure (Cr.P.C), 1973** under **Section 223(a)** provides that the mob involved in same offence in the same act can be tried together. **The Indian Penal Code (IPC), 1860** also has some proximate sections related to hate speech and hate crimes under **Sections 153A** (promoting enmity between different groups on grounds of religion, race, place of birth, and many other grounds and doing acts prejudicial to maintenance of harmony).

Sec 153B (imputationassertions prejudicial to national integration),**Section 505**(statements

conducing to pubic mischief) but as seen in majority of the cases, these sections were in "time posed upon the perpetrators and only sections against individuals such as Section302(punishment for murder), **Section 307**(attempt to murder), **Section 323**(punishment for causing hurt), **Section 325**(punishment for causing grievous hurt) etc". are applied because of which the crime is seen as an offence against individual and not the community. Such an approach is not justified as incidents like mob lynching are seen from communal lenses and are usually targeted against a certain minority, caste, religion, gender etc. and is a matter of public order and not merely an offence against a person. The offence of lynching usually takes place as an organized hate crime against a community so it must be considered as heinous offence.

There is an urgent need to bring in a special law to deal with the menace of mob lynching. The special law dealing with the atrocities against the scheduled caste and scheduled tribes **— The SC/ST (Prevention of Atrocities) Act 1989** — may not have ended caste discrimination, but it has acted as a great deterrent After all, mob lynching is no ordinary crime. The evidence collected by *IndiaSpend* suggests that since 2010, there were as many as 87 incidents of hate crimes on 289 victims in cow related violence The apex court had used strong language while asking the Union Government to curb mob lynching. It had observed, "Citizens cannot take the law into their hands or become law unto themselves," In March this year, **the Union Home Ministry** admitted that between 2014 to 3 March 2018, 45 persons were killed in 40 cases of mob lynching across nine The Supreme Court condemned mob lynching incidents across the country and urged Parliament to enact a law to deal with the crime that threatens the country's social fabric and the Rue of Law .States on 23rd July 2018 , the Union Government indicated its

first concrete instance of concern towards mob lynching incidents , in the wake of Supreme Court directive to curb the mob violence . It constituted a high level under the Union Home Secretary to deliberately about the issue and market recommendations within 4 weeks . They feel mob lynching is of a separate genre and needs specially attention and treatment .

Presently there is no law with regard to mob lynching , so a law is the need of an hour because it is found out who is a real accuser of the group . **Mob lynching can not be aptly handled under Section 323, 324,307, 302 of IPC , 1860**. Some argue that more enacting a law , Union Government and the State government need to show greater political will to curb mob lynching.

The SC/ST Act of 1989 records 22 offenses relating of different examples or conduct perpetrating criminal offenses and breaking the confidence and regard of the booked stations and clans of Scheduled Caste and tribes network .

GUIDELINES PROVIDED BY SUPREME COURT ON PREVENTING

MOB –LYNCHING :

The West Bengal (Prevention of Lynching) Bill, 2019 accommodates three years to life imprisonment to those harming an individual and the death penalty or thorough life imprisonment for those causing death. Recently, **Rajasthan** additionally passed an enemy of lynching bill.**Manipur** was the main state to pass a law against lynching. In 2018, the Supreme Court had likewise given rules to control lynching.

- The state governments shall designate a senior police officer in each district for taking measures to prevent incidents of mob violence and lynching.
- The nodal officers shall bring to the notice of the Director General of Police (DGP) any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence-related issues.
- The Central and the state governments should broadcast on radio and television and other media platforms including the official websites that lynching and mob violence of any kind shall invite serious consequence under the law.
- Curb and stop the dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which have a tendency to incite mob violence. Register FIR under relevant provisions of law against persons who disseminate such messages.
- State governments shall prepare a lynching/mob violence victim compensation scheme.
- Ensure that there is no further harassment of the family members of the victims.

- If a police officer or an officer of the district administration fails to do his/her duty, the same will be considered as an act of deliberate negligence for which an appropriate action must be taken against him/her.

MEASURES SUGGESTED BY THE HON'BLE SUPREME COURT :

In the case of **Tehseen Poonawalla vs. UOI** [6] Supreme Court suggested various measures related with dealing of Mob Lynching

PREVENTIVE MEASURES :

1) The local and The State Government will communicate on the radio about the lawful results of mob lynching .
2) Police shall register FIR **under The Indian Penal Code , 1860 Sec 153A** against a person who sends provocative message related to mob violence .

REMEDIAL MEASURES:

1) the exploited people or the families of the victims will get lawful guide **under Legal Aid .**[7]
2) The instance of crowd Lynching will be attempted in optimized court the procedures will be closed in a half a year .

CASES RELATED TO MOB LYNCHING;

1. Recently , on nineteenth July , in the eastern Bihar a crowd beat to death three men associated with attempting to take dairy cattle .

2. On June 26th **Tabrez Ansari's** dad , Farook Ansari was additionally executed by the crowd along these lines to his child , fifteen years prior ,he was gotten by thegroup of people while submitting robbery and was lynched .

[6] Tehseen Poonawalla vs. Union of India [Ma No 1607 of 2018 in IA Nos.14870-14871 of 2018]
[In Writ Petition (C) No 19 of 2018]
[7] Legal Service Authoity Act, 1987

3. In historic judgement of **Alimuddin case** [8] Lynching case , which was the first of its kind where the offenders were given the life imprisonment .

4. On 27th July 2019, **a juvenile of 14 years** of age has been lynched by the mob when he was caught committing theft in AshokNagar , Delhi .

5. West Bengal President Dilip Ghosh alleged that maximum people in West Bengal as lynched for Jai Shree Ram chants .

6. In the case of **Mohammad Haroon vs. Union of India** [9]**,** the Supreme Court held that State along with the intelligence agencies to prevent recurrence of communal violence .It also directed the negligent officers who either do or abstain from doing any negligent act which result in agony of the victims of the lynching .Same judgement was held in **Arumugal Selvai vs. State of Tamil Nadu** [10] where the court ruled for action to be taken against the officers who did not prevent the violence or did not instigate criminal proceedings against the accused.

7. In **Dadri**[11] ,on 28th Septmber 2015 , when Mohammad Akhlaq and his sons were dragged out of their home and were beaten to death by a mob of around 2000 people on suspicion that they stole and slaughtered a cow calf . Later an Indian court found prima facie evidence of meat that may have been either mutton or beef, and ordered registration of first information report against the slain Mohammed Akhlaq. The government's inquiry concluded that he was not storing beef for consumption.
8. In the case of Nandini Sunder vs.State of Chattisgarh[12] the Supreme Court held that it is the responsibility of the state to prevent internal disturbance and to take steps to ensure public order. The Same has been provided under Article 355 of the Constitution of India which places the duty on Union to protect states against any external aggression or internal disturbance .

[8] Nithyanand Mahto and others vs. State of Jharkhand , AIR 2018 Jharkhand High Court 490, Jharkhand High Court 491
[9] Mohammad Haroon vs. Union of India (2014) 5 SCC 252
[10] Arumugal Selvai vs. State of Tamil Nadu (2016) 9 SCC 682
[11] 2015 Dadri ,Mob lynching case
[12] Nandini Sunder vs. State of Chattisgarh (2011) 7 SCC 547

NOT ONLY THE MUSLIMS, EVEN THE NON –MUSLIMS ARE ALSO THE VICTIMS:

(victims of mob-lynching are not only the minority people but also majority **)**

9. On **May 2017 six individuals were pounded the life out of in East Singhbhum District** of Jharkhand by crowds in the midst of bits of gossip about kid taking posses. Police officers who attempted to stop the assault were likewise assaulted and were frail to stop the furious crowds.3 In that episode in East Singbhum region, three men to be specific, Vikas Kumar Verma, Gautam Kumar Verma and Gangesh Gupta, were hauled out of house and pounded the life out of and lady was mercilessly ambushed as residents blamed them for abducting youngsters. Exploited people were not from minority community.

CONCLUSION:

India is not a country of hatred and it is not the territory and ecosystem which makes India , it is the people of India themselves. Of late, lynching and vigilante attacks have become the instrument of choice for violence against minorities particularly Muslims.

Mob lynching simply means when a mob gives a death penalty to a person without a fair trial or any legal authority. This can be done through beating, stabbing, setting fire to the person or hanging. This type of punishment is not accepted in any kind of civilized society Vigilante attacks and lynching are different to „communal riots". The crowd is of general perception that if judicial organ of the government and police administration cannot provide them justice ,they should own it by themselves . There is a need for patience and respect across the people of the society .

This clearly shows that people in the country have lost their trust on law and order. Mob lynching simply means when a mob gives a death penalty to a person without a fair trial or any legal authority. This can be done through beating, stabbing, setting fire to the person or hanging. This type of punishment is not accepted in any kind of civilized society Vigilante attacks and lynching are different to „communal riots". The crowd is of general perception that if judicial organ of the government and police administration cannot provide them justice ,they should own it by themselves . There is need for patience and respect across the people of the society . This clearly shows that people in the country have lost their trust on law and order

SUGGESTIONS:

At the individual level steps can be taken by the administration to ensure speedy justice, registering the FIR without any delay The government should take steps to pass the law demanded by the civil society, **Manav Suraksha Kanoon (MaSuKa)** which provides that the **law to be made for mob lynching shall be cognizable, non-bailable and non-compoundable** . The parliament should follow the guidelines issued but the Supreme Court to draft and pass a new law to deal with the cases of mob lynching .

OFFENCES AGAINST WOMEN

K.Bhanu Sireesha

V.Mohan Vinay

INTRODUCTION

Protection of women against crimes is a sine quo non duty of the Government and also lies upon every citizen of the nation. Way from the offence of pre-birth elimination of females to till death every day the offences are at increasing rate against the women. Way back to the early years crimes against women in the form of dowry deaths, murders, rapes has never came to an end, in spite the crimes against women is increasing in day to day life.

Violence against women collectively also known as Sexual and gender-based violence. It is a violent act that is committed against the women.

CRIMES AGAINST WOMEN UNDER INDIAN PENAL CODE, 1860

1. ***Voluntarily Causing miscarriage to women-*** If any person willingly causes a female with child to miscarry and if such miscarriage is caused not in a bona fide faith for the cause of saving the life of such women then the person is *punished with three years of sentence and fine-* ***Sec-312***

If such women is quick with child then she shall be *punished with seven years and also obligated to fine or sometimes both. This clause includes the pregnant women who causes herself to miscarriage.*

A women with child means pregnant women.

2. ***Causing miscarriage without women's acquiescence-*** If any person commits the offence of miscarriage to a women without the acquiesce of her, Whether the woman is quick with child, or not, then they shall be *imprisoned for life or they may sentenced for a period of ten years and also liable to fine-* ***Sec-313***

The dissimilarity between sec- 312 and 313 is in the former one the women is also punishable for miscarrying herself and in the later one miscarriage is caused without the acquiesce of the women so only the person who causes abortion alone will be punished.

3. ***Death caused by act done with intent to cause miscarriage-*** Any person who is intended to cause miscarriage of a female with child does any act which further leads into death of women they shall be sentenced with an *imprisonment of ten years and also liable to fine.*
4. ***Kidnapping-*** IPC furnishes two modes of kidnapping-
    1. Kidnapping from lawful guardianship
    2. Kidnapping from India

5. ***Sec-360*** Says if any individual transfers any person beyond the premises of India without the acceptance of that person or any person lawfully authorized on behalf of that person then it amounts to kidnap from India.
6. ***Sec-361*** provides that if any person who wrongfully persuades any minor under the age of 16 in case of a boy and 18 in case of a girl or any unsound mind person or any minor who is under lawful guardianship, without the permission of such lawful custodial is said to be kidnap.
7. ***Abduction-*** No matter any person by compulsion or by any fraudulent manner induces any person to go from any place is said to be abduct that person- ***Section-362***.

Minor distinction is-The offence of abduction is committed in respect of a person of any age and in case of kidnapping the offence will be committed against the minors (In case of Male 16years and in case of female 18years).

8. ***Outraging the modesty of women- Sec-354*** of IPC, 1860 provides that if any person uses criminal power or assaults any women intentionally to scandal her modesty then the person will be *fined and sentenced to a period of five years and it can be extended to maximum of seven years if the circumstances draws.*

In *RAM DAS vs STATE OF WEST BENGAL*[1] the Supreme Court opined the mere proof of assault is not sufficient and it must be proved that the accused does the act intentionally to outrage the women's modesty.

In *STATE OF MAHARASTRA vs MANOHAR ALIAS MANYA KANHAIYA BAIRAGI*[2] the Bombay HC highlighted that this section not only creates a criminal liability on the accused for using criminal force against a women, but also the action is likely to be resulted in the outrage of the modesty of the women.

9. ***Rape-*** Rape is the only crime where society blames the victim. Rape is a flagitious crime. This evil nature of crime leads to psychological disturbance. Rape is an everyday issue in the country of India.

Since the word, rape mentioned in the IPC, 1860 is entirely dissimilar to the word mentioned under the Act of 2013 criminal law amendment.

[1]. 1954, AIR(SC) 711 : 1954 Cri.L.J,1793
[2]. 1994 Cr.L.J 2536(BOM)

As per IPC, 1860 The word rape defined as sex without the willingness of the women, or with willing but under the fear of death or under wrong deceit.

10. ***1983 Amendment to criminal law-*** A girl named Mathura while she is in custody of police she was raped by two police officers. Then her family lodged a complaint against the officers and the trial went all the way to the apex court.

The jury found that the officers are not guilty by reason of she was ostensibly accustom to sexual intercourse.

By Mathura case a new offence was inserted I.e., *Custodial rape* and if public servants commits rape they are also imprisoned and fined. The 1981 amendment had *prohibited publicising of the victim's identity and also banned the character assessment of rape victims.*

11. ***2013 major amendment to Criminal law ACT, 1973-*** Jyoti Singh who viciously gang raped her in a bus. This case was a turning point for revising the existing laws in India and lead to the understanding that there are many other offences like acid attacks, stalking etc.

The second case is that Nirbhaya's by this case the punishment was enhanced *from seven to ten years* and *if the act leads to death then the accused shall be convicted with imprisonment up to twenty years.* Again in this case the character defamation came into play the court opined that *character of the victim is not at all relevant in rape cases. One of the convicted in this case is a juvenile. Hence the Juvenile Justice Act was reduced the age from eighteen to sixteen for trial of cases.*

12. ***REPORT-*** As per the estimation, India is the world's fourth dangerous country for women.

Instances-

- The physio therapy scholar, Jyoti Singh who brutally gang raped in a bus at New Delhi.
- Seventeen year girl in West Bengal was found in a canal in 2013, half-naked and deep cuts on her body and with blade marks. Recently in Hyderabad, A twenty-seven year's old women veterinary doctor while returning to her home four men have been gang raped her and burnt her body.[3]
- A fifteen year old child was raped in Rajasthan by a twenty year man to whom she had been married because of the man was angry on his in-laws for not sending the girl to his

[3]. *Omar khan,* Four men confess to gang rape of women they later burned alive, Indian policy say, CNN, 30th November, 2019, https:www.cnn.com (1st December,2019)

house even after the marriage took place a long back. In North Delhi, Fifty five year old women was raped and killed by a Twenty four years men.

After 2012 Delhi bus gang rape case, the government established *fast-track courts to deal exclusively with the matters of rape but it still had one lakh thirty-three thousand cases pending.*

2018, Aged about eight years, Asifa was raped and murdered in Jammu & Kashmir. *Seven people had brutally raped a girl in a temple and was committed by the priest of the temple where the crime took place and also the other accused persons are his nephew and son who are juveniles and other persons were four police officers.*

This leads to change in POSCO Act, if the victim is aged below twelve years then the accused shall be punished with death penalty and if the victim is of the age of sixteen then the offender is punishable with twenty years and also amended the rule for disposing the cases of such nature by the fast-track courts within one year to six months.

Sec-375 says that a man is said to commit rape

The crime of rape is the entrancement of a women without her consent by using fraud, threat and force. The issue is that mostly the issues of rapes never reported in India because of threats, dignity of women etc.

13. Punishment is prescribed under sec-376

The person shall be sentenced for a term of *seven years and can be extended to life imprisonment and also liable to pay fine.*

In case of persons of armed forces, or any police officer, or any public servant, or any other subordinate authorities to above mentioned authorities, or staff of a hospital, or any relative, guardian or teacher in a position of fiduciary or trustworthy commits the offence of rape then they shall be imprisoned for a period of ten years and the sentence can be increased to the extent of life imprisonment and fine.

14. Sec-376(A) - If a person commits a crime sentenced U/Sub-section 1& 2 of Section-376A and in such course if inflicts any injury and causes death of the women or causes such women to be in persistent vegetative state he shall be *sentenced for a term of not less than twenty years and the same can be extended to life imprisonm*ent.

15. Sexual intercourse during separation by husband upon the wife of him- If a person has sexual intercourse with his wife without her consent and such wife is separately living either by a decree of separation passed by any competent court then he shall be punished with *imprisonment of not below two years and can be extended to further period of seven years and also liable to fine-*

Sec-376(B)

16. ***SEC-376(C)-*** Any person-

- who is in a position of any authority or in a fiducially relation.
- or any public servant
- or superintendent of a jail, remand place or any other place of custody constituted by or under any law for the moment in force or a children's institution or women's organization.
- Or on the administration of a hospital or on the staff of a hospital

➢ mistreats such position or fiducially relationship to cause or seduce any women either in custody or such women is under his charge or present in his premises to have sexual intercourse but that does not amounting to rape, he shall be punished with the sentence of *not below five years and it can be extended to further period of ten years.*[4]

17. ***Gang rape-*** *The genesis is the rape and the species is the gang rape,* ***SEC- 376(D) of IPC*** provides that if a women is raped by two or more persons by collectively forming into a group or acting in additionally with a common consciousness each of such charged person shall be considered to commit the crime and the penalization for such offence is stringent in nature for a term of *not below 20 years and the captivity can be even extended to imprisonment for life.*

18. ***Habitual offenders-sec-376E-*** Any person who is previously convicted for the offences of sec-375 & 376A to 376D and *further if he committed the same offence then such person is imprisoned for life.*

19. ***Eve-teasing-*** *Provision 509 of the IPC Act,1860* confer that if any person whom so ever is deliberately defaming the modesty of any female by using any words or by making any sounds or through gestures, or by displaying any object and having with such intention that the sound or word shall be heard or such object or gesture shall be seen by such female or which infringes upon the privacy of such female and imprisonment for such offence is *three years and damages of fine will be awarded to the victim.*

20. ***SEC-498A*** provided that a person being the husband or relative of such husband subjects women to cruelty he shall be imprisoned for a term of *three years and also liable to pay the fine.*

For the purpose of this provision cruelty includes-

- Any intentional conduct which leads to commit a suicide by a women or to cause serious danger or injury to life, health which includes both mental and physical of a women.

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[4]. *Ratanlal & Dhirajlal,* The Indian Penal Code, 752 (thirty-third edition,2011)

- Harassment to the women with a view to coerce her or any other person related to her for the purpose of unlawful demanding of property or any valuable security.[5]

In *SHANTI BEHAL vs STATE*[6]- The allegation was that the victim is subjected to harassment, cruelty and ill-treatment by her husband and her mother-in-law. Victim had wrote a letter to her parents expressing that there is an endanger to her life before her death.

In dying declaration she stated that her mother-in-law was involved for burning her and also stated that her husband and her mother-in-law harassed her. The same declaration was recorded and corroborated it with the circumstantial evidence and other medical evidence. The victims father also given evidence as a witness as to the demand of dowry.

The court held that husband and mother-in-law of the deceased to be convicted as per section 498A.

21. ***Cyber-crimes-*** In the world of technology, India also advanced and adopted technology. But the people nowhere left any chance of disparaging the dignity of the women. Cyber Crimes against women includes cyber stalking, Cyber defamation, Cyber pornography etc.

SPECIAL LAWS ENACTED BY PARLIAMENT FOR BETTER SAFETY AND PROTECTION OF WOMEN-

➔ ***Child Marriage Restraint Act, 1929-*** By recognizing child wedlock as a social evil, the government of India enacted the above Act and this Act was popularly known as Sharda Act. The minimum age for performance of marriage for boys and girls are *twenty-one and eighteen respectively.*

➔ ***Prohibition of Child Marriage Act, 2006-*** This Act prescribed that without any exceptio the minimum lawful age for wedlock in India is eighteen years when it is with the case of girl and in case of boy is twenty-one years and this is applicable without any bar irrespective of the religions to which the people belong.

In accordance with the recent progressive study of UNICEF's there is a diminution rate of child marriages across the globe.

REPORTS: As per the report of ***UNICEF's***, In India ***twenty-seven percent*** *of girls* were being married before they attain the age of eighteen years and seven percent of girls were married before

[5]. *Prof. N. V. Paranjape,* Indian Penal Code, 762(Second edition, 2013)
[6]. 1994 Cr.L.J 2043(Del)

the age of fifteen only and also the study reported that India is the highest country where the child marriages are being held the total number of child marriages in India is 15,509,000.[7]

➢ Child marriage results in the following evils it breaks the process of schooling, social separation, terminates the girls possibilities and adds the risk of experiencing domestic violence.

➔ ***Domestic violence-***The instances of domestic violence is becoming higher among all the classes of people. DV is so easy for persons to ignore as it was a crime which is committed within the four walls of the house by there in-laws itself and the domestic violence is such a crime which took place without any witnesses and unfortunately the accused sometimes cannot be convicted as there will be misappropriation of evidence.

➔ Domestic violence cannot be confined not only to physical assault which eventually results in injuries there are other types which included emotional, sexual, psychological, economic abuses.

DV is an abusive behaviour in a marital relationship which is used by one partner against the other to gain control and power over them.

Due to raise in the increase of crimes against women within the four walls of the house by their In-laws family itself, the legislative assembly enacted a law to provide more effective protection for the women. The Act is called as ***The Protection of Women from Domestic Violence Act, 2005.***

Even though Men sometimes abused by their partners, but domestic violence is most often related to women.

➔ ***The Immoral Traffic(Prevention) Act, 1956***- Article-23 of the India constitution prohibits human trafficking.

Human trafficking is the exploitation of people by means of fraud, force, coercion or deception. This heinous crime is committed against especially on women and child and also men.

➔ ***Indecent Representation of Women(Prohibition) Act, 1986-*** In spite of law relating to obscenity codified U/s-292, 293 and 294 in IPC,1860. There is an increasing inclination of indecent representation of women through advertisements which have the effect of derogating the decency of the women. Therefore the Govt. felt essential to have a distinguish legislation to prohibit indecent representation of women.

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[7]. *Child marriage rates in India, Girls not brides,* https://www.girlsnotbrides.org (26th, November,2019).

In *C. RAJA KUMAR Vs COMMISSIONER OF POLICE HYDERABAD*[8]

It was held that if a beauty contest represents any women indecently by depicting in any manner, the figure of a women or any part of her body in such a way to derogate the women or to deprive the public morality would amount to violation of the provisions of the Act and also unconstitutional as it violates Article- 14, 21 and 51A of the Indian Constitution.

➔ ***Dowry Prohibition Act, 1961-*** The Prohibition of Dowry Act was enacted with an aim to prohibit the demanding of dowry at the time or after the wedlock. Due to increase in dowry deaths and suicides the POI enacted this law.

➔ ***SEC-304 of the IPC Act, 1860*** deals with dowry deaths it express that within seven years of performance of marriage, if a women's death took place by causing burns or bodily injuries and it is shown that soon before the death of such women if she is subjected to cruelty by their relatives of the husband or husband himself for demand of dowry then it is presumed that such death is dowry death

The sentence provided to the accused under the offence of dowry death is *seven years* and the same can be increased up to *life imprisonment*.[9]

In a judgement delivered by the Rajasthan High court it was held that in case of dowry death if an accused immediately takes her wife to hospital and lodged report without any delay the accused can be acquitted. BHAKHAR RAM AND ANOTHER VS STATE OF HARYANA.

➔ ***SEC-113B of Indian Evidence Act,***- Inference as to dowry death If any question is aroused in relation to whether a person has committed the death of a women for dowry and such women son before the death subjected to cruelty in demand for dowry then court can draw a presumption that such person had committed the death for dowry demand.

➔ ***The Sexual Harassment of a Women at Workplace(Prevention and Prohibition, Redressal)Act, 2013-*** This Act was enacted with a view to protect and prevent the women against sexual harassment at workplace. The damages are determined on the basis of mental trauma of the victim, emotional distress, loss of carrier opportunities to her, medical expenses mentioned in sec-15 of the said Act.

RECENT STATISTICS:

[8]. (1991) cc 144 A.P.H.C., 1998 AP 302

[9]. *Prof. T. Bhattacharyya,* The Indian Penal Code, 504(Eight edition,2014)

The instances of violence against women in the world continue to raise.

➢ It is calculated approximately that 35% of women in and around the world have experienced either physical or sexual violence by a non-partner at some point in their lives. However, some national research show up that 70% of the women experienced sexual and physical abuse from an intimate partner in their lifetime.

➢ It is globally determined that Eight-seven thousand of women were knowingly killed in the year 2017 and fifty-eight percent were killed by the family members of the In-laws itself.

➢ Globally it was noticed that forty-nine percent of adult women were the victims of human trafficking for the purpose of sexual exploitation and nearly in total seventy-two percent of the girl child and women were trafficked.

➢ Globally, out of three students at least one student aged between thirteen to fifteen have been bullied by their equals in schools at least on one day in the previous month, both girls and boys equally experiencing bullying. It is however reported that boys are experiencing physical bullying when compare to girls and girls are experiencing psychological bullying. Gender based violence in a school is a major hurdle.

REPORT BY NATIONAL FAMILY HEALTH SURVEY

As per the study of NFHS between the age group of fifteen to forty-nine in India thirty percent of the women have been experienced physical violence from the age of fifteen. The study additionally revealed that six percent of women in the age group of fifteen to forty-nine have experienced sexual violence further the report says that thirty-one percent of women in India have experienced emotional, sexual and physical violence by their spouses.

➢ By a report of Live mint ninety-nine percentage of sexual violence cases are not at all reported.

CONCLUSION

Despite there exist many provisions and special legislations with regard to protection of women from crimes, crime rate against women is always at higher rate and women continues to be the victims of crime at all time. The issue of offences against women is always been an alarming one. Offences committed against women is not only a violent acts it is concern of women'srights.

PERSONS ENTITLED TO GET THE PROPERTY UNDER HINDU LAW

Guna Sekhar Kalla & Sravani Kurra

PERSONS ENTITLED TO GET PROPERTY UNDER HINDU LAW
RULES FOR CALCULATING THE SHARE IN A PARTITION
PRINCIPLES IN CASE OF AGRICULTURAL PROPERTY
CONCLUSION

PERSONS ENTITLED TO GET THE PROPERTY UNDER HINDU LAW

RULE UNDER MITHAKSHARA SCHOOL OF LAW

1) COPARCENER:

In the case of Surtaj Kuari v Deoraj Kuari[1], it was held that every person including minor or a major. At the time of partition every coparcener gets an interest in the undivided property i.e., title to the property. The minors get a share but it is maintained in common with fathers and brothers. So all the members in the descent of father i.e., son, son's son and so on will get a share.

In the Guramma Bharatar Chanbasappa Deshmukh v. Mallappa Chanbasappa[2], The doctrine of "Jethansi" or "jeshtbagam" is now absolute and unenforceable. The principle of Hindu Law is equality of division and the exception to that rule has almost, if not altogether, disappeared. One of the exceptions was in favour of the eldest son, who was originally entitled to a special share on partition. Either a tenth or a twentieth in excess of the others or some special chattel, or joint property was from early times condemned. As between brothers or other relations absolute equality is now the invariable rule in all the States, unless, perhaps where some special family custom to the contrary is made out.[3]

In the case of Shripad Gajanan Suthankar v Dattaran Kashinath Suthankar[4]

One 'M' was the head and his two sons 'G' (defendant No. l) and 'K' were coparceners of a joint Hindu family, 'G' had an only son 'S' (defendant No. 2). 'K' died in 1921 leaving behind a widow 'R' (defendant No. 3) and a daughter 'L'5. The plaintiff is the son of 'L'.

A partition took place in the family in 1944 between the then two coparceners, viz.,'M' and 'G', under which an allotment for the residence and maintenance of 'R' had been made. 'M' passed away but before his death he gifted his entire share in the joint family derived under the partition to 'S', who however, alienated some of these properties. Long after the demise of her husband 'R' adopted the plaintiff in February 1956. In April 1956 the plaintiff filed a suit (out of which the present appeal

[1] (1888) ILR 10 All 272
[2] AIR 1964 SC 510
[3] Siromani v. Hem kumar AIR 1968 SC 1299
[4] (1974) 2 SCC 156

arises) ignoring the partition of 1944 and praying for fresh partition by metes and bounds of his half share.

Held :

At the partition of 1944 although as a physical fact only 'M' and defendant No. l were alive, the plaintiff must be deemed to have been alive. The division had denied a share to him while he was eligible, in the eye of the law, to a share. There were thus three coparceners and the plaintiff was entitled to a third out of the estate of the joint family as it then existed.

The partition of 1944 was valid; so also the gift of his exclusive share by 'M' and 'S'. The plaintiff will be eligible to get one-third of the available joint family property. He could reopen the partition only to the limited extent rights flowing from these two facts, viz., disruption of jointness and alienation by one sharer. However, the allotment for maintenance of the 3rd defendant will have to be ignored, brought into the corpus and in the division by metes and bounds allotted to the share of the plaintiff.

The plaintiff has to be given his one-third share as in 194, when the partition took place. assuming that adopted son would have got a lakh of rupees, say. But 'M's' share has been entirely gifted away and must be ignored. Which means that the plaintiff's one-third share valued at one lakh will have to come out of 'G's' properties which would be one-half of three lakhs, i.e., 1-1/2 lakh. It would be unfair to deprive 'G' of a lion's share out of his allotment merely because, before adoption, he had not parted with his properties. It would be eminently just to make the first defendant bear only one-half the burden cast by the notional re-entry of the plaintiff into coparcenary and the court directs a division into two equal shares of such of the properties which fell to the first defendant at the date of adoption, and award one share to the plaintiff. The justice and equity of the situation, not any inflexible legal principle, prompts this course.

Minors in coparcenary-Partition possible- Right of such minors to challenge on attaining majority Transfer of Property Act 1882, S. 7 An adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of a joint family when one of the members is a minor In the case of such lastly mentioned partitions where a minor can never be able to consent to the same in law, if a minor on attaining majority is able to show that the division was unfair and unjust, the court will certainly set it aside. The rule, however does not apply to decrees if the minor is properly represented before the court and the decree is as binding on

him as on the adult parties, unless minor can show fraud or negligence on the part of his next friend or guardian ad litem. A minor can sue for partition and obtain a decree if his next friend can show that it is for the minor's benefit.[5]

2) SON BORN OUT A VOID OR VOIDABLE MARRIAGE

The void and voidable marriages are discussed in the section 11[6] and 12[7] of Hindu Marriage Act, 1955[8]. If a child is born out of that marriage then he is treated as a legitimate child of parents and is statutorily entitled to get the property as a legal heir[9]. Thus he can inherit the property of his parents but not from any other relations of their parents. In the situation of legitimate that is born out of valid marriage, he is considered as coparcener by birth and get a share at the time of partition. But in the instance of statutory legitimate child he cannot be treated as the coparcener of the family as he was a child out of void or voidable marriage. For example, a Hindu person married w1 and during the subsistence of this marriage, he married again. Out of these two marriages he was blessed with two children i.e., one from each{S1& S2}. Here S1 is a legitimate child and S2 is a statutory legitimate child. S1 can get the property upon partition as a coparcener but S2 can't get because he can inherit the property that whatever their parents get. In case of death of S1 the share of S1 is taken by F by survivor ship and S2 is not even entitled to the partition property by survivor ship. Accordingly he is not a coparcener and cannot get a share at the time of partition.

3) ILLEGITIMATE SON:

An illegitimate son inherits from the mother only not from the father. Even then he can get the property from father and it depends on the caste of a person. If he is a Brahmin, Kshatriya or Vaishaya he is merely a member of the putative father's joint family but not a coparcener and therefore cannot get a share in the property albeit entitled to get maintenance[10]. If a son is born out a permanently kept concubine, called as Dasiputra, who is a Sudra then he cannot either ask for a share in the property or get a share if the father was joint with his collaterals.[11] Even when his father got separated from

[5] Bishun deo Narain v. Seogeni Rai, AIR 1951 SC 280, 283 1951 SCR 548: 1951 ALJ 127: ILR 30 Pat 947
[6] Sec 11 of Hindu Marriage Act,1955
[7] Sec 12 of Hindu Marriage Act,1955
[8] Hindu Marriage Act,1955
[9] Family Law Lectures, Poonam Pradhan Saxena, pg.no 238
[10] Vellayappa v natarajan, (1931) 58 IA 402
[11] Gur narain das v Gur tahal das, (1952) 2 Mad LJ 251

the collaterals then also he can't claim for the share in the property[12]. If the property is partitioned among his sons and himself then also he is not eligible to ask for the share in the property. But he (dasiputra) can be given the property by his father and it valid in the eyes of law but it is purely depends on the discretion of father[13]. The only constraint is, he cannot demand the property from his alleged father. In the case of death of his father then the dasiputra will become a coparcener of the family and can demand for the share of property at the time of as a matter of right. Then he is enabled to get ¼ th of the share of the legitimate sons[14]. So after the death of father he can become a coparcener and get property with the right of survivorship. During the life of father the incidences of survivorship don't exist. In the worst case if all the brothers die then the whole property can be taken by the dasiputra under the doctrine of survivorship.

For example, Claim of partition by an illegitimate son of a Sudra against the legitimate son. Since the illegitimate son is a coparcener with the legitimate son of his father, it must necessarily follow that he is entitled to demand partition against the legitimate son. There can be no doubt that though the legitimate son cannot enforce partition during the father's lifetime and though he is not entitled to demand partition where the father has left no separate property and no collaterals he can enforce partition in a case where the father was separate from the collaterals and has left separate property and legitimate sons[15].

4) AFTER BORN SON:

A son who is born after the partition but is conceived before the partition then it should be postponed or a share should be kept as ide for him which is to be given when he is born. If a female child is born then the share is again divided among themselves. The son when he is born becomes coparcener of the family and so he is entitled to get a share as his father.

5) DISQUALIFIED COPARCENERS:

Ownership of the property brings with it the advantages and responsibilities and if a coparcener cannot keep them the he is disqualified as a coparcener. Because if the property is attached to the person which cannot maintain it then it is detrimental to the person and also to the property. So a

[12] Dorai BAbuv Gopala Krishna, AIR 1960 Mad 501
[13] Packirisamy v Doraiswami, (1931) ILR 9 Rang 266
[14] Gur narain das v Gur tahal das, (1952) 2 Mad LJ 251
[15] Gur Narain Das v Gur Tahal Das, AIR 1952 SC 225

person with infirmities and certain diseases is not entitled to get the property even though he belongs to the three generations for the holder of the property i.e., the Karta. After the passage of the Hindu inheritance (Removal of Disabilities) Act, 1928 where the property is given to the people even though they have infirmities like congenital and incurable blindness[16], deafness and dumbness[17], virulent and incurable leprosy and other incurable diseases. But in the cases where the person is suffering from congenital and incurable insanity[18] or idiocy[19] then he is not eligible to get property and the law bars it. Subsequently, after getting property through succession or partition if a person becomes insane then one cannot grab the property given. Only in the case when before inheritance or partition the person is insane or idiotic then only the property is not devolved upon that person.

6) FEMALE MEMBERS:

The female members include father's wife, widowed mother, and paternal grandmother. These female members have right to get a share but thy cant initiate the partition or demand for it. When the partition happens then they are entitled to get it. If the female person dies before partition then her children won't get a share in that property and her share is again divided among the coparceners by survivorship. In one case they can demand for partition i.e., when the partition happened they are legally entitled to get it but did not get then they can demand to do the partition again.

a) Father's wife:

Whenever the partition is occurred in the family then the father's wife or wives (prior to 1955 Act which is legal) also get a share in the partition, which is either initiated by Son or Father. The share of the wife should be equal to share of the son. If the son is the sole survivor of the family after father's death and the partition is not done before his death then the whole property is devolved upon him by the survivorship and the father's wife or wives won't get any share.

For example: if f has two wives and two sons then the property should be divided into five parts that is each one should get an equal share including the wives.

[16] Gurneswar v Durga Prasad, AIR 1917 PC 146
[17] Savitri Bhai v Bhaubat, AIR 1923 Mad 215 (FB)
[18] Bijai v Jagat Pal, (1891) ILR 18 Cal 111 (PC)
[19] Ram Singh v Bhani, AIR 1916 All 47

b) Widowed mother:

In her case if the partition is initiated by any of her sons who are coparceners then she will also get a share equal to their share. If the father has two or more wives then if he married before 1955 then each one of them will get an equal share. If it is after 1955 then they won't get only the legally wedded one will get a share equal to the son's share. For the partition a minimum of two coparceners are needed. So in the case of single son then the whole property goes to him through the doctrine of survivorship when the father died without partition.[20]

The co widows under Mitakshara law succeed as co-heirs to the estate of their deceased husband and take as joint tenants with rights of survivorship and equal beneficial enjoyment; they are entitled as between themselves to an equal share of the income. Though they take at joint tenants, no one of them has a right to enforce an absolute partition of the estate against the others so as to destroy their right of survivorship. But they are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the mom accruing therefrom[21].

A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener.

The assumption that though the right vested in the widow by the Act is a right of property which may on demand for partition become separated from the coparcenary property, it is still liable to revert to the coparcenary on the determination of the widow's estate does not give full effect to the Statutory conferment upon the widow of "the same right of claiming partition as a male owner".

The interest which a widow acquires under 5, 3(2) of Act 18 of 1937 has no analogy with the interest which a female member of a Hindu joint family acquires in the property of the joint family allotted to her on partition between her sons or grandsons. It is true, that under Mitakshara law when the family estate in Hindu joint family is divided a wife or mother is entitled to a share, but is not recognized as the owner of such share until the division of the property is actually made, as she has no pre-existing

[20] Sita devi v shamsher Prasad gupta AIR 2010 Sik 8
[21] CIT v. lndra Balakrishna. AIR 1960 SC 1172.

rights in the estate save a right of maintenance. If she dies before the property is divided, her share in the property falls back into the property from which it was carved out. But a Hindu widow acquires under S. 3(2), even before division of the property, an interest in property and that interest gets defined as soon as an unequivocal demand for partition is made by her. [22]

c) Paternal Grandmother:

The paternal grandmother will get a share only when the partition is happened after the death of her son. It may be paternal grandmothers if their grandfather married two or more before 1955 Act. Her share is equal to the share of the grandson.[23] For example there are three sons for grandmother and first has one son, second one has two sons and third one has three sons then in the absence of her each son will get a one third share and the grandsons divide that one third share that is GS1 ($1/3^{rd}$), GS2 and GS3 ($1/6^{th}$), GS4, GS5 and GS6 ($1/9^{th}$) where GS is Grandson. If she is present and her sons are dead then the property should be divided into 7 parts as there are six grandsons in the above example. And she will get that one seventh property and the rest $6/7^{th}$ property is divided among the grandsons according to their share as in the absence of the grandmother. That is GS1 (6/21), GS2 and GS3 (6/42), GS4, GS5 and GS6 (6/63).

If in the case where the son of the grandmother is alive that is father then there is judicial conflict that is whether she will get a share or not. In the case of Krishna lal v nadsehwara[24] and in Budry Roy v Bhagwat[25], where the Patna and Calcutta high court respectively are of the opinion that the grand mother has to get a share even when his son is alive and the partition occurred between son and grandsons. But the Bombay and Allahabad HC are of the opinion in the cases of jamna bai v vasudev[26] and Sheo narain v janki[27] respectively that the grandmother won't get a share because the grand sons are not the direct descendants of her and also the partition is between her son and grandsons.

Property is given to women with some rules attached to them. They are

[22] Satrughan isser v sabujpari, AIR 1967 SC 272, Satrughan Isser v. Sabujpari, AIR 1967 SC 272, 274-276: (1967) 1 SCR 7.
[23] Kanhaiylal v Gaura
[24] AIR 1918Pat 91
[25] (1882) ILR 8 Cal 649
[26] (1930) ILR 54 Bom 417
[27] (1912) ILR 34 All 505

i) Females are entitled to get a share at the time of partition under the Benaras, Mithila and Bombay (Maharashtra) Schools only and not under the Madras (Dravida) School.[28]

(ii) Father's wife and widowed mother are entitled to get a share only when they were not paid stridhana by their husbands or father-in-law that was equal to or more than the value of the share that is to be given to her at partition. Where she was not given any stridhana, she gets her full share and where she was paid stridhana but its quantum or value was less than her share, the share will accordingly be proportionately reduced[29].

(iii) Even though these females are entitled to get a share, they are incapable of demanding and ascertaining it before a partition. They cannot demand it since they have no pre-existing right in the property, except for a right of maintenance, and till a division of the property is actually made by a partition, they do not get their shares.[30]

(iv) Where a female dies before a partition has been effected, her share pass to her legal representatives, but remains in the common pool as in family property, and at a subsequent partition, will be divided among all who on such day, are entitled to get a portion from it.

(V) Since a woman does not have an ownership right in the property, she can neither prevent the Karta from alienating the property, nor can she challenge an unauthorised alienation. Even where a preliminary decree in a partition declares her entitlement to a specific share, it would not affect a consent made on a mortgage that was executed by her son and her husband.[31]

(vi) A mere severance in status by the coparceners, does not entitle her to possess or get her share, as a female can be granted her portion only when a partition by metes and bounds is effected.[32]

(vii) Where a partition by metes and bounds takes place, and a female, though entitled, is not given her share, she can file a suit for a re-opening of the partition and claim her share.[33]

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[28] Narayanan v ponnammal, (2002) 4 LW 338(Mad)
[29] Radha bai v Pandarinath, (1942) ILR Nag 534
[30] Sheo Dyal v Judoonath, (1868) 9 WR 61
[31] pratapmull v dhanabhati (1936) 63 IA 33
[32] sri gopal v janak dulari, (1946) ILR All 612 (FB)
[33] Radha bai v Pandarinath, (1942) ILR Nag 534

(viii) Prior to the passing of the Hindu Succession Act, 1956, a female took ha share as a limited owner of the property. Though she could enjoy it and possess it, she had no general power to alienate it. Under the Act of 1956, this limited ownership was converted into an absolute ownership, if the female was in possession of her share on the day the Act was enforced.[34] Post 1956 the share that she takes is her absolute property, with full powers of disposal over it.

(ix) An entitlement to maintenance does not operate as a disqualification for a woman, for getting a share at the time of partition. Presently, a Hindu woman's right to claim maintenance is secured under both the civil and criminal laws but if she gets a share, her maintenance rights are affected, since for seeking maintenance, she must show that 'she is incapable of maintaining herself' and the quantum of share that she gets at a partition, would be a major factor while deciding on the above point.

A partition of the joint Hindu family can be affected by various modes, viz., by a family settlement, by oral arrangements by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bound. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events and the preliminary decree does not bring about any irreversible situation. The concept of partition that the legislature has in mind cannot be equated with a mere severance of the status of the joint family which can be affected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind is a partition completed in all respects and which has brought about an irreversible situation. Unless a partition of the property is affected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Since the legislation is beneficial and placed on the statute book with the avowed object of benefiting women who are a vulnerable section of the society in all its strata, it is necessary to give a liberal effect to it. (Para 7)

[34] THE HINDU SUCCESSION ACT, 1955, SEC 14

Since in the present case the final decree had not been passed and the property had not been divided by metes and bounds, clause (iv) to S. 29-A was not attracted and the respondent-daughters were entitled to their share in the family property. [35]

RULES FOR CALCULATING THE SHARE IN A PARTITION

On a partition among the members of a joint family, all the members may effect a division among themselves, or only the branches may separate. The followings rules are to be observed while calculating the shares of the members who separate:

(i) A partition has to be effected between two generations as the first step, for example, between a father and his sons.

(ii) The shares are to be so calculated that the share of the father on the one hand and the share of each of the son on the other, are absolutely equal.

(iii) The father takes the share as his exclusive or separate property with respect to the sons, while the son takes it as coparcenary property when he has male issues. In the absence of any male issues, he takes the property as a sole surviving coparcener.

(iv) When one son dies during the lifetime of the father and leaves behind issues, the branch of the deceased son takes the share that he would have had he been alive[36] tie, the benefit of the death of a son will be taken by .male descendants, and not by his collaterals or ascendants.

(V) Where a joint family comprises only brothers, each of them takes an equal share. This is called a per capita distribution.

(Vi) Each branch takes the property as per stirpes (according to the stock), but the members of each branch will take per capita as regards each other.

(Vii) When female members, who are entitled to get a share, are present, they m be given a share at the time of partition. The father's wife takes a share equal to that of a son, the mother's (widowed)

[35] S.Sai Reddy v S. Narayana Reddy, (1991) 3 SCC 647, (Para 8). S. Sai Reddy V. S . Narayana Reddy, (1991) 3 SC C 647.
[36] Dharamambal v S. Laxshmi Ammal, AIR 2003 NOC 117

share is equal to that of the brothers and the paternal grandmother's share is equal to that of a grandson.

PRINCIPLE IN CASE OF AGRICULTURAL PROPERTY

The fundamental principle of a partition is that every co-sharer be given property of equal value, having similar potential. In the case of agricultural property, factors like fertility of land, proximity to metalled roads, previous possession by a member so as to maintain continuity of cultivation, must be taken into consideration while effecting a distribution.[37]

POSITION IN THE CASE OF AGRICULTURAL PROPERTY

There are two brothers B and BB survived till 1909 and entitled to 50% share each in joint family Properties and after the death of BB his widow adopted her grandson whose is respondent herein. This Widow also died in 1950. Then the Adoption of respondent related back to death of adoptive father BB. After death of B, his son and his grandson, then the property of B's share is devolved upon B's great grandson who is appellant herein. The court held that properties by inheritance never went to collateral unless it is a valid pre partitioned debts. Accordingly held, on partition, appellant and respondent entitled to 50% share each in run property and the creditor won't get anything[38]

RULE UNDER DAYABHAGA SCHOOL OF LAW

Under the Dayabhaga law, the father is the absolute owner of his share and there is no right by birth, in favour of the son, and consequently, the son cannot demand a partition from the father. A partition may take place at the instance of the father, if he so desires, and if he wants. At his pleasure, he can give a share to his wife, which is either equal to or unequal to the share of the son.[39] A widow, on the death of her husband, becomes his heir with the sons, and where the family continues as joint, she can, in her own right, sue for claiming her share or demand a partition from the joint members. Unlike under the Mitakshara law, she has a pre-existing ownership and a definite share in the property and her rights do not arise only when a partition takes place.[40]

[37] Baldev Singh v Financial Commission, Haryana, AIR 2003 P&H 351
[38] Babu Rao Marutrao Mane v. Ramchandra Balasaheb Mane, AIR 2005 Bom 375
[39] Sorolah Dossee v Bhooban Mohun, (1885) 15 Cal 292
[40] Soudminey v Jogesh, (1877) ILR 2 Cal 262.

CONCLUSION

A Hindu father under Mitakshara law can affect a partition among his sons even in the lifetime of Karta of the joint family and such partition would be binding on them. In such a case he can define and specify his share along with his sons and thus effectuate a separation among them. But in no case, ho can divide the joint family property among the different members by virtue of a Will, although he could do it with their consent. It is, however, necessary that the member of the joint Hindu family seeking to separate himself must make known his intention to other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case. The proof of a formal dispatch or receipt of the communication by other members of the family is not essential, nor its absence fatal to the severance of the status.

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PHILOSPHY OF BAIL- IN THE LIGHT OF INDIAN JUDICIAL SYSTEM

Gagori Bhattacharya & Amrita Das Gupta

ABSTRACT

In literal sense 'bail 'denotes security which means release of a prisoner from police custody after furnishing a security. Detention in prison is very traumatic and the liberty of the person got hampered. The concept of bail in India is rooted with personal liberty. In bail jurisprudence, there is two attribute one is the personal liberty of the accused and another is the security of public interest. Indian laws regarding bail attempts to harmonize between this two concepts. One can enjoy freedom and liberty after getting bail but is always bound to observe the conditions of bail. After reviewing the practical scenario of present criminal justice system the authors are of the opinion that, there are many loopholes in the present system of bail. An attempt is made to shape the enlarged bail jurisprudence on a compact note. This study focuses on the philosophy behind the provision of bail rather than the explanation of statutory provisions.

Keywords: bail, Supreme Court, judiciary, CrPC, magistrate.

INTRODUCTION

"Our bail system suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice" – Mr. Justice Bhagwati[1].

There is no statutory definition of the term 'bail' available in the Code of Criminal Procedure, 1973(CrPC). Etymologically, the word is derived from an old French verb 'bailer' which means to 'give' or 'to deliver'; although another view is that its derivation is from the Latin term 'baiulare', meaning to 'bear a burden'[2]. In simple words, bail is understood as a conditional liberty i.e. release of one who is charged with an offence upon some restrictions imposed on him. In India, the provision regarding bail has been enumerated in CrPC. Bail is nevertheless one of the important yet contradictory concept of criminal justice. In one hand it's a matter of right and on the other hand the right is encircled with various restrictions. In India, the grant of bail is totally depends upon the discretion of judges. Though there are no specific guidelines on granting of bail, gravity of offence is the main factor behind the decision.

The Supreme Court in Vaman Narain V State 2009(1) Supreme 478, while giving the meaning of the term 'bail' has concluded: "Bail may thus be regarded as a mechanism whereby the State

[1] S.N Misra, The Code Criminal Procedure,1973, 626(Central Law Publications, 18th Edn.,2012)
[2] B.B Mitra and S.P. Sen Gupta, Code of Criminal Procedure,1973,Vol.2, 2674(Kamal Law House,Kolkata,22th Edn.,2015)

devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice."[3].

HISTORY

The concept of bail is not of recent origin. The release of accused upon a security or surety is very old one. The concept of bail in England has been traced back to the system of frank pledge adopted in England following Norman Conquest[4]. Under that system the community as a whole was required to pledge its property as a security for the appearance of the accused at the trail. Later after introduction of English Common law, a system of interim release of an accused on surety was prevalent and surety had to be bound to produce the accused to attend his trail on the date appointed for such trail[5]. The system of bail in some form or other was also prevalent in ancient India. However, to prevent pre-trail detention Kautilya's Arthasastra also advocated speedy trail of the accused. The bail system also prevalent in the form of muchlaka i.e. personal bond and jamanat i.e. bail on furnishing surety during Mughul period. After the invasion of British rule in India the common law rule of bail was introduced in India[6]. Later such common law provision has been codified under Code of Criminal Procedure.

PHILOSOPHY BEHIND BAIL JURISPRUDENCE IN INDIA

No society is free from crime, only the degree of crime is differs from country to country. In India the prison system as a feature of punishment is prevailing from ancient times. Ancient Hindu law makers, such as, Manu, Brihashpati stated about various forms of punishment, prison system is one of the forms of punishment. But with the changing nature of society, the system of punishment is also changed. Bail is nothing but the conditional release from prison. The object of granting bail is connected with the concept of freedom. Conceptually, it continues to be understood as a right for assertion of freedom against the state imposing restraints since the U.N. Declaration of Human Rights of 1984,to which India is a signatory, the concept of bail has found a place within the scope of human rights[7]. Right to life, liberty and security of persons[8] and Freedom from arbitrary arrest, detention or exile[9] is secured by U.N. Declaration of Human

[3] B.B Mitra and S.P. Sen Gupta, Code of Criminal Procedure,1973,Vol.2, 2674(Kamal Law House,Kolkata,22th Edn.,2015)
[4] M.R Mallick, Bail Law and Practice, 3(Eastern Law House,5th Edn.,2015)
[5] M.R Mallick, Bail Law and Practice, 3(Eastern Law House,5th Edn.,2015)
[6] M.R Mallick, Bail Law and Practice, 3(Eastern Law House,5th Edn.,2015)
[7] B.B Mitra and S.P. Sen Gupta, Code of Criminal Procedure,1973,Vol.2, 2674(Kamal Law House,Kolkata,22th Edn.,2015)
[8] Article 3, U.N. Declaration of Human Rights of 1984
[9] Article 9, U.N. Declaration of Human Rights of 1984

Rights of 1984 and bail as a matter of freedom inferred from those above rights. The freedom granted on bail is not absolute and did the bail is a freedom or not is still a conflicting issue. Bail is a matter of right in case of bailable offence but in case of non-bailable offence it can be cancelled at any time. The main objects behind bail jurisprudence are, to give a chance to the alleged offender to lead a normal life and not to curtail his fundamental right and to ensure his attendance on trial (by imposing conditions) and to give him a opportunity to prepare his defense.

The main philosophy of bail originated from the conflict between State's power and the liberty of the alleged offender. It is a known concept that until and unless the guilt is proved, the offender (alleged) is innocent in the eye of law. Likewise, the accused has every right to pray for bail instead of accepting the confinement as an under trail prisoner.

An accused is not detained in custody with the object of punishing him on the assumption of his guilt. It must not be lost sight of that personal liberty is fundamental and can be circumscribed only by some process sanctioned by law[10]. Right to life and liberty is an indispensible attribute of one's life. But in case of bail, a balance is required between liberty and security of community. A balance is also required between personal liberty and the investigational right of the authority.

Indian judges while disposing any bail application consider the prima facie of a case and considered factors like seriousness of crime, gravity and nature of offence and circumstances. This philosophy leads to the balance between liberty and large interest of people.

CONSTITUTIONAL MANDATE REGARDING BAIL

Indian constitution expressly guarantees right to life and personal liberty under Article 21. After Maneka Gandhi's case[11] the scope of right to life has been widened. In numerous cases, Supreme Court linked bail jurisprudence with personal liberty. In Hussainara Khatoon's case[12] Supreme Court has diagnosed the root cause for long pre-trail incarceration to be the present-day unsatisfactory and irregular rules for bail which insist merely on financial security from the accused and their surities. Many of the under trails being poor and indigent are unable to provide any financial security. Consequently, they have to languish in prison awaiting their trail. But

[10] B.B Mitra and S.P. Sen Gupta, Code of Criminal Procedure,1973,Vol.2, 2675(Kamal Law House,Kolkata,22th Edn.,2015)
[11] Maneka Gandhi v. Union of India AIR 1978 SC 597 : (1978) 1 SCC 248
[12] Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360

incarceration of persons charged with non-bailable offences during pendency of trail cannot be questioned as violative of Article 21 since the same is authorized by law[13].

Supreme Court has labeled the system of 'bail' in India as 'antiquated' as it is oppressive against the poor. The court stated "…..the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitive judicial process."[14] To ensure the personal liberty, Supreme Court suggested a process of bail free from financial security. Apex is of the opinion that, if the circumstances clearly denotes that there is no chance of absconding of accused then the bail can be granted on personal bond. This is because the apex court wanted a process of bail free from pecuniary means. Supreme Court in a case stated that, imposing unjust or harsh conditions, while granting bail, is violative of Article 21[15]. The statute permits Judges ample power to grant or refuse bail on any ground, but Supreme Court while interpreting bail as constitutional right bars unfair conditions which can be opposed to right to life and personal liberty.

Ordinarily, in cases under The Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), release of under trails on bail is extremely restricted, but the Supreme Court has ruled that even in TADA cases, where there is no prospect of a trail being concluded within a reasonable time, release on bail may be necessary as this can be taken to be embedded in the right to speedy trial under Article 21[16]. Supreme Court in number of cases suggested speedy trail where the bails are refused in numerous occasions, right to speedy trail is comes under the provision of Right to life under article 21.

In this juncture, we can assume that, the bail jurisprudence in India is directly connected with Indian Constitution, as the philosophy of liberty within the bail provision party denotes with the liberty permitted under Article 21. Though Anticipatory bail under section 438 CrPC is not anyway connected with the concept of liberty, it is merely a statutory provision.

TYPES OF BAIL

To understand the system of bail it is evident to know the types of bail. There are two types of bail enumerated in CrPC, **a) Bail after arrest; and b) Bail before arrest**

[13] M.P Jain, Indian Constitutional Law,1138 (LexisNexis,7th Edn.,2016)
[14] Babu Singh v. State of Uttar Pradesh, AIR 1978 SC 527,529 : (1978) 1 SCC 579
[15] Gurbaksh Singh Sibba v. State of Punjab AIR 1980 SC 1632
[16] M.P Jain, Indian Constitutional Law,1139 (LexisNexis,7th Edn.,2016)

a) Bail after arrest: - According to CrPC there are several provisions regarding bail after arrest by different authority, those are:

Power of Police to grant bail: - In case of bailable offence the police have power to grant bail, but after the challans are filed in court, the accused person has to fill the prescribed bail bond in order to get regular bail from court. A person Arrested has a Legal and Constitutional Entitlement to inform his relations that he has been detained.

The police cannot keep any person arrested for any alleged offence for more than twenty-four hours. Within 24 hours the police are legally duty-bound to produce the said arrested person before the nearest magistrate under whose jurisdiction the alleged offence has been committed. In case the police fail to produce him within the prescribed period of 24 hours, the detention will amount to an illegal detention, and on moving a habeas corpus writ petition, he has to be set at liberty at once. There have been instances, where police has kept persons in their custody for more than 24 hours, and on filing a writ petition they have been ordered to be released[17].

POWER OF MAGISTRATE TO GRANT BAIL

The object of Sections 167 and 309 of the Code of Criminal Procedure is to bring the accused persons before the court and safeguard their interests. As the detention in both the cases is authorized by Magistrate or the Court, the accused person, therefore, remain under the control of the court or the Magistrate authorizing his custody in the manner prescribed or authorized[18]. Such a custody of the accused cannot be interfered with or interrupted by any person or authority except and with the proper permission and sanction obtained from the said magistrate or the court in accordance with the provision of law[19]

When proviso (a) to section 167(2), CrPC is attracted, the right to bail accrues to the accused and the magistrate has no discretion in the matter and if the accused offers bail he shall have to be released on bail. When a bail is granted under proviso (a) to section 167(2), CrPC and thereafter charge sheet is filed, release under order of bail continuous to be in operation due to the deeming provision provided in proviso (a) to section 167(2), CrPC and such bail can only be cancelled under subsection 5 of section 437, CrPC.

Except where the proviso (a) to section 167(2) CrPC is attracted, the bail has to be granted on the following guiding principles:

[17] Palak Basu, Law Relating To Protection Of Human Rights, 698(Edn 2012)
[18] Palak Basu, Law Relating To Protection Of Human Rights, 700(Edn 2012)
[19] Bhai Jashi Singh v. State of Punjab. 1995 Cri LJ 285 at p. 288(P&H)

- That there is reasonable ground for believing that the accused has committed the offence with which he is charged.
- The nature and gravity of the charge.
- The severity of degree of punishment which might follow in the particular circumstance in case of a circumstance.
- The danger of the accused absconding if he is released on bail.
- The character means the standing of the accused.
- The danger of the alleged offence being continued or repeated assuming that the accused is guilty of having committed that offence in the past, and
- The danger of witnesses being tampered with.[20]

POWER OF SESSIONS JUDGE TO GRANT BAIL

CrPC provides wide power upon Sessions court. Section 439(1), CrPC confers special powers both upon the Court of Sessions and the High Court in respect of bail and unlike Section 437(1), CrPC, there is no bar imposed under Section 439(1) against granting of bail by the court of Sessions or High Court to persons accused of an offence punishable with death or imprisonment of life[21].

POWER OF HIGH COURT AND SUPREME COURT TO GRANT BAIL

Both High Court and Supreme Court has ample powers to grant bail in various cases. Normally, High Court's findings are treated by the Supreme Court as binding on such issue, but if High Court has rejected incontrovertible evidence on hyper-technical consideration, the Supreme Court may interfere [22] . Under Indian Constitution the Supreme Court generally does not interfere, except in exceptional circumstances with the grant or refusal of bail by the high Court[23] . Under section 390 High court possess special power to adjudicate bail application regarding sentence passed by the Trail judge.

[20]State v. Jagjit Singh. AIR 1962 SC 253
[21] Palak Basu, Law Relating To Protection Of Human Rights, 718(Edn 2012)
[22] Palak Basu, Law Relating To Protection Of Human Rights, 725(Edn 2012)
[23] Article 136, Indian Constitution

b) Bail before arrests: - Bail before arrest is Called Anticipatory bail and it is not a matter of right like other bails. Anticipatory bail is discussed under section 438 CrPC. This bail can be granted either by the Sessions court or High Court and Supreme Court. In literal sense, Anticipatory bail is a direction to release a person on bail, issued even before the person is arrested. In case of Anticipatory bail, a person apprehending arrest may file a petition under section 438 CrPC.

END NOTE

The Indian bail system is based on security which is nothing but a monetary amount. The pecuniary amount which is charged for bail is hard to fulfill by the poor, this leads towards the hardship and create economic pressure on the family of the accused. Indian constitution advocated for equality[24] among all citizen, but this kind of procedure is a fuss for the poor. The rural side of India suffers from unawareness of bail law and they are harassed by the sureties as the sureties claim unjust amount from them. Some under trial prisoners failed to apply for bail considering the economic conditions of their family. These circumstances challenged the philosophy behind bail jurisprudence. Therefore, it can be said that the Indian bail system needs drastic change if it intends to follow the philosophy of personal liberty.

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PLANT VARIETY PROTECTION LAWS IN INDIA AND INDIA'S STATUS IN UPOV CONVENTION

Rachita Agrawal

Shivani Singla

INTRODUCTION

The Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act was passed by the Indian Government in 2001. After India became signatory to the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) in 1994, a legislation was required to be formulated. Various objectives such as recognition and protect the rights of farmers, accelerate agricultural development in the country, protect plant breeders' rights; stimulate investment for research and development both in public & private sector for the development new of plant varieties and others.

Protection of Plant Varieties and Farmer's Rights Authority has been established under Section 3 of the Plant Varieties Act. An efficient and effective IPR regime is one which balances individual incentives and benefits with the wider needs of the society, while, IPRs are a well-established institution in the manufacturing sector, their application to agriculture is still in a state of evolution. The key issue in the agricultural sector is, quite simply, that some agricultural innovations are imperfectly appropriable. This imperfect appropriability may reduce innovators' incentive to invest in the improvement of such crops. India is among the first countries in the world to have passed legislation granting farmers' rights in the form of the Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act, 2001. India's law is unique in that it simultaneously aims to protect both farmers' and breeders' rights. The Indian case assumes immense importance due to the country's lead in establishing a legal framework on Farmers' Rights and also significant as the Indian Gene Centre is recognized for its native wealth of plant genetic resources. At international level, the UPOV system of Plant Variety Protection (PVP) is designed to encourage innovation in the field of plant breeding.

OBJECTIVE OF RESEARCH

The Plant Varieties Protection and Farmers' Rights Act, 2001, enacted to establish unique system by extending the concept of Plant Breeders Rights (PBRs), which is currently applied to new varieties of plants, held by farmers, NGOs and public sector institutions. This study attempts to evaluate the potential implications of India's Plant Varieties and Farmers' Rights Act on stakeholder's access to genetic resources. The study focuses on two aspects:

(i) The scope of India's legislation as an attempt to satisfy various interests; and
(ii) The India's status in UPOV Convention international convention.

A detailed research has been conducted on the national and international plant variety protection that exists. The significant part of the research has been dedicated to the reasons for why UPOV Convention not suited for India and what the implications are.

HISTORICAL BACKGROUND OF PLANT VARIETY PROTECTION

From early days man started living in equilibrium with nature. As the man realized that he has to depend heavily on nature and natural resources for his daily requirement, he automatically developed curiosity and instinctive interest towards various plants. This ultimately led the human beings to acquire knowledge about various plants and its species. The knowledge was not only for their use in food and medicine but also for their other basic needs. Such indigenous knowledge about plants, agricultural practices and other aspects which affect the human kind is of important strategic value and has got wide ranging economic repercussions.[1] Recent developments in the field of bio-technology and genetic engineering have offered new opportunities and challenges with regard to protection and conservation of biological resources. Hence, the need to protect these plant.

As with other categories of intellectual property, a key role in the inclusion of agriculture innovations within the international regulatory regime was played by industry associations. The Congre's Pomologique de France, held in 1911, had called for special protection for plant varieties. This agitation continued in the 1920s and 1930s, culminating in the foundation in Amsterdam on 17 November 1938, of the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINEL). At its summering Congress in June 1956 a resolution of ASSINEL called for an internationalConference to promulgate an international system for the protection of plant varieties.[2] Hence, through international conventions, a sui generis system was developed to protect the new plant varieties.

At global level the following conventions deals with the protection of plant varieties:

- UPOV Convention, 1961
- TRIPs Agreement
- Convention on Biological Diversity

[1] Sukanta K. Nanda, "Protection of Plant Varieties in India" in "The Law of Intellectual Property Rights".
[2]Available at https://www.journalijdr.com/sites/default/files/issue-pdf/10918.pdf.

PLANT VARIETY PROTECTION LAW

In order to provide for the establishment of an effective system for the protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants it has been considered necessary to recognize and to protect the rights of the farmers in respect of their contributions made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties. The Govt. of India enacted "**The Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act, 2001**"[3](herein after Plant Varieties Act) adopting sui generis system.

Historical Background

The Protection of Plant Varieties and Farmers' Rights Act was passed by the Indian Government in 2001. After India became signatory to the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) in 1994, a legislation was required to be formulated. Article 27.3 (b) of this agreement requires the member countries to provide for protection of plant varieties either by a patent or by an effective sui generis system or by any combination thereof. Thus, the member countries had the choice to frame legislations that suit their own system and India exercised this option. The existing Indian Patent Act, 1970 excluded agriculture and horticultural methods of production from patentability. The sui generis system for protection of plant varieties was developed integrating the rights of breeders, farmers and village communities, and taking care of the concerns for equitable sharing of benefits.[4]

Objective of the Act

The Plant Variety Act provides for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders. It encourages the development of new plant varieties.

The Plant Variety Act is enacted to achieve following objectives:

[3] PPV&FR Act, 2001, available at https://indiacode.nic.in/bitstream/123456789/1909/1/200153.pdf.
[4]Available at https://www.researchgate.net/publication/228968363_The_Protection_of_Plant_Varieties_and_Farmers'_Rights_Act_of_India.

- To recognize and protect the rights of farmers in respect of their contributions made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties.
- To accelerate agricultural development in the country, protect plant breeders' rights; stimulate investment for research and development both in public & private sector for the development new of plant varieties.
- Facilitate the growth of seed industry in the country which will ensure the availability of high quality seeds and planting material to the farmers.[5]

Important Definitions

Some of the important definitions in the context of the Plant Varieties Act[6] include the following:

- Breeder:

  Under *Section 2(c)* of the Plant Varieties Act[7] 'Breeder' means a person or group of persons or a farmer or group of farmers or any institution which has bred, evolved or developed any variety

- Denomination:

  Under *Section 2(g)* of the Plant Varieties Act[8] 'Denomination' in relation to a variety or its propagating material or essentially derived variety or its propagating material, means the denomination of such variety or its propagating materialor essentially derived variety or its propagating material, as the case may be, expressed by means ofletters or a combination of letters and figures written in any language

- Essential Characteristics:

  Under *Section 2(h)* of the Plant Varieties Act[9] 'essential characteristics' means such heritable traits of a plant variety which are determined by the expression of one or more genes of other heritable determinants that contribute to the principlefeatures, performance or value of the plant variety

[5]Available at http://vikaspedia.in/agriculture/policies-and-schemes/crops-related/protection-of-plant-varieties-and-rights-of-farmers/protection-of-plant-varieties-and-farmers-rights-act-2001.
[6] Supranote 3
[7]PPV&FR Act, 2001, Ibid.
[8]PPV&FR Act, 2001, Ibid.
[9]PPV&FR Act, 2001, Ibid.

- Extant Variety:

  Under *Section 2(j)* of the Plant Varieties Act[10] 'extant variety' means a variety available in India which is-

  (i) notified under section 5 of the Seeds Act, 1966 (54 of 1966); or

  (ii) farmers' variety; or

  (iii) a variety about which there is common knowledge; or

  (iv) any other variety which is in public domain

- Farmer:

  Under *Section 2(k)* of the Plant Varieties Act[11] 'farmer' means any person who-

  (i) cultivates crops by cultivating the land himself; or

  (ii) cultivates crops by directly supervising the cultivation of land through any other person; or

  (iii) conserves and preserves, severally or jointly, with any person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selectionand identification of their useful properties

- Farmer's Variety:

  Under *Section 2(l)* of the Plant Varieties Act[12] 'farmer's variety' means a variety which-

  (i) has been traditionally cultivated and evolved by the farmers in their fields; or

  (ii) is a wild relative or land race of a variety about which the farmers possess the common knowledge

- Seed:

  Under *Section 2(x)* of the Plant Varieties Act[13] 'seed' means a type of living embryo or propagule capable of regeneration and giving rise toa plant which is true to such type

- Variety:

  Under *Section 2(za)* of the Plant Varieties Act[14] 'variety' means a plant grouping except micro-organism within a single botanical taxon of the lowest known rank, which can be-

  (i) defined by the expression of the characteristics resulting from a given genotype of that plant grouping;

[10]PPV&FR Act, 2001, Ibid.
[11]PPV&FR Act, 2001, Ibid.
[12]PPV&FR Act, 2001, Ibid.
[13]PPV&FR Act, 2001, Ibid.
[14]PPV&FR Act, 2001, Ibid.

(ii) distinguished from any other plant grouping by expression of at least one of the said characteristics; and

(iii) considered as a unit with regard to its suitability for being propagated, which remains unchanged after such propagation,and includes propagating material of such variety, extant variety, transgenic variety, farmers' variety andessentially derived variety.

Salient Features of the Act

- Plant Varieties Authority:

  Section 3 of the Plant Varieties Act[15] provides for an establishment of an authority to be known as the Protection of Plant Varieties and Farmer's Rights Authority. This authority is to be set up by the Central Government and be a body corporate having perpetual succession and a common seal with the power to acquire, hold and dispose of movable and immovable properties. It can sue and can be sued by others. The Head Office of the Authority shall be at New Delhi and it may establish branch offices at other places in India with prior approval of the Central Government.

  The Authority shall consist of a Chairperson and fifteen members as representatives of different concerned ministries and departments such as seed industry, farmer's organizations, tribal communities and State-level women's organization, etc.

  The duty of the Authority is to promote the development of new plant varieties and to protect the rights of the farmers and breeders by taking such measures as it may think fit.

- Compulsory Variety Denomination:

  Section 17 of the Plant Varieties Act[16] requires that every application shall assign a single and distinct denomination to a variety with respect to which applicant is seeking registration in accordance with the regulations. If the denomination assigned to the variety by the applicant does not satisfy the requirements specified in regulations, the Registrar may require the applicant to propose another denomination within the prescribed time period.

  The Section further provides that the denomination assigned to a variety cannot be registered under the Trade Marks Act, 1999.

- Term of Protection:

[15]PPV&FR Act, 2001, Ibid.
[16]PPV&FR Act, 2001, Ibid.

The certificate of registration shall be valid for Nine years in the case of trees and vines and Six years in the case of other crops. The term may be reviewed and renewed for remaining period on payment of such fees as may be fixed. The total period of validity shall not exceed-

(i) in the case of trees and vines, eighteen years from the date of registration of the variety

(ii) in the case of extant variety, fifteen years from the date of the notification of that variety by the Central Government under section 5 of the Seeds Act, 1966

(iii) in other cases, fifteen years from the date of registration of the variety.

- Fees for Registration:

Application for registration of plant varieties should be accompanied with the fee of registration prescribed by the Authority. Fee for registration for different types of variety is as under:

The Registration of a variety is renewable subject to payment of annual and renewal fee as may be fixed.[17]

- Benefit Sharing:

S.No	Types of Variety	Fees for Registration
1	Extant Variety notified under section 5 of the Seeds Act, 1966	Rs 2000/-
2.	New Variety/Essentially Derived Variety (EDV)/ Extant Variety about which there is common knowledge (VCK)	Individual Rs. 7000/- Educational Rs.10000/- Commercial Rs.50000/-
3.	Farmers Varieties	No Fee

[17] Supra Note 5.

Section 26 of the Plant Varieties Act[18] provides that on receipt of a copy of the certificate of registration, the Authority shall publish such contents of the certificate and invite claims of benefit sharing to the variety registered under such certificate. Benefit sharing is adopted to protect the interest of traditional community.

Any person or group of persons or firm or governmental or non-governmental organization shall submit its claim of benefit sharing to such variety in the prescribed form within such period, and accompanied with such fees, as may be prescribed.

Provided that such claim shall only be submitted by any-

(i) person or group of persons, if such person or every person constituting such group is a citizen of India; or

(ii) firm or governmental or non-governmental organization, if such firm or organization is formed or established in India.

After this the Authority shall send a copy of claims to the breeder and the breeder may accept or reject these claims.

The amount of benefit sharing to a variety, determined by the Authority shall be deposited by the breeder of the variety in the National Gene Fund.

- Compulsory Licensing:

  The authority can grant compulsory license, in case of any complaints about the availability of the seeds of any registered variety to public at a reasonable price. The license can be granted to any person interested to take up such activities after the expiry of a period of three years from the date of issue of certificate of registration to undertake production, distribution and sale of the seed or other propagating material of the variety.[19]

- National Gene Fund:

  Under Section 45 of the Plant Varieties Act provisions for the National Gene Fund are given. The Central Government shall constitute a Fund to be called the National Gene Fund and there shall be credited thereto-

  (a) the benefit sharing received in the prescribed manner from the breeder of a variety or an essentially derived variety registered under this Act, or propagating material of such variety or essentially derived variety, as the case may be

[18] PPV&FR Act, 2001, Ibid.
[19] Supra Note 4

(b) the annual fees payable to the Authority by way of royalty under sub-section (1) of section 35

(c) the compensation deposited in the Gene Fund under sub-section (4) of section 41

(d) the contribution from any national and international organization and other sources.

The Gene Fund shall, in the prescribed manner, be applied for meeting-

(a) any amount to be paid by way of benefit sharing under sub-section (5) of section 26

(b) the compensation payable under sub-section (3) of section 41

(c) the expenditure for supporting the conservation and sustainable use of genetic resources including in-situ and ex-situ collections and for strengthening the capability of the Panchayat in carrying out such conservation and sustainable use

(d) the expenditures of the schemes relating to benefit sharing framed under section 46[20]

Criteria for the Registration

A new variety is registrable under the Plant Varieties Act[21] if it conforms to the criteria of Novelty, Distinctiveness, Uniformity and Stability. However, in case of registration of an extant variety, the criterion of novelty is dropped and is registrable within specified time if it conforms to the rest criteria.

- Novelty:

  A new variety shall be deemed to be novel, if, at the date of filing of the application for registration for protection, the propagating or harvested material of such variety has not been sold or otherwise disposed of by or with the consent of its breeder or his successor for the purposes of exploitation of such variety-

  (i) in India, earlier than one year

  (ii) outside India, in the case of trees or vines earlier than six years, or in any other case, earlier than four years,

  before the date of filing such application

  For this purpose a trial of a new variety which has not been sold or otherwise disposed of shall not affect the right to protection. Also if on the date of filing the application for registration, the propagating or harvested material of such variety has become a matter of common

[20]PPV&FR Act, 2001, Ibid.
[21]*Section 15*, Ibid.

knowledge other than through the aforesaid manner shall not affect the criteria of novelty for such variety.

- Distinctiveness:

  A new variety is deemed to be distinct if it is clearly distinguishable by at least one essential characteristic from any another variety whose existence is a matter of common knowledge in any country at the time of filing of the application.

- Uniformity:

  A new variety is deemed to be uniform if subject to the variation that may be expected from the particular features of its propagation it is sufficiently uniform in its essential characteristics. According to the requirement of uniformity, it is expected that there may be certain normal variation in the particular features of propagation of variety and these variations may be caused by differences in soil, water, climate, environment, fertilizers or topography. If the variations are more than expected , then the variety is not deemed to be uniform.

- Stability:

  A new variety is deemed to be stable, if its essential characteristics remain unchanged after repeated propagation or, in the case a particular cycle of propagation, at the end of each such cycle.

Registrable and Non-Registrable Varieties

Under the Plant Varieties Act[22] some varieties are registrable and some are non-registrable varieties.

There are four types of varieties which are registrable:

(i) A New Variety
(ii) An Extant Variety
(iii) Essentially Derived Variety
(iv) A Farmer's Variety

These varieties have to satisfy the criteria of novelty, distinctiveness, uniformity and stability for registration that is given under the Section 15 of the Act.[23]

[22]PPV&FR Act, 2001, Ibid.
[23]PPV&FR Act, 2001, Ibid.

- Non-Registrable Varieties:

  In the following cases, plant varieties may not be registered-

  (i) A new variety shall not be registered if the denomination given to such variety is either not capable of identifying such variety, consists solely of figures, can mislead or cause confusion to public regarding the identity of such variety, is likely to hurt religious sentiments, is prohibited for use as a name or emblem for any purpose mentioned in the Emblems and Names (Prevention of Improper Use) Act or is solely or partly of geographical name.[24]

  (ii) No registration of a variety shall be made under this Act in cases where prevention of commercial exploitation of such variety is necessary to protect public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment.

  (iii) The Central Government shall, by notification in the Official Gazette, specify the genera or species for the purposes of registration of varieties other than extant varieties and farmers' varieties under this Act.

  (iv) No variety of any genera or species which involves any technology which is injurious to the life or health of human beings, animals or plants shall be registered under this Act.

  (v) The Central Government shall not delete any genera or species from the list of genera or species specified in a notification issued under sub-section (2) except in the public interest.

  (vi) Any variety belonging to the genera or species excluded under sub-section (4) shall not be eligible for any protection under this Act.[25]

Infringement and Penalties

- Infringement:

  Section 64 of the Plant Varieties Act provides that a right established under this Act is infringed by a person who-

[24] Section 15(4),PPV&FR Act, 2001,Ibid.
[25]Section 29, PPV&FR Act, 2001, Ibid.

(i) not being the breeder of a variety registered under this Act or a registered agent or registered licensee of that variety, sells, exports, imports or produces such variety without the permission of its breeder or within the scope of a registered license or registered agency without permission of the registered licensee or registered agent, as the case may be

(ii) uses, sells, exports, imports or produces any other variety giving such variety, the denomination identical with or deceptively similar to the denomination of a variety registered under this Act in such manner as to cause confusion in the mind or general people in identifying such variety so registered.[26]

- Penalties:

Various penalties are laid down for various offences and these penalties are:

(i) Penalty for applying false denomination-

Imprisonment for a term which shall not be less than Three months but which may extend to Two years, or with fine which shall not be less than Fifty thousand rupees but which may extend to Five lakh rupees, or with both.[27]

(ii) Penalty for selling varieties to which false denomination is applied-

Imprisonment for a term which shall not be less than Six months but which may extend to Two years, or with fine which shall not be less than Fifty thousand rupees but which may extend to Five lakh rupees, or with both.[28]

(iii) Penalty for falsely representing a variety as registered-

Imprisonment for a term, which shall not be less than Six months but which may extend to Three years, or with fine which shall not be less than One lakh rupees but which may extend to Five lakh rupees, or with both.[29]

(iv) Penalty for subsequent offence-

Imprisonment for a term which shall not be less than One year but which may extend to Three years, or with fine which shall not be less than Two lakh rupees but which may extend to Twenty lakh rupees, or with both.[30]

[26]PPV&FR Act, 2001, Ibid.
[27]Section 70, PPV&FR Act, 2001, Ibid.
[28]Section 71, PPV&FR Act, 2001, Ibid.
[29]Section 73, PPV&FR Act, 2001, Ibid.
[30]Section 74, PPV&FR Act, 2001, Ibid.

VARIOUS RIGHTS PROVIDED UNDER PPV&FR ACT, 2001

There are various rights which are provided under the Plant Varieties Act[31] and these rights are:

- Breeder's Rights
- Researcher's Rights
- Farmer's Rights
- Community Rights

Breeder's Rights

Section 28 of the Plant Varieties Act talks about the following rights of a breeder of a registered variety. These rights are-

(1) A certificate of registration for a variety confers an exclusive right on the breeder or his successor, his agent or licensee, to produce, sell, market, distribute, import or export the variety.

Provided that in the case of an extant variety, unless a breeder or his successor establishes his right, the Central Government, and in cases where such extant variety is notified for a State or for any area thereof under section 5 of the Seeds Act, 1966 (54 of 1966), the State Government, shall be deemed to be the owner of such right.

(2) A breeder may authorize any person to produce, sell, market or otherwise deal with the variety registered under this Act subject to such limitations and conditions as may be specified by regulations.

(3) Every authorization under this section shall be in such form as may be specified by regulations.

(4) Where an agent or a licensee becomes entitled to produce, sell, market, distribute, import or export a variety, he shall apply in the prescribed manner and with the prescribed fees to the Registrar to register his title and the registrar shall, on receipt of application and on proof of title to his satisfaction, register him as an agent or a licensee, as the case may be, in respect of the variety for which he is entitled for such right, and shall cause particulars of such entitlement

[31] PPV&FR Act, 2001, Ibid

and conditions or restrictions, if any, subject to which such entitlement is made, to be entered in the Register:

Provided that when the validity of such entitlement is in dispute between the parties, the Registrar may refuse to register the entitlement and refer the matter in the prescribed manner to the Authority and withhold the registration of such entitlement until the right of the parties in dispute so referred to has been determined by the Authority.[32]

Researcher's Rights

Section 30 of the Plant Varieties Act allows any person-

(1) the use of any variety registered under this Act by any person using such variety for conducting experiment or research
(2) the use of a variety by any person as an initial source of variety for the purpose of creating other varieties

But, the authorization of the breeder of a registered variety is required where the repeated use of such variety as a parental line is necessary for commercial production of such other newly developed variety.[33]

Farmer's Rights

Section 39 of the Plant Varieties Act deals with Farmer's rights and by granting certain specific rights to farmers, the farmers have been put in the same position as a breeder developing a new variety. The Act provides following specific rights to farmers'-

i. A farmer who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety under this Act
ii. A farmers' variety shall be entitled for registration.
iii. A farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund

[32]PPV&FR Act, 2001, Ibid.
[33]PPV&FR Act, 2001, Ibid.

iv. A farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act.[34]

However, the farmer is not entitled to sell branded seed of a variety protected under this Act.

Community Rights

Section 41 of the Plant Varieties Act recognizes the rights of local communities in the contribution of the evolution of any variety.

It provides that on behalf of any village or local community, interested persons shall apply to the Central Government for staking claim for compensation for the contribution of the people of that village or local community in the evolution of any variety.

The Centre may make a report to the Authority, after being satisfied that the village or local community has contributed significantly to the evolution of the variety. The Authority shall grant a sum of money as compensation which is to be deposited in the National Gene Fund and then this money is given to the claimants.

UPOV CONVENTION

The UPOV Convention was adopted in 1961 as a result of the Diplomatic Conferences held in Paris in 1957 and 1961. The UPOV Convention entered into force in 1968 with the ratification of Germany, the Netherlands and the United Kingdom. The UPOV Convention was amended in 1972, 1978 and 1991.As of Februray 14, 2019, UPOV had 75 members, 17 States (initiating States) and one international organization (initiating organization) had initiated with the Council of UPOV the procedure for becoming UPOV members and another 26 States and one international organization had been in contact with the Office of the Union for assistance in the development of legislation on plant variety protection.[35]

The UPOV system of Plant Variety Protection (PVP) is designed to encourage innovation in the field of plant breeding. In that respect, the 1991 Act of the UPOV Convention recognizes that it is important to encourage breeding in all plant genera and species and not to pre-determine for which

[34]PPV&FR Act, 2001, Ibid.
[35]Available at https://www.upov.int/export/sites/upov/members/en/pdf/status.pdf.

genera and species breeding would, or could, be beneficial. An important corollary to this principle is that it is inappropriate to conclude that a PVP system is not effective because it does not encourage breeding in a particular crop.[36]

Objective of the Convention

The objective of UPOV Convention is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefits of the society.

The purpose of this Convention is to recognize and to ensure to the breeder of a new plant variety, or to his successor in title, a right the content and the conditions of exercise of which are defined hereinafter.[37]

Conditions Required for Protection

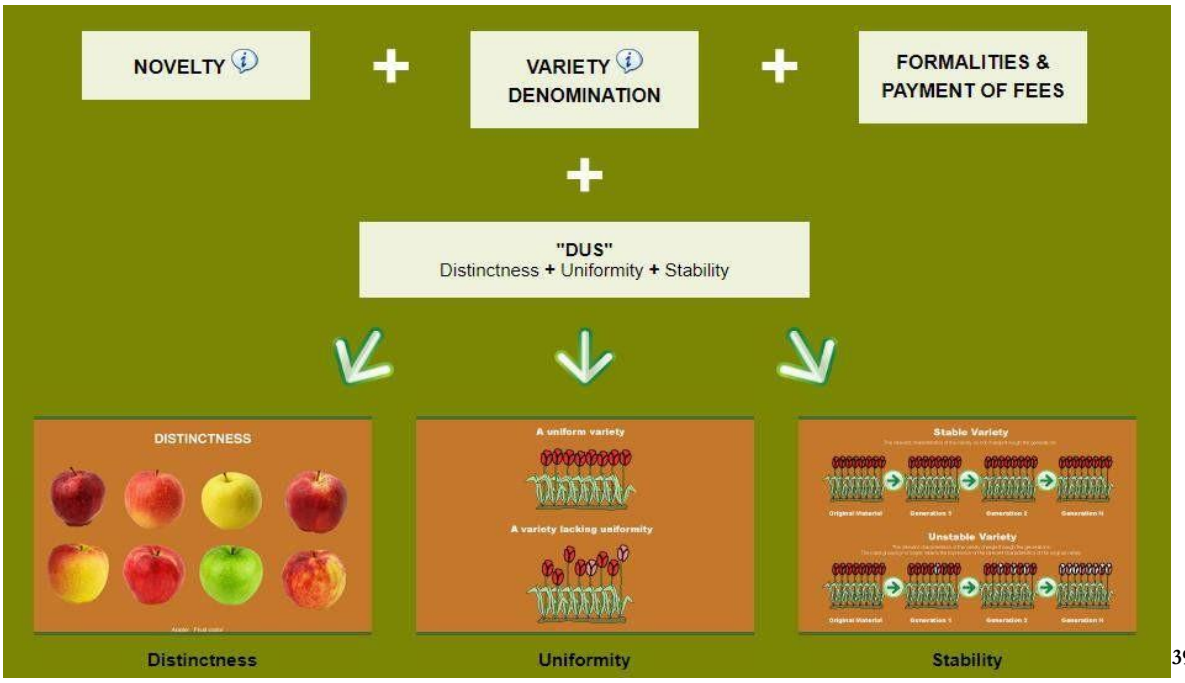
Article 5 of the Convention lays down the conditions required for the protection of a new plant variety. The protection shall be granted when these conditions are fulfilled.

(1) The breeder's right shall be granted where the variety is-

(i) new,
(ii) distinct,
(iii) uniform and
(iv) stable.

(2) The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 20, that the applicant complies with the formalitiesprovided for by the law of the Contracting Party with whose authority the application has beenfiled and that he pays the required fees.[38]

[36]Available at https://www.upov.int/export/sites/upov/about/en/pdf/353_upov_report.pdf.
[37] UPOV Convention, 1961 available at https://www.upov.int/export/sites/upov/upovlex/en/conventions/1961/pdf/act1961.pdf.
[38] UPOV Convention, 1991, available at https://www.upov.int/export/sites/upov/upovlex/en/conventions/1991/pdf/act1991.pdf.



[39]

- Novelty:

  The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not beensold or otherwise disposed of to others, by or with the consent of the breeder, for purposes ofexploitation of the variety

  (i) in the territory of the Contracting Party in which the application has been filedearlier than one year before that date and

  (ii) in a territory other than that of the Contracting Party in which the application hasbeen filed earlier than four years or, in the case of trees or of vines, earlier than six years beforethe said date.[40]

- Distinctness:

  The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application.[41]

- Uniformity:

[39] Available at https://www.upov.int/overview/en/conditions.html.
[40] Article 6, UPOV Convention, 1991, Ibid.
[41] Article 7, UPOV Convention, 1991, Ibid.

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevantcharacteristics.[42]

- Stability:

  The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end ofeach such cycle.[43]

Rights of the Breeder

Article 14 of the UPOV Convention provides that the effect of the right granted to the breeder is that his prior authorization shall be required for:

i. Production or reproduction
ii. Conditioning for the purpose of propagation
iii. Offering for sale
iv. Selling or other marketing
v. Exporting
vi. Importing
vii. Stocking

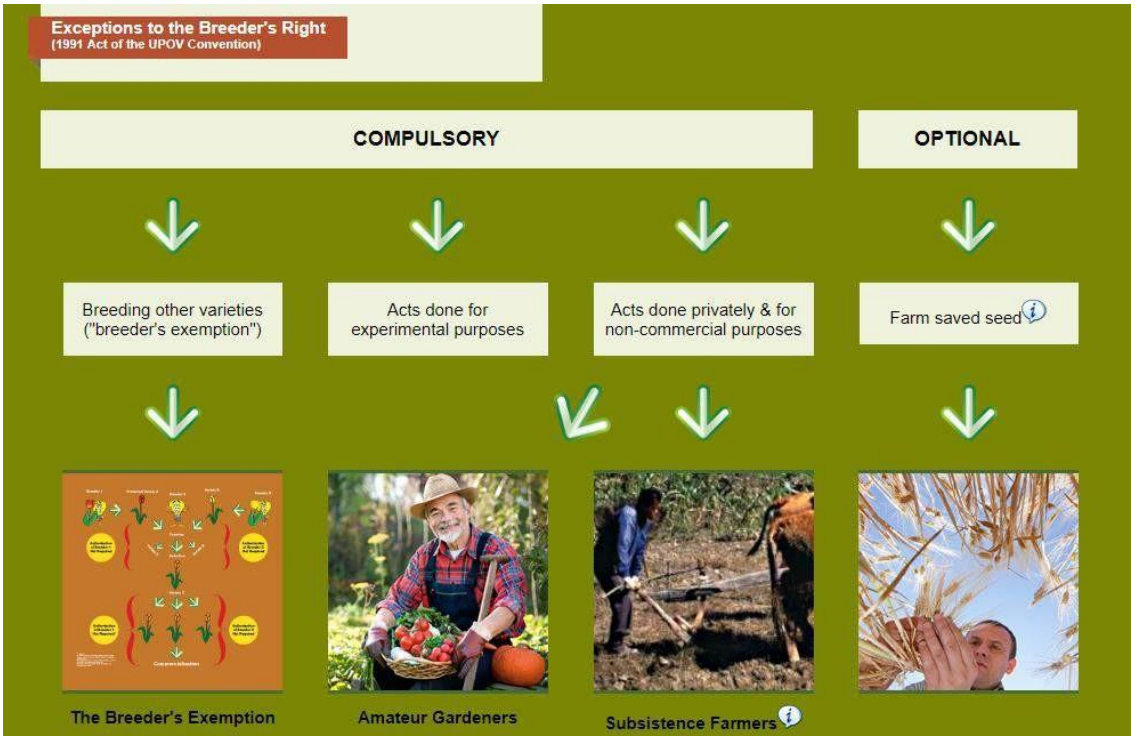
for any of the above purposes.[44]

It further extends the breeder's rights to harvested material, producemade from harvested material, essentially derived varieties, varieties not clearly distinguishable, and varieties that need repeated use of the protected variety.

Exceptions to the Breeder's Rights

Article 15 of the Convention lays down the compulsory and optional exceptions to the Breeder's Rights.

[42]Article 8, UPOV Convention, 1991, Ibid.
[43]Article 9, UPOV Convention, 1991, Ibid.
[44]UPOV Convention, 1991, Ibid.



The breeder's right shall not extend to-

(i) acts done privately and for non-commercial purposes,
(ii) acts done for experimental purposes and
(iii) acts done for the purpose of breeding other varieties.[45]

Article 17 also states that-

(1) Except where expressly provided in this Convention, noContracting Party may restrict the free exercise of a breeder's right for reasons other than ofpublic interest.
(2) When any such restriction has the effect of authorizinga third party to perform any act for which the breeder's authorization is required, theContracting Party concerned shall take all measures necessary to ensure that the breederreceives equitable remuneration.[46]

Period of Protection

Article 19 of the Convention lays down the period of protection given to the registered varieties.

(1) The breeder's right shall be granted for a fixed period.

[45]Available at https://www.upov.int/overview/en/exceptions.html.
[46]UPOV Convention, Ibid.

(2) The said period shall not be shorter than 20 years from the dateof the grant of the breeder's right. For trees and vines, the said period shall not be shorter than25 years from the said date.

Variety Denomination

Article 20 of the Convention states that, the variety shall be designated by a denomination which will be its generic designation.

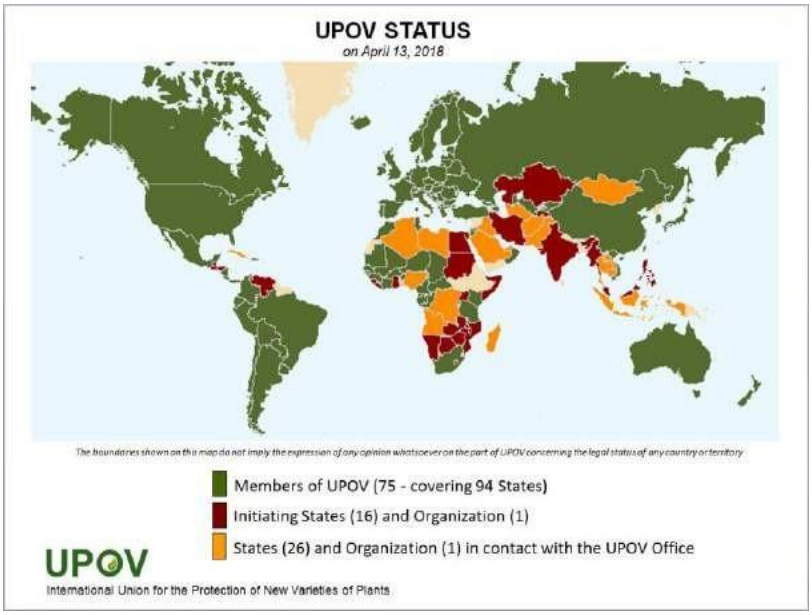
The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any Contracting Party, an existing variety of the same plant species or of a closely related species.[47]

INDIA'S STATUS IN UPOV CONVENTION

India is one of those 17 States which have initiated the procedure for acceding to the UPOV Convention.

India is also one the Observers in the UPOV Convention and is the part of Council, Administrative and Legal Committee (CAJ) and Technical Committee (TC).[48]

[49]



[47]UPOV Convention, 1991, Ibid.
[48]Available at https://www.upov.int/members/en/observers.html.
[49]Available at https://www.upov.int/members/en/status_in_relation_to_upov.html.

UPOV CONVENTION NOT SUITED FOR INDIA

The UPOV model does not address the needs of India and other developing countries as it embodies the philosophy of the industrialized nations where the primary goal is to protect the interests of powerful seed companies who are the breeders. It does not recognize the notion of prior knowledge of the farming community and consequently takes no notice of the farmers' right to the benefits flowing out of such knowledge.

The move to join UPOV is not suited for an agrarian economy like India where seeds are essentially produced by farmers and farmers- cooperative and not by private corporations.

- UPOV is anti-farmer as, among other disadvantages, it restricts his right to save seeds to replant, a practice followed by 75 percent of the Indian farming community. Although the first amendment in 1978 put limited restrictions on protected seed, the 1991 amendment brought in very strong protection as regards the same. In the latter amendment, the exemption for farmers to save seed has become provisional.
- It does not recognize or support communities' inherent rights to biodiversity and their space to innovate.
- UPOV aims at plant patents and now also permits dual protection of varieties. This effectively means that in the UPOV system, the same variety can be protected by Plant Breeders' Right and patents.
- Contrary to the CBD, the UPOV model does not provide for benefit sharing with the farmers. So they end up paying royalties for their own germplasm that has been tampered with and repackaged by the Trans National Corporations.
- The costs of testing, approval and acquiring an UPOV authorized Breeders' Right certificate could be extremely expensive which shall effectively preclude the participation of small companies, farmers' co-operatives or farmer/breeders, but for the largest seed companies.
- UPOV model has the potential to aggravate the erosion of biodiversity which can prove extremely dangerous, especially in poor countries. Chemicals or genetic engineering will be used to try to compensate for crop vulnerability which farmers cannot afford. Uniformity leads to harvest loss and further food insecurity.
- Contrary to the developed nations, research is conducted in India by public institutions like various agricultural organizations. The control of plant varieties in the hands of big seed companies and privatization of genetic resources can affect research negatively. Additionally,

UPOV rules on `essential derivation' will act as a disincentive to researchers since TNCs can bully researchers to submit to accusations of plagiarism.

Compared to the present Indian scenario the UPOV system is far too expensive. The expenditure of testing, approval and acquiring an UPOV authorized Breeders Right certificate could be in thousands, even lakh. These rates will definitely disqualify the participation of all small scale farmers.[50]

SUGGESTIONS

It is a fact that neither of the two UPOV conventions contains operative farmers' rights. What UPOV provides for farmer's are not the rights, but they are mere privileges. Hence, if India were to become a member of UPOV, then it will not be able to maintain a strong farmer rights regime, which the PPVFR Act contains. That is, thereafter India will be under obligation to model its law according to the terms specified by the UPOV Convention. The Indian plant variety law contains various desirable UPOV features which India can uphold only by not becoming a member of UPOV.

India needs to take a firm stand and reject UPOV acting as a role model for other developing nations. India's joining UPOV could have "a domino effect" on nine other Asian developing countries that are currently consulting UPOV on their national legislations. The developing countries must evolve a sui generis legislation which takes a balanced approach between giving rights to farmers, formal plant breeders and traditional communities on their genetic resources.

CONCLUSIONS

As we have observed that the UPOV model does not address the needs of India and other developing countries as it embodies the philosophy of the industrialized nations where the primary goal is to protect the interests of powerful seed companies who are the breeders it is better for these countries to not to be a part of such international obligation that turns out to be a disaster for their economy. Agriculture being a very sensitive part of the economy of the developing countries is to be governed by domestic laws for protection rather than international legislations pondering burden on their economies or getting against.

[50] Available at http://www.legalservicesindia.com/article/1261/Corporate-Breeder's-and-Farmer's-right-in-India-with-respect-to-PPVFR-Act,-2001.html.

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PRINCIPLES OF CRIMINAL LAW: REVISITING THE ROOTS

Meenakshi Kaushal

INTRODUCTION

"Principles of criminal law in the most general and figurative form may be defined as the sustainable basis of this legal sphere, its "skeleton", on which legal matter grows and on which the whole "body" of criminal law is formed."[1]

With these above lines, renowned legal scholar Jerome Hall in his work General Principles of Criminal Law, explained that criminal law could be understood at different levels of abstraction. The lowest in the scale should be the *specific rule of criminal law*, which are the most detailed rules defining individual crimes including murder, theft, burglary, robbery etc. Moving up on the scale comes the higher level of abstraction being *criminal law doctrines*, which are broader in concept than the specific rules at the lower abstraction. Doctrines regarding insanity, minority, undue influence, necessity etc. are covered under this head. On reaching the highest of the scale, there is the *general rules of criminal law* i.e., criminal law doctrines, which forms the "ultimate norms of penal law"[2] which explains what underlies the crime while providing theoretical framework.

Criminal law is vaguely seen as an instrument with the state to curb or oppress or repress the offender of the law. If proven guilty, the offender is set to face some unpleasant consequences which may directly affect his body, property or measures taken to protect community against him. However there is another side to it as well. The accused stands in the position of danger to be deprived of his liberty, wealth or reputation, which leads to degradation of his life. Thus even though criminal law acts as an effective tool to curb the violation of law, at the same time it should be strongly backed by some principles so that the unwarranted harassment of the offender is not resulted. With such importance placed on principles, it becomes necessary as a student of criminal law to study such principles in its form, need, applicability and the very nature as the foundation of various laws reflecting needs of society in such form and manner that an overall understanding is attained.

THE NEED TO STUDY PRINCIPLES OF CRIMINAL LAW

"It is a fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification."[3]

[1] Yu. E. Pudovochkin; V. K. Andrianov, Principles of Criminal Law: Immersion in Theory, 2016 J. E.-Eur. Crim. L. 201 (2016).
[2] Jerome Hall, Principles of Criminal Law, Indianapolis: (The Bobbs-Merrill Company Publishers, 1947)
[3] JV Barry, 'Morality and the Coercive Process' (1962–4) 4 Sydney Law Review 28, 29.

In words of Professor Glanville Williams, crime can be defined as "a legal wrong that can be followed by criminal proceedings and which may result in punishment"[4] Such proceedings and punishments forms the basis of criminal jurisprudence which are backed by certain principles of criminal law that deals with the scope and applicability of these laws in furtherance of aims to be achieved by the social control. Thus it becomes important to study these principles.

AS MEANS TO ACHIEVE PURPOSE OF CRIMINAL LAW

While finding the balance between protection of the society at large from the offender and providing reasonable measures to accused so that he is not unreasonably deprived of his quality of life, the underlying question that needs to be answered becomes: What is the purpose of Criminal Law? Once the answer to the question is understood on its very foundation, the balancing acts come with more ease.

PROTECTION OF THE COMMUNITY OR SOCIETY AT LARGE

"Law is a human institution created by human agents to serve human ends."[5]

Law finds its roots from the society itself. For a society to survive and grow, it must have the power to protect itself against those who cause harm. Thus every society exercises the social control for which it frames certain laws and also mentions the sanctions with them. Criminal Law, as an instrument of the society, aims to ensure that the community gets what it is owed from wrongdoers i.e., protection of its subjects and curbing the elements that differ from its object. Society may use retributive measures whereby the wrongdoer pays for his wrongdoing and the person who has been wronged feels that the justice has been done; or may use deterrent measures to teach its subjects a large, thus curbing motives of offenders; or may use preventive measures to cause fear of punishment in minds of offenders thus curbing potential violation of laws; or the community may prevent harm from wrongdoers by reforming the through reformative measures whereby it is tried to bring change in one's character and personality through education and reshaping so that when the punishment ceases, he becomes a useful member of the society.

[4] G Williams, Textbook of Criminal Law (2nd edn, 1983) 27.
[5] Krishna Iyer, V.R., Perspectives in Criminology, Law and Social Change, (New Delhi: Allied Publishers Pvt. Ltd, 1980), p.67.

PROTECTION OF THE ACCUSED/OFFENDER

"Criminal Justice is a complex social institution which regulates potential, alleged and actual criminal activity within procedural limits supposed to protect people from wrongful treatment and wrongful conviction"[6]

In criminal law, one of the factors that come into play regarding the offenders is his individual rights. "Such rights are connected to autonomy and free action insofar as they are thought of as entitlements to avail oneself of particular resources in light of free individual decisions and choices."[7] However, such rights extend only to the ambit where the rights of other are not violated. "If a person autonomously infringes upon the rights of others, then they should bear responsibility for the infringement."[8]

In a democratic society, the criminal process is not merely a tool for repression of offender, but is a series of rules which preserves procedural guarantees, while disclosing truth of the events in process of achieve justice. "The just procedure is to find the path between the need for an investigation to carry out material criminal law and the protection of the rights of the accused. This is the mission of criminal procedural law".[9] In such criminal process, minimum guarantees should respected while reflecting the concepts of due process in law such as to be told the nature of the charges; to be given time to prepare a defence; to be tried without undue delay; the right to defend oneself directly or through a defence counsel of one's choice; the right not to incriminate oneself; to question prosecution witnesses and to call witnesses for the defence; to be heard by an independent and impartial court or tribunal; and the right to appeal, etc.

AS BACKBONE OF PRINCIPLE OF DUE PROCESS OF LAW

'*Due*' can be understood as, 'what is just and proper'. The expression 'due process of law' may be described as the limitation on the state regarding use of power only in ways which are proper and just. Thus, it can be understood as exercise of state power under a defined ambit as permitted by law along with such safeguards for the protection of individuals as prescribed within such ambits. Under criminal

[6] Andrew Sanders and Richard Young, "Criminal Justice",1968, Fourth Ed. (2010).
[7] Findlay M, Problems for the Criminal Law. Oxford University Press, USA. (2001)
[8] Ashworth A, Principles of Criminal Law. 3rd Edn, Oxford University Press, USA. (1999)
[9] Horst Schönbohm, Norbert Lösing, Criminal procedure (1998)

law, liberty is one of such safeguards where due process has to be exercised. Liberty is the eager maintenance of that atmosphere in which men have the opportunity to be their best selves.[10] Certain principles of criminal law ensure that there is no arbitrary restriction on liberty and thus the concept of due process is followed under criminal jurisprudence.

"Rule of law must run close to the rule of life."[11] The question of the efficacy of the criminal justice system and protection of rights of the people are interrelated and need constant scrutiny. When the rule of law collapses, it is replaced by *matsya nyaya*, which means the law of jungle.[12] In the field of criminal law the due process model is grounded on the idea of a confrontation between an individual and a state whose interest are irreconcilable.[13] The concept of due process is reflected on various principles such as concept of presumption of innocence until proven guilty, the burden of proof on the plaintiff, guilt to be decided before proper court or tribunal while following proper rules and procedures etc., whereby violation of principles of liberty is kept on check through these principles.

PRINCIPLE OF LEGALITY: ANALYSING THE PRINCIPLES.

Legal certainty as an inherent feature to rule of law is recognized by every legal system, which may differ in form and manner in different systems. Principle of legality is based on requirement of such legal certainty in any jurisprudence which is reflected in different manners based on different traditions of the society. The essence of this meaning of the principle of legality is limitation on penalization by officials, effected by the required prescription and application of specific rules[14]. "There is hardly a penal code that can be said to have a single basic principle running through it"[15]. Following are the principles which constitute the main structure of a legal system, giving it a sense of certainty:

DOCTRINE OF *NELLUM CRIME SINE LEGE :* 'NO CRIME WITHOUT LAW'

The criminal quality of an act cannot be discovered by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?[16]

[10] Justice, Markandey Katju, "Individual Liberty and Criminal Law", Cri LJ Journal, 2010, p.45
[11] Ibid
[12] Ibid
[13] Francois Tulkens, "Criminal Procedure: Main Comparative Features of the National Systems" in, The Criminal Process and Human Rights: Towards a European Consciousness, Mirelle Delmas- Marty (ed.), (Dordrech: Martinus Nijhoff Pub. 1995), pp, 10-11
[14] Jerome Hall, Principles of Criminal Law, Indianapolis: (The Bobbs-Merrill Company Publishers, 1947),p.19
[15] Livingston Hall and Sheldon Glueck, Cases on the Criminal Law and it Enforcement, 15 3rd Edition, 1958
[16] Lord Atkin in Proprietary Articles Trade Association v Attorney-General (Canada) [1931] AC 310, 314.

Nullum crimen sine lege means no conduct shall be held criminal unless the statue prohibits it.[17] The doctrine in its traditional sense explains that there should be certainty as to the law defining and specifying clearly as to what crime is and what is not. If an act or omission has to be penalised by the virtue of it being a crime, it should finds its place in the criminal system statute specifying the applicability and limitations in a form as refined as possible to eliminate all the possibilities of being vague so that no innocent bear the unreasonable harm. "The prohibition is that no conduct shall be held criminal unless it is described in the hypothesis of a penal statute."[18] "Offences are whatever the legislature has prohibited for good or for bad reasons."[19] Statue is only source of creation of crime and custom does not enjoy this privilege.[20]

The origins of the principle date back to post-World War II when a set of compelling criminal statutes were established and the drafters of the Nuremberg Statute affirmed the notion of individual criminal responsibility from a tri-dimensional perspective: legal, moral and criminal.[21] The basis of the doctrine is to prevent the vague application of any law which may result in arbitrariness and discrimination. Realizing the importance of certainty of law in defining what will amount to crime, Supreme Court in *Kartar Singh v. State of Punjab*[22], observed that the more uncertain and undefined the words are, the more individual will find himself in the unlawful zone, far away from the clearly marked boundaries of the law. *Nullem crime sine lege* attempts to protect individuals' liberty from unjust interference or abuse by the state, while ensuring the fairness and transparency of the criminal mechanism. One of the aims achieved by the doctrine is protection from ex post facto clause, constraining the state from criminalizing the acts retrospectively, thus ensuring fairness.

During Nuremberg, one of the main points of objection was that the trail of the accused on ground of crime against humanity is in violation of principle as is based on ex post facto law. The tribunal however rejected the objection while observing:

[17] Jerome Hall, Principles of Criminal Law, Indianapolis: (The Bobbs-Merrill Company Publishers, 1947),p.20
[18] Ibid
[19] Bentham
[20] Surajmani Stella Kujur v. Durgacharan Hansdah, AIR 2001 SC 938. (2001) 3 SCC 13.
[21] Iulia Crisan, The principles of legality "nullum crimen, nulla poena sine lege" and their role, Issue 5 accessed from www. effectius .com on 2nd September, 2018.
[22] (1994) 3 SCC 569 at 575

> "The maxim is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaty and assurance have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would unjust if his were allowed to go unpunished. Occupying the position they did in the government of Germany, the defendant, or at least some of them must have known of the treaties signed by Germany, outlawing resources to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their design of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."[23]

Essentials: On analysis of the principle, following essentials can be listed: (a) the criminalising law should be derived from specific written legislative source. (b) the law must be clear, specific and unambiguous. (c) the law must not act retrospectively to prosecute or punish the accused in regard to crime which was committed before such act/omission which did not possess criminal nature at the time of commission. (d) in case of conflict, the law should be interpreted in favour of the accused.
Reflections in Law: The Roman jurisprudence strictly adhered to norm that crimes both offences and penalty be exactly described in the statute.[24] **European Convention on Human Rights 1950** recognises the concept of '*non-derogable right*'[25], whereby it states that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."[26] The same principle can be found in the **Universal Declaration on Human Rights.**[27] **Rome Statute, 1998** follows the principle under Article 22 stating, "No person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[28] Further, it states that "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[29] Similar provisions can be found under the **International Covenant on Civil and Political Rights, 1966**, the **American Convention on Human Rights, 1969**, etc.

[23] Nuremberg Judgment, at pp. 39.
[24] Jerome Hall, Principles of Criminal Law, Indianapolis: (The Bobbs-Merrill Company Publishers, 1947),p.21
[25] Article 7, European Convention on Human Rights, 1950.
[26] Ibid
[27] Article 11(2), Universal Declaration on Human Rights, 1948.
[28] Article 22 (1), Rome Statue of the International Criminal Court, 1998.
[29] Article 22 (2), Rome Statue of the International Criminal Court, 1998.

Indian Penal Code offence as a thing punishable under this Code, or under any special or local law.[30] The Constitution of India, under Article 20(1) provides, "***No person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as offence***..."[31] Constitution being the *grundnorm*, other statues should adhere to it to find their legality. Various subject-specific enactments including the Narcotic Drugs and Psychotropic Substances Act, 1985[32], the Immoral Traffic (Prevention) Act, 1956; the Prevention of Corruption Act, 1988; the Drugs and Cosmetic Act, 1940; Protection of Children from Sexual Offences Act, 2012; the Prevention of Money-Laundering Act, 2002; the Pre-Natal Diagnostic techniques (R.& R. M,) Amendment Act, 2002; etc., adheres to this principle.

DOCTRINE OF *NULLA POENA SINE LEGE:* 'NO PUNISHMENT WITHOUT LAW'

"No law, made after a fact done can make it a crime for before the law there is no transgression of the law."[33]

Where the doctrine of nullum crimne sine lege concerns with punishiability of an act or omission while look into question of its criminality derived by a written statute, the doctrine of nulla poena sine lege further extends the scope and concerns with the legality of the punishment/penal liability so imposed on commission of such conduct. On one hand, both doctrine combined provides for bedrock foundation for the criminal justice system, while on other as per Professor Hall, the difference lies on the fact that nulla poena sine lege "affects only proven criminals" while nullum crimen sine lege "protects the mass of respectable citizens".[34]

As per Professor Hall, The origin of the principle can be traced back to Magna Carta, from where the concept of 'due process' came into existence. The doctrine keeps a check on criminal mechanism regarding prosecution and punishment ensuring its legality in lines of rule of law. The concept of 'liberty' of individual is thus protected and legal certainty is achieved. "A final important signification of the principle is that penal laws shall not be given retroactive effect."[35] The goal of nulla poena is

[30] Section 40, Indian Penal Code, 1860.
[31] Article 20(1), The Constitution of India, 1950.
[32] Act No 61 of 1985.
[33] Hobbes, Leviathan (1651) Chaps. 27, 28.
[34] Jerome Hall, Principles of Criminal Law, Indianapolis: (The Bobbs-Merrill Company Publishers, 1947)
[35] Ibid,p.20

not merely to prevent retroactive punishment or abuse of power but also to realize equality before the law and consistency in sentencing.[36] The above doctrine can be studied under two heads:

i. Non-retroactivity of penal laws

The principle intends to avoid unjust and unreasonable application of the penal laws to hold the accused liable subsequent to the commission of act, being seriously disadvantageous to the accused. Thus, no ex post facto penal laws should have retrospective application. However, such prohibition does not prevent legislature to enact retrospective procedural laws, unless thereby deprives the accused of a substantial right which is vital for its protection. [37] As held by the Supreme Court, "What is prohibited...is the conviction of a person or his subjection to a penalty under an ex post facto law, and not the trail thereof."[38] In other case of Rattan Lal v. State of Punjab, it was observed that any ex post facto law beneficial to the accused is not prohibited.[39]

ii. Principle of strict construction

"In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the Statue."[40]

The doctrine prohibits punishing any person except where a statute specifying such punishment is present. It provides for interpretation of the penal statutes in strict sense.[41] If any doubt or ambiguity is present, the construction of the penal provision must be done in favour of accused, favouring the liberty of the subject. Thus, a state may declare a maximum limit or both minimum and maximum limit on a punishment for any crime. Such a statutory limitation forms he crux of this principle and any punishment cannot be awarded until and unless it is backed by a specific legislature in the criminal mechanism of the state.

iii. Prohibition of imposing heavier penalty than provided by law

The concept of the doctrine prohibits imposition of a penalty heavier than the one applicable at the time the crime was committed. The construction of the penal provision should be done with respect

[36] Shahram Dana, Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing, 99 J. Crim. L. & Criminology 857 (2008-2009)
[37] Trompson v. Utah, 170 U.s. 343.
[38] Rao Shiv Bahadur Singh v. State, 1953 S.C.R 1188
[39] AIR 1965 SC 444.
[40] Lord Atkin in Liversidge v. Anderson, 194 A.C. 206.
[41] Niranjan Singh Karam Singh Punjab v. Jitendra Bhimaraj Bijja, AIR 1990 SC 1962, at 1968

to the status quo that was prominent at the time of commission of crime and not otherwise. If a punishment described for an offence is increased post commission of the same, the construction of the penal cannot be done so award the heavier punishment. Instead the status quo present at the time of commission has to be followed. On the other hand, if the punishment has been decreased subsequent to commission of crime, may advocates of the theory argue that the offender should be benefited from such decrease, thus providing an advantage –edge to the offender's right to liberty.[42]

Essentials: On analysis of the principle, following essentials can be listed: (a) prosecution and punishment provisions cannot be applied retrospectively; (b) Penal statutes should be constructed strictly; (c) in case of conflict, the law should be interpreted in favour of the accused; (d) Certainty of in legislations dealing with penal laws.

Reflections in Law: Article 11 of the **Universal Declaration of Human Rights, 1948;** Article 51(1) of **the International Covenant on Civil and Political Rights, 1996**; Article 7(1) of t**he European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950**; Article 9 of **the American Convention on Human Rights, 1969**; Article 23 of **Rome Statue of International Criminal Court**, **1998**, etc. are various sources of the principle.

The Constitution of India, under **Article 20(1)** provides, "No person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as offence, nor ***be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence***."[43] Constitution being the *grundnorm*, other statues should adhere to it to find their legality. It has been observed that, Supreme Court of Indiain number of cases such as interpretation of TADA, 1987 in Kartar Singh case[44] and Nalini case[45], have favoured the doctrine while stating that very harsh and drastic containing stringent provisions they must be strictly construed.

[42] Wardale v. Binnus, (1946) K.B. 451
[43] Article 20(1), The Constitution of India, 1950.
[44] Kartar Singh v. State of Punjab, (1994) 3 SCC 569
[45] State of Tamilnadu v. Nalini, AIR 1999 SC 2640

DOCTRINE OF *PRAESMPTIONS JURIS SED NON DE JURE*
(PRESUMPTION OF INNOCENCE)

The principle states presumption of innocence. It enshrines the idea: "the law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty."[46] Thus it is on the prosecution to prove guilt beyond a reasonable doubt. It is considered as one of the fundamentals of criminal justice which forms "a basic component of fair trial"[47]. Presumption here is not completely presuming an accused to be innocent, but merely that the court is not satisfied that the guilt has been proved beyond a reasonable doubt. Bentham observed that:

> The defendant is not in fact treated as if he were innocent, and it would be absurd and inconsistent to deal by him as if he were. The state he is in is a dubious one, betwixt non-delinquency and delinquency: supposing him non-delinquent, then immediately should the procedure against him drop: everything that follows is oppression and injustice.[48]

Article 11 of the Universal Declaration of Human Rights says, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[49]. The maxim can also be found in Article 6 of the European Convention for the Protection of Human Rights, 1953; Article 14, the United Nations International Covenant on Civil and Political Rights, etc.

Indian Legal Scenario:

"It is now a well settled principle that presumption of innocence as contained in Article 14(2) of the International Covenant on Civil and Political Rights is a human right although per se it may not be treated to be a fundamental right within the meaning of Article 21 of the Constitution of India."[50]

The principle of presumption of innocence has treated as one of the cardinal feature of criminal jurisprudence[51], the principle is not followed in its entirety. Few exceptions being:

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[46] Coffin vs. U.S., 156 U.S. 432,432-463 (1894)
[47] Estelle v. Williams, 425 U.S. 501, 503 (1976)
[48] J. Bentham, Principles of Judicial Procedure, Chapter XXIX: 'Natural and Technical Systems Compared'.
[49] Article 11, Universal Declaration on Human Rights, 1950.
[50] Noor Aga vs. State of Punjab and Anr. [(2008) 16 SCC 417]
[51] Rabindra Kumar Dey vs State Of Orissa : 1977 AIR 170; Jaikrishnadas Manohardas Desai and Anr. v. State of Bombay, [1960] 3 S.C.R. 319. 324, Sunil Kumar Sharma vs State (CBI): 139 (2007) DLT 407

i. Where mere non-compliance of a statutory duty raises a presumption of guilt of the accused. In such cases, no mens rea is required by the statute for amounting to crime. Few examples being Section 30 of the Protection of Children from Sexual Offences Act, 2012; Section 35(1) of the NDPS Act; Section 20 of the Prevention of Terrorism Act, 2002; Section 10(C) of the Essential Commodities Act, 1955; Section 68 of the Standard of Weight and Measurement Act, 1976; etc;

ii. Section 114 of The Indian Evidence Act, 1972 states that unless a man who is in possession of stolen goods soon after the theft, accounts for such possession, the court may presume that he is thief or has received the goods knowing them to be stolen;

iii. Under the Indian Evidence Act, 1872, Section 113A, 113B and 114A, certain presumptions against the accused;

iv. Under Negotiable Instruments Act, 1881, in cases of cheque bouncing, it is presumed that the holder of the cheque had received the cheque in discharge of debt and that mere fact is essential to form a crime;

v. Under Narcotics and Psychotropic Substances Act, 1985 a presumption that an accused had a culpable state of mind to commit an offence has been raised; etc.

DOCTRINE OF ACTOI INCUMBIT ONUS PROBANDI BURDEN OF PROOF– A BRIEF STUDY.

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt."[52]

The principle advocated that the burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. No rule of criminal law is of more importance than that which requires the prosecution to prove the accused's guilt beyond reasonable doubt. Firstly, this means that it is for the prosecution to prove the defendant's guilt and not for the latter to establish his innocence; he is presumed innocent until the contrary is proved. Secondly, they must satisfy the jury of his guilt beyond reasonable doubt.[53] The underlining idea is a fact holds good until contradictory evidence is submitted.

[52] Woolmington v DPP, [1935] AC 462, 472.

[53] The Law Commission of India, 47th report on the trial and punishment of social and economic offences.

The principle has found its prominent place throughout precedents in all jurisprudences. It has been held that "If the jury is left in reasonable doubt whether act was unintentional or provoked, the prisoner is entitled to be acquitted."[54] Further in Harbhajan Singh v. State of Punjab[55], the Supreme Court has recognized that "the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt." The various reasons cited for such burden are availability of resources with the state to collect and furnish evidence; also that placing burden on accused may amount to abuse of power by state that may result in injustice. Under Indian law, it can be found that as the criminal proceedings are initiated by the prosecution, it should be the duty of the prosecutor to answer the charges.[56]

Exceptions: There are certain provisions in law, which presume that the deed is committed by the accused unless contrary is proved. Under such circumstances, the burden of proof shifts to the accused to prove that the alleged act is not done by him. Some of such presumptions are Sections. 113-A, 113-B, and 114-A, Indian Evidence Act, 1872; Sections, 3(2-A) and 6(3), the Immoral Traffic (Prevention) Act, 1956; Sections, 8(a) and (b), the Scheduled Castes and Scheduled Tribes (Preventions of Atrocities) Act, 1989; Section 20(i) and (ii), the Prevention of Corruption Act, 1988; Section 4, the Drugs and Cosmetic Act, 1940; Sections, 9 and 10, the Opium Act, 1878; Section 29, Protection of Children from Sexual Offences Act, 2012; Section 24, the Prevention of Money-Laundering Act, 2002; Section 20 of the Pre-Natal Diagnostic techniques (R.& R. M,) Amendment Act, 2002; etc.

*DOCTRINE OF NEMO TENEEBATUE PRODERE SEIPSUM (*RIGHT AGAINST SELF-INCRIMINATION)

The fault of the accused is not to be proved out of himself, but rather to be discovered by other means and other men.[57]

As there exists the principle of presumption of innocence in the criminal jurisprudence, another principle that follows is that the evidence should come from other sources other than the accused himself. Thus the accused cannot be made to provide evidence against him by any means unless he

[54] Supra at 55.
[55] [1965] 3 S.C.R. 235
[56] Section 101, Indian Evidence Act, 1972.
[57] Glanville Williams, Criminal Law, 2nd Ed, (London: Stevenson & Sons, 1983)

chooses to do the same with his 'free will' involved. The principle aim is to protect the accused from the act of coercing evidence out of him by the prosecution.

The principle finds it source internationally in the International Covenant on Civil and Political Rights[58], while in India, it has been provided constitutional protection under Article 20(3) guarantying: "No person accused of an offence shall be compelled to be a witness against himself."[59] Criminal Procedure Code provides protection from self incrimination under section 313 where power to examine the accused has been specified. Additionally, it provides that an accused person cannot be convicted on the basis of a coerced and non-voluntary confession.[60] Similarly, Evidence Act provides that any confession made by the accused will be considered irrelevant if the same has been caused by inducement, threat or promise.[61] Section 25 of the act provides that confession made before the police officer cannot be proved. In same lines, confession made while in custody can also not be proved.[62] The Supreme Court of India in the case of *M.P.Sharma v. Satish Chandra*[63], jotted down the essentials of the principle as: (a) The right against self-incrimination concerns a person 'accused' of an offence; (b) the protection is granted against the compulsion to be a witness; (c) the protection is granted against the compulsion that results in giving evidence against himself. In another landmark decision, the court held that a tape recording made without knowledge of the accused that may be used against him, made without force, coercion or oppression, was held to be admissible in evidence before court.[64]

DOCTRINE OF NON BIS IN IDEM/ AUTREFOIS ACQUIT (DOUBLE JEOPARDY)

"A man shall not be brought into danger for the one and the same offence more than once."[65]

The idea behind the principle is that a person cannot be tried again for an offence for the reason that he has previously been acquitted in the same offence and such a plea can be taken or combined with plea of not guilty. It essentially protects a person from multiple punishments or successive prosecution

[58] Article 14 of the International Covenant on Civil and Political Rights, 1966.
[59] Article 20(3), The Constitution of India, 1950.
[60] Article 164(2), The Criminal Procedure Code.
[61] Section 24, The Indian Evidence Act, 1972.
[62] Section 26, The Indian Evidence Act, 1972.
[63] AIR 1954 SC 300
[64] Yusuf Ali v. State of Maharashtra, AIR 1968 Sc 147.
[65] 2 Hawk C. 35 S. 1

based on same facts of a case where the elements of multiple prosecutions are similar to those for which the accused has already been prosecuted or has been acquitted by the court. The object behind can be jotted as prevention of misuse of right of liberty by the state and protection of the individuals from the financial, emotional, and social consequences of successive prosecutions. if the elements of a crime is same as that to, for which the accused is being prosecuted, the accused cannot be held guilty or a separate charge cannot be initiated against that person[66]. However, if a person is convicted under a different law, it cannot be said to be a double jeopardy.[67]

One of the sources of the principle is the Fifth Amendment to the United States Constitution, that provides, "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." In India, the principle finds its place as protection as a fundamental right under the Article 20(2) of the constitution which provides "No person shall be prosecuted and punished for the same offence more than once". Section 26 of the General Clauses Act, 1897 and section 300 of the Criminal Procedure Code, 1973 enshrines the same principle.

Essentials of the principle can be found on looking into the provisions of acts: (a) one can take the defence of double jeopardy when one is convicted again for a same crime having same elements of prosecution[68]; (b) offence for which the subject was prosecuted and punished previously, must be same[69]. (c) the previous prosecution must have taken place before a court or judicial tribunal. Thus proceedings before departmental and administrative authorities would not amount to double jeopardy.[70] (d) The subject must have been prosecuted and punished in the previous proceeding.[71]

CONCLUSION

"Any narrow and pedantic, literal or lexical construction likely to have loopholes for dangerous criminal tribe to sneak out of the meshes of the law should be discouraged. For the new criminal jurisprudence must depart from the old cannons, which made indulgent presumptions and favoured constructions benefitting accused persons and defeating criminal statues calculated to protect the public health and the nation's wealth."[72]

[66] Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao, (2011) 2 SCC 703
[67] Institute of Chartered Accountants of India v. Vimal kumar Surana, S.L.P. (Crl.) Nos.3411-3412 of 2009
[68] O.P.Dahiya V Union of India , (2003)1 SCC 122)
[69] The State of Bombay v. S.L. Apte, AIR 1961 SC 578
[70] Venkataraman v. Union of India, AIR 1954 SC 375.
[71] Roshan Lal & ors v. State of Punjab, AIR 1965 SC 1413,
[72] Murlidhar Megh Raj Loya v. State of Maharashtra, 1976 (3) S.C.C. 684.

'Legal certainty' and 'equity' are considered as the basic foundation cores of any criminal jurisprudence. Study of principles of criminal law as light-bearer for ensuring legal certainty and protection of right of individual's liberty becomes crucial. On study of these principles, it becomes clear why celebrated Professor Hall called them the "ultimate norms of penal law"[73] as they clearly act as the skeleton to the body of the criminal law, protecting the basic human right of liberty from being exploited.

[73] Jerome Hall, Principles of Criminal Law, Indianapolis: (The Bobbs-Merrill Company Publishers, 1947)

PROTECTION OF CHILDREN RIGHTS IN INTERNATIONAL PARENTAL CHILD ABDUCTION (TIME FOR INDIA TO JOIN HAGUE CONVENTION ON CIVIL ASPECTS TO INTERNATIONAL CHILD ABDUCTION, 1980

Akansha Gupta

INTRODUCTION

One fine morning husband wakes up to receive greatest shock of his life that his wife had run away from US taking his children to India. After that he is just stuck in jurisdiction battle for 3 yrs because there is no particular law related to such abduction in India. In this battle not only a parent loses his child but a child also loses his rights too.[1]

The increased movement of people across the world for career aspects has not only led to advancement in employment but also a profound influence in marriage prospects. Today married couple not only belongs to different castes but also different countries. When such transnational marriages breakdown, it brings several conflict of laws issue. One such evil born out of transnational marriages breakdown is international parental child abduction and conflict of laws related to it. It is also referred as parental kidnapping as well as child abuse.

International parental child abduction as defined under **Hague Convention on Civil Aspects to International Child Abduction** [2] means 'wrongful removal of child by a parent from habitual residence to another country without consent of another parent'. This abduction occurs as children are now becoming object of revenge or a weapon of threat between couples. There is no doubt that child is worst sufferer in international parental child abduction. Such abduction causes psychological as well as emotional trauma to children. They often develop a feeling of hatred towards left behind parent.

The Hague Convention on Civil Aspects of International Parental Child Abduction came into force on 1st Dec 1983 after an increasing number of parental child kidnapping all over world. The hardships that left behind parent had to go due to conflict of laws served path for origin of such convention among countries. The main objective of this convention is to "*Deter child abduction and promote cooperation among countries for speedy and prompt return of child to their home country*". It provides a path for rescue of children who were stuck in battle of jurisdiction among the countries to their habitual residence if both countries are signatories to

[1] Refer to case no.1 available at (www.498a.org/contents/pressConference/Press%20Conf%20-%20Child%20Abduction%20Case%20Studies.pdf)

[2] Herein , Afterwards referred as Hague convention

convention. It works on the pretext of best interest of child as well as protects child rights. For instance child has a right to participate in the return proceedings.

Several countries that have joined the convention have succeeded in reducing the number of abductions to their land. But situations become worse when child of that country is abducted to the country which is not a signatory to convention and again parent is stuck in litigation battle. For instance Thousands of children of US are abducted to India and US has no solution to it, then to urge India to join Hague Convention.

Key provisions related to convention:

- Article 12: to provide for return of child in case of wrongful abduction of child from habitual residence.
- Article 13: talks about exceptions where return of wrongful removal of children might be refused
- Article 18: The provisions of this Chapter do not supersede the power of a judicial or administrative authority to order the return of the child at any time, thus main is speedy return with less importance given to exceptions.

Thus dilemma lies here, till 2018 India is not a signatory to the Hague Convention and no doubt situation is worse for people who are stuck in court litigation battle of international child abduction which goes on for several years and affects child rights. Moreover in absence of particular legislation regulating such abduction it is left wisdom of courts. Courts decide on the basis of either 'best interest of child[3]' or 'comity of courts[4]' principles. Latest principle being given by Supreme Court in the case ***Surya Vardhman v State of Tamil Nadu***[5] : "*In cases, where the jurisdiction of the foreign court in not in doubt, the "first strike" principle could be applicable, namely, whichever court seized the matter first, ought to have prerogative of jurisdiction in adjudicating the welfare of the child*." Recently Andhra High Court has returned child abroad to his homeland looking at the best interest of child but this happens rarely, court litigation affects child as well eat up child rights.

[3] *Sarita Sharma v Sushil Sharma*
[4] *V. Ravi Chandran v. Union of India*, (2010) 1 SCC 174;
[5] Criminal Appeal No. 395 OF 2015,decided on 27th February 2015

This article also attempts to discuss fragmented law in India with regard to international parental child abduction and thereby affects on child. Courts take help of legislation such as 'Guardian and Wards Act 1890' if couple belongs to different religion and if both are Hindus then 'Hindu Minority and Guardian ship Act 1956' for delivering orders. Depending on which legislation is used either parental authority or best interest of child is ranked high by the courts. Thus there is need of consistency in decision of courts as well as need to promote child rights as they are being exploited in such situations.

INDIA: FRAGMENTED LAW RELATED TO PARENTAL CHILD ABDUCTION AND LOSS OF CHILD RIGHTS UNDER SUCH ENVIRONMENT

As of now there is no particular law related to international parental child abduction to or from India. Therefore India is becoming first breeding ground for such abductions across the world.[6]

Either of two acts is applicable when Indian courts face such abduction issues:

- HINDU MINORITY AND GUARDIANSHIP ACT 1956
- GUARDIAN AND WARDS ACT 1890

The GWA is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. Under such law parental is on higher rank as compared best interest of child

Under the Hindu Minority and Guardianship Act, the custody of a child is given to any person, be it the child's natural parents or guardian with the prime importance given to the welfare of the child[7]:

Besides these acts there are principles which take on the reasoning for the order. For instance in ***Sumedha Nagpal v. State of Delhi[8]:*** Supreme Court has observed that, "No decision by any Court can restore the broken home or give a child the care and protection of both dutiful parents. But a decision there must be, and it cannot be one repugnant to the normal concepts of family and marriage."

In another case ***Surinder Kaur Sandhu v Harbax Singh Sandhu[9] and Elizabeth Dinshaw v Arvind M Dinshaw[10]:*** courts in above cases returned the child to habitual residence (foreign

[6] According to the State Department, From 2010 to 2014, 173 cases were registered; only 22 cases have been resolved, with the abducted child returning home (see earlier **story**)

[7] Gila Hariharan v. Reserve Bank of India, (1999) 2 SCC 228.

[8] JT 2000 (7) SC 450

[9] 1984 AIR 1224

[10] 1987 SCR (1) 175

territory) following comity of courts where as in another case ***Sarita Sharma v Sushil Sharma***[11]: Court said that foreign court order was one of considered factor in deciding the case and judge ruled upon 'best interest of child.' and did not return the child.

In another case : ***Arathi bandi v Bandi Jagadrakshaka Rao***[12], the court evolved a new principle and held " jurisdiction is vested in those courts of the state that has the most intimate contact with the issues arising in the case and could not be attracted 'by the operation or creation of fortuitous circumstances."

"*Justice should not only be done, but also seen to be done."*

If we look towards judgments then we observe court talks about best interest of child but in practice it is not seen to be done. 'Best interest of child' as defined under Juvenile Justice (Care and Protection of Children) Act, 2015, means that if court is basing their decision on such principle then it must ensure that child is not deprived of basic rights such as right to identity, social well being, physical and emotional development[13] whereas in cases involving such abduction there is loss of such rights. The time taken by courts to arrive at final decision is so long that a child develops feeling of hatred towards parents as well right to survival and development suffers as being away from habitual residence.

Thus fragmented law as well as time taken by courts in India has not only lead to increase in international parental child abduction but also loss of basic rights to children which has significant impact on their future.

Thus the time has come for the India to dispose of such cases in a speedy manner and pass particular legislation to become party to Hague Convention and even court[14] has also asked India for being a party to convention to protect child rights and bring an end to sufferings of child who are victims of international parental abduction.

"Everything has been said already but as no one listen we must always begin again"

"In the year 2009, Law Commission of India, headed by former Supreme Court Judge, Justice (Dr.) A.R. Lakshmanan, had submitted a report recommending the government to ratify the

[11] (2000)3 SCC 14
[12] (2013) 15 SCC 790
[13] Simple understanding of sec 3 of Juvenile Justice (care and protection of children) Act
[14] Seema Kapoor & Anr. Vs. Deepak Kapoor & Ors

Hague Convention. (Law Commission of India, Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980), Report No. 218 (Mar. 2009). It recommended that "the Government may consider that India should become a signatory to the Hague Convention which will in turn bring the prospects of achieving the return to India of children who have their home in India. In the meantime, the Hon'ble High Court of Punjab and Haryana in the matter of ***Seema Kapoor & Anr. V. Deepak Kapoor & Ors***[15]**:** referred the matter to Law Commission of India to examine multiple issues involved in inter-country, inter-parental child removal amongst families and thereafter to consider whether recommendations should be made for enacting a suitable law for signing the Hague Convention on Child Abduction[16]."

On basis of such order the Law Commission of India prepared Report No. 263 and recommended India to join convention along with comparison of THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION BILL, 2016, bill prepared by Ministry of Women and Child Development and THE PROTECTION OF CHILDREN (INTER-COUNTRY REMOVAL AND RETENTION) BILL, 2016 revised bill by law commission. But soon it was declined on the basis of most of women who flee with their child were domestic violence victims[17] and no protection is accorded to them under Hague convention

Thus this article attempts to remind people about child rights and weigh them over domestic violence victims. Under international parental child abduction there is a breach of child rights such as right to survival and development, right to family which every child has. Moreover this article urges India to join Hague Convention as it is consonance with child rights and would also pave the way for return of child to their home land. Therefore India should join convention to protect child rights as well as solution to international parental abduction.

[15] Civil Revision No. 6449/2006 decided on 24th February, 2016,
[16] http://www.mea.gov.in/Images/attach/CONCEPT_NOTE_final.pdf
[17] For rejection of bill ,refer to https://www.bestcurrentaffairs.com/hague-convention-civil-aspects-child-abduction/

INTERNATIONAL PARENTAL CHILD ABDUCTION: CHILD ABUSE

International parental child abduction is nothing but a child abuse and as per the protections to child guaranteed under CRC[18] , India should join Hague Convention which protects child from such abductions and thus abuse.

Child undergo physiological as well as emotional trauma during such abduction. Hague Convention protects child from violence, a child may undergo when another parent forcefully abducts the child by bringing back the child to habitual residence to live life in peaceful manner.

Child abuse is doing something or failing to do something that results in harm to a child or puts a child at risk of harm. Child abuse can be physical, sexual or emotional, neglect, or not providing for a child's needs, is also a form of abuse. According to WHO: "Child abuse or maltreatment constitutes all forms of physical and or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power." Child abductions involve all these symptoms thus child abuse.

Children trust and confidence is almost shaken in such situation when one parent separates the child from another parent, they start developing feeling like that another parent doesn't care or love them and flaws in Indian law to solve these abduction cases add to the misery of child.

Thus India should join such convention as it protects the children from such abuse, if India do not follow this not only situation would be worsen but there would be breach of rights under CRC as well.

There is always an ongoing debate what should be rank first, in return of children in case of wrong removal: prevention of child abuse or domestic violence towards women and children.

[18] Article 19: Children have the right to be protected from being hurt and mistreated, physically or mentally. Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them

India has refused on the basis of domestic violence victims which should be ranked high at the cost of child abuse. Most of parent who ran away with a child is mother and is fleeing from domestic violence and Hague Convention does not consider such exception so joining would be harmful for both children and women

But this is not case even law commission in latest report has recommended return of children to be ranked first, moreover there is statistics of parents running are mothers but not fleeing from domestic violence[19] . Moreover trend is on change with Hague Convention as they are accepting domestic under cases:

*For example in case of in **Lozano v. Montoya**[20]: The United States Supreme Court, a Hague Convention, 1980, case in US, relating to domestic violence, recognized the impact of domestic violence on the child, observing:"the return of the child may be refused if doing so would contravene fundamental principles relating to the protection of human rights and fundamental freedom"*

Also in case ***Blondin v Dubois**[21]:* The United Supreme Court declared that there is evidence of domestic violence against mother and child would be placed in intolerable situation of abuse against him as well and thus court did not issue the order of return.

Moreover in revised bill law commission gave a recommendation which would balance the approach between domestic violence and return of child, "Notwithstanding anything contained in section 16, the High Court may not pass the order of return of the child if the person, institution or any other body, opposing the return, establishes that (c) the person who is allegedly involved in wrongful removal or retention, was fleeing from any incidence of 'domestic violence' as defined in section 3 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005)."[22]

Thus abuse should be ranked high and balanced approach is also given , there is no reason for India not being party to convention. These children are at risk of serious emotional and

[19] Supra note 7 pgno.7
[20] 134 S. Ct. 1224 (2014)
[21] 189 F.3d 240 (2d Cir. 1999)

[22] Supra note 7 pg7

psychological problems—the result of 'parental alienation'. They may also experience anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt and fearfulness. As adults, they may struggle with identity issues, their own personal relationships and parenting. Thus they need to be protected from such abductions.

Children have the right to know and be loved by both of their parents. We must find the collective will to bring them home, and end the child abuse of child abduction. This can be by joining Hague Convention which is consonance with child rights.

AWARENESS PROGRAMMES

"Bring Our Kids Home" is an association established by left behind guardians, whose kids have been abducted to India from the United States. They bring issues to light about International Parental Child Abduction (IPCA) inside the group and supporter for the provoke return of all stole American kids, casualties of this wrongdoing.

Through training, activism and support, they expect to change the way worldwide child abduction is seen and treated in the United States and India. Child abduction is child abuse and it is crime against kids and their deserted parent.They additionally try to have a wide coalition of help from Government, child's rights group, legitimate community, media and in particular overall population

In India, there are various organisation as well as NGOs which are working on and for the maintenance and enforcement child right.

For example: "Cry" is an organisation working in this field. These organisations ensure and involve that all children be supported and shielded from unsafe impacts, mishandle and abuse in any frame and have a minding, secure family.

"Child Rights and shared parenting"(CRISP) is a Non-Governmental Organization (NGO) founded recently by a group of citizens, who recognize the serious effects of "parental alienation" on children due to single parent families on account of divorce or separation. CRISP also focuses on furthering the rights of a child to remain connected with both parents. While most NGOs pertaining to children deal with issues related to child labour, education etc. They also deal with issues related to the unquestionable right of children to be cared for by both biological parents.[23]

[23] https://blog.ipleaders.in/parental-child-abduction-law-india/

CONCLUSION

A child is invaluable asset to society, it has a definite role to play in the development of nations, and the future of the country depends on how these children are nurtured to become the citizens of the country. Thus time has come for India to join Hague convention to protect future of children as well as of nation. [24]

Moreover in the case In ***Roxann Sharma v. Arun Sharma,***[25] the Apex Court "deprecated the practice of 'forum shopping' requiring the entitlement of custody rights of the other spouse to be judicially determined. The Court observed that: *"the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration".*

Moreover to prevent mental agony to child as well as parent, India should join Hague convention. Thus it is time for India to settle the law related to international parental child abduction and to protect child rights as well. Hague convention has succeeded in deterring abductions in signatories' country. After joining Hague convention, next step should be criminalizing to eradicate the problem. India can no longer cause sufferings to child on basis of domestic violence to women. It is time to awake India and bring their children back to homeland.

[24] Child Rights, Poverty and Protection: to Identify Policy Gaps in An Indian Perspective Addressing Juvenile Delinquency, Anuradha Palanichamy
[25] *AIR 2015 SC 2232*

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DIGITAL PAYMENTS: THE REGULATORY FRAMEWORK IN INDIA

Aishwarya Arora

DIGITAL PAYMENTS: THE REGULATORY FRAMEWORK IN INDIA
DIGITAL WALLETS
TYPES OF IDENTITY THEFT
ELIGIBILITY CRITERIA:
CAPITAL REQUIREMENTS:
KYC REQUIREMENTS
TACKLING MONEY-LAUNDERING
SECURITY OF PAYMENTS
INTEROPERABILITY
UNIFIED PAYMENT INTERFACE (UPI)
CONCLUSION

DIGITAL PAYMENTS: THE REGULATORY FRAMEWORK IN INDIA

The digital payments ecosystem in India has seen an excellent growth in the last five years. For instance, the *Report of the Committee on Deepening of Digital Payments* has observed that the Digital Payments Per Capita in India has shown a growth from 2.4 transactions in 2014 to about 22 transactions in 2019[1]. The segment is formed of different types of systems of online payment which cover transactions done through RTGS (Real Time Gross Settlement), NEFT (National Electronic Fund Transfer), IMPS (Immediate Payment Service), Digital Wallets, and Unified Payments Interface (UPI). Of these, Digital Wallets and UPI have amplified their operations in the wake of demonetization in the November of 2016.

DIGITAL WALLETS

a. Meaning

In a report by the RBI, e-money[2] is defined as the prepaid value stored electronically and is issued by authorized 'Issuers' and the liability for the stored value is that of the issuer. It is a value denominated in a currency backed by the central authority of that country. In India, its share in the total payments systems has increased from a negligible **0.8%** in 2012 to **21.5%** in 2017. Therefore, it is seen that the definition does not cover crypto-currencies as they do not enjoy the necessary approval by the RBI, but, places within its

[1] RBI, Digital Transaction Metrics, Report of the Committee on Deepening of Digital Payments, (May 17, 2019), https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/CDDP03062019634B0EEF3F7144C3B65360B280E420AC.PDF

[2] Department of Payment & Settlement Systems, RBI, Glossary, Benchmarking India's Payment Systems, (June, 2019), https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/BIPS04062019CE3C72E9873244ED8BAAE9C8FC5955A8.PDF

ambit, the Prepaid Payment Instruments (PPIs), more specifically, the digital wallets and the Government backed Unified Payment Interface (UPI).

b. Prepaid Payment Instruments (PPIs)

PPIs[3] are defined as "*payment instruments that facilitate purchase of goods and services, including financial services, remittance facilities, etc., against the value stored on such instruments.*" They can be of three types:

i. **Closed system payment instruments:** They are issued by an entity to a holder to facilitate the purchase of goods and services from the issuer itself. An ideal example of this type of a system would be a brand-specific gift card.
ii. **Semi-closed payment instruments:** These are used for purchase of goods and services, including financial services, remittance facilities, etc., at a group of clearly identified merchant locations or establishments which have a specific contract with the issuer to accept the PPIs as payment instruments. These instruments do not permit cash withdrawal, irrespective of whether they are issued by banks or non-banks.
iii. **Open System PPIs:** These PPIs are issued only by banks and are used at any merchant for purchase of goods and services, including financial services, remittance facilities, etc.

As closed-system payment instruments do not provide third party payment and settlement services and open-system PPIs are issued only by banks, digital wallets are placed under the second category, that is, the semi-closed payment instruments. They are reloadable instruments that can be issued only in electronic form.

[3]RBI, Definitions, Master Direction on Issuance and Operation of Prepaid Payment Instruments, (Oct. 11, 2017), https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11142

The regulatory framework for digital wallets is provided in the *"Master Direction on Issuance and Operation of Prepaid Payment Instruments",* which was first issued by the RBI in 2009 by virtue of Section 18 read with Section 10(2) of the Payment and Settlement Systems Act, 2007. The 2009 guidelines permitted the non-bank entities to issue semi-closed instruments for the first time. These guidelines have seen numerous amendments since then.

By 2016, as more disruptive technologies emerged and newer players entered the business, a fillip was given to the growth of the whole segment. With the implementation of demonetization that severely restricted the flow of hard cash in the economy, employing alternate means of payment had become necessary. Following this, it became imperative for the RBI to put in place a comprehensive set of directions to be followed by the private entities operating these online payment systems. Thus, after taking a feedback from all the stakeholders into consideration, major changes were announced in the aforementioned Master Directions in 2017 which was further amended in 2019.

With more and more private entities operating their own digital wallets, the Master Directions address some of the key concerns in this area as follows:

ELIGIBILITY CRITERIA:

Any company incorporated in India and registered under the Companies Act, 1956 or Companies Act, 2013 can issue and operate PPIs *after* receiving authorisation from RBI. According to Regulation 3(1)[4] of the Payment and Settlement Systems Regulation, 2008, entities are required to seek authorization from Department of Payment and Settlement Systems (DPSS) of the RBI by submitting an application in the prescribed manner.

[4] RBI, Payment and Settlement Systems Regulation, 2008, (Dec 20, 2017), https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/PSSAMENDED201720122017C638035D14964D16B0D79590F4F86E31.PDF

CAPITAL REQUIREMENTS:

The RBI looks at net-worth of an entity for approval. In the pre-2017 directions, there was a requirement of a minimum paid-up capital of Rs. 5 Crores and a minimum positive net worth of Rs. 1 Crore for non-banking entities. However, as the policy stands today, the minimum paid-up capital requirement has been done away with while the minimum positive net worth requirement has been increased to Rs. 5 Crore.

The minimum positive net worth requirement is to be satisfied as per the latest audited balance sheet at the time of submitting of the application for approval. Moreover, this has to be maintained at all times. Additionally, the entity, within three financial years of receiving the RBI authorization, has to achieve a minimum net-worth of Rs. 15 Crore which shall also be maintained at all times. Done with the intention of controlling who enters the market and to weed out non-serious players, this policy has proven to be unreasonably restrictive for the smaller entities.

KYC REQUIREMENTS

The issuers can issue two types of semi-closed PPIs based on the level of their KYC compliance, that is to say, on the level of identification-related information provided by the user. The first type can be issued with minimum or limited KYC. The minimum KYC details include the customer's mobile number verified through One-Time-Pin (OTP), and a self-declaration of name and a government identification number to authenticate the account.

The amount of funds loaded in this type of an instrument, during any month, cannot exceed ten thousand rupees and the total amount loaded during the whole of financial year cannot exceed one lakh rupees. Only the purchase of goods and services is allowed and bank transfer and interoperability of the instrument is not permissible for PPIs with a limited KYC compliance.

These minimum-detail instruments are mandatorily required to be converted within 18 months into full-KYC compliant, semi-closed PPIs. On the other hand, the full KYC-compliant PPIs, apart from allowing for purchase of goods and services, offer the option of 'fund transfer back to the source', bank account transfers as well as transfer to beneficiaries of up to one lakh rupees per month.

TACKLING MONEY-LAUNDERING

The entity operating a digital wallet is required to adhere to the RBI *Master Direction on Know Your Customer (KYC), 2016*[5] for customer identification. These Master Directions have provided for a sound framework for the prevention of money-laundering and since the non-bank issuers are essentially in the business of operating a payment system, compliance with Prevention of Money Laundering Act, 2002 and the Prevention of Money-Laundering (Maintenance of Records) Rules, 2005 framed thereunder, is necessary.

Additionally, PPI issuers are required to maintain the log of all transactions for a period of ten years and are also required to file Suspicious Transaction Reports (STRs) to the Financial Intelligence Unit (FIU-IND). These stringent procedures for customer identification and for monitoring of transactions through record-keeping will ensure that no criminal use of these alternate money instruments can be made, intentionally or unintentionally, for money laundering or for funding of terror activities.

SECURITY OF PAYMENTS

RBI, in its guidelines, has always emphasised on a strong risk management system to protect customer data shared during the financial transactions. Now the guidelines have even ensured that the entities issue an Information Security

[5] RBI, Master Direction- Know Your Customer (KYC) Direction, 2016, (Feb. 25, 2016), https://rbidocs.rbi.org.in/rdocs/notification/PDFs/18MDKYCD8E68EB13629A4A82BE8E06E606C57E57.PDF

Policy approved by their Board. Some of the mandatory requirements to be followed by the private entities to prevent fraudulent transactions are:

- If the PPI issuer provides the same login for its wallet and its other services, that information regarding the same has to be clearly conveyed to the holder.
- Restrictions on multiple invalid attempts to log in have to be placed.
- Every payment transaction has to be authenticated through customer consent and alerts should be sent out for every transaction.
- Overall, a suitable mechanism has to be put in place for preventing, detecting and restricting occurrence of fraudulent transactions.

Increasing norms around customer protection and fraud prevention is going to have the effect of increasing customer confidence in the digital payments, thereby increasing its adoption and increasing business.

As per the norms, a 'cooling period' for fund transfer is also a requisite whenever a new PPI account is opened, freshly loaded or a new beneficiary is added. In that time, alerts are sent to the customers to review the new additions and prevent erroneous transactions.

INTEROPERABILITY

Interoperability is the technical compatibility that enables a payment system to be used in conjunction with other payment systems. Interoperability allows PPI Issuers, system providers and system participants in different systems to undertake clear and settle payment transactions across platforms without participating in multiple systems.

With *Prepaid Payment Instruments (PPIs) – Guidelines for Interoperability*[6] released by the RBI in 2018, an attempt has been made to make the digital wallets operable with each other. That is to say, a user of one wallet can make a payment to a merchant that accepts a different wallet. This has made the payments through PPIs seamless. The interoperability between the wallets is to be enabled through the use of Unified Payments Interface (UPI) facilitated by the National Payments Corporation of India (NPCI).

These directions have positives for both the non-banking entities as well as the users. For the users, it means that registration with multiple payment systems is not necessary anymore as payment to one system can be made using another system and for digital operators, it has meant that they get access to each other's' customer base much like the ATM networks.

UNIFIED PAYMENT INTERFACE (UPI)

a. Private Entities facilitating UPI-based transactions

The aforementioned discussion on Unified Payments Interface (UPI) necessitates the need to explain the working of this instrument. It was developed by the National Payments Corporation of India (NPCI) and was launched in 2016. It facilitates inter-bank transactions in real-time which are processed either on web or a mobile platform. As per the UPI Procedural Guidelines[7] released by the NPCI, the Payment System Provider (PSP) should be an entity regulated by RBI under Banking Regulations Act, 1949 and should be authorized for providing mobile banking services. However, the private players have been allowed to participate in the UPI based transactions through a multi-bank PSP model. Here, the private entity, usually a technology platform provider, connects multiple bank accounts to the UPI system through the use

[6] RBI, Prepaid Payment Instruments (PPIs) – Guidelines for Interoperability, (Oct. 16, 2018), https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI61724025FD07FE407D8796EC6C97A17A8E.PDF

[7] NPCI, Membership Requirements, Unified Payments Interface- Procedural Guidelines, (Dec., 2016), https://www.npci.org.in/sites/default/files/UPI-PG-RBI_Final.pdf

of Application Program Interface (API) Technology[8]. Thus, a person having an account with one bank can transfer money instantly to a different account with another bank using any of the UPI- enabled applications available. It eliminates the need to add a beneficiary or to authenticate the transaction at multiple levels. The transaction data, however, can be decrypted only by the bank account of the payer and not by the Third Party App Providers (TPAPs) because of the use of the API technology embedded in UPI.

b. Obligation of the Participating Banks

Considering the sensitivity of these transactions, NPCI delineates the obligations that are to be fulfilled by the TPAP as well as the PSPs for enabling such transactions. For example, before initiating operations, the TPAP is mandated to seek a written permission from the NPCI and is required to give the names of the participating banks. The responsibility of the participating banks is immense as they are primarily responsible for providing security against any kind of breach of customer data that could happen through the third party apps. As the responsibility for storing payment sensitive data of the customers is with the PSP, they must perform an audit on the TPAP's infrastructure to ensure that the integrity of such data is maintained and that the functioning of the app is secure. Along with the TPAP, the PSPs are also responsible for addressing the complaints of the consumers.

c. Obligation of the Third Party App Providers (TPAP)

The obligation on the third parties is to store only that customer data to which the customers have given their consent. A record of details like customer's name, mobile number, gender, email id etc. can only be in an encrypted format and all the information exchange between the third party and the bank is to be done through a secure channel. As a caveat, it has also been provided that the

[8] NPCI, Circular No. 32, Multi bank Model (API Approach), (Sep. 15, 2017), https://www.npci.org.in/sites/default/files/circular/UPI%20Circular%20no%2032_Multi-Bank%20Approach_15th%20Sept.pdf

third party shall not share the details of individual transactions with any other third party, including their holding company or subsidiary and the Indian Government or Intelligence without the prior consent of the PSP and NPCI. Currently, there are 40 NPCI approved third party apps[9] and 141 banks connected on the UPI system[10]. Various policy measures taken by the government to push its adoption among the business owners, its ease of use and zero cost to the consumers have all contributed to the growth of UPI. In September, 2019, the segment has registered 955.02 million transactions in volume worth Rupees 161 thousand Crores[11] and it is likely to grow at an annualised average growth rate of 100 per cent[12].

CONCLUSION

As is evident from the above discussion, the economy's dependence on the digital modes of payments has risen. The number of players operating both digital wallets and the UPI-based apps is also increasing. To regulate the operations of the semi-closed prepaid payment instruments or digital wallets, as they are called, RBI has issued the Master Direction on Issuance and Operation of Prepaid Payment Instruments taking into consideration the sensitivity of the information involved in these transactions of these transactions and its impact on the users. This is why the directions now provide for a stricter eligibility criteria for the issuers. Laws have also been tightened to prevent fraud and money laundering through PPIs while the convenience for the users has been increased by way of enabling interoperability between the instruments owned by different issuers. Apart from aiding interoperability, UPI is also a full-fledged payment system

[9] NPCI, 3rd Party Apps, What We Do, UPI, https://www.npci.org.in/upi-PSP%263rdpartyApps
[10] NPCI, UPI Product Statistics, What We Do, UPI, (Sep., 2019), https://www.npci.org.in/product-statistics/upi-product-statistics
[11] NPCI, *supra* note 9
[12] RBI, Expected Outcomes of Vision 2021, Payment and Settlement Systems in India: Vision- 2019-2021, https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/PAYMENT1C3B80387C0F4B30A56665DD08783324.PDF

governed by the NPCI through the UPI Procedural Guidelines under which a private player connects multiple banks to the UPI system using the API technology. It enables users to make payments across bank accounts seamlessly, in a secure environment.

All these developments are likely to raise the number of digital transactions from 2069 crore in December 2018 to 8707 crore in December 2021[13]. To support this level of rapid growth, a regulatory framework that encourages, inter alia, competition amongst the payment system operators, thereby ensuring cost-effectiveness to the users, and provides easier accessibility, quick grievance redressal mechanism and safe and secure transactions to the users, is a prerequisite.

[13] RBI, *supra* note 11

Global Legal System is a Multicultural, Multinational and Multi-disciplinary Legal Phenomenon: The relevance of Indian Legal system with the Global Law

Charul Mishra

ABSTRACT

This Research Article deals with the impact of global law on the different legal systems of the world, especially Indian legal system. The legal system of each country is based on the culture, diversity, customs, and kind of individuals, economy, and the social aspects of the country. Global legal system is a way of connecting the legal systems of all the countries as well as it happens to differentiate between every legal system it connects and reveals the diversity and uniqueness of that legal system. It should also be justified that various legal systems of countries has also given their substantial contribution in forming the global community and global law which forms the insight of international relation giving a way to international trade, economic stability and global peace. This Article also talks about the role of different International Organizations like the United Nations, the European Union, the International Chamber of Commerce, the International Arbitration Centres, International trade Associations, and the role of various law practitioners like Global law firms, Global in-house legal departments, international judges and Arbitrators etc. who have a huge contribution in making the global legal system multi-cultural, multi-national and multi-disciplinary and diverse. Though the global law has revealed the diversity of various legal systems, but without the tremendous efforts made by the various organizations, educational institutes as well as the well-defined legal systems, the global law could not reach the status it enjoying today. From small components to big differences, the Global law is still developing with the great history of its evolution. At last, the Article mainly focuses on the international trade relations giving a wide overview of how the globalization effects the multi-disciplinary notions of the Global legal system.

1.1. INTRODUCTION

The global legal system has evolved a lot since the Second World War, with the formation of United Nations. It gradually lost the characters and patterns of classical era and now influenced and focused on the individuals, humans, people, humanity and future generations. The development in the field of mankind, cultural heritage, sustainable development and international trade. Judicial institutions and institutionalised procedures are now established to monitor state's activities. The abrasion of states' sovereignty is giving way to a global community and a new international power structure based on multilateral decision processes aimed at protecting fundamental interests and global values[1]. The legal system is a part of its social system. It reflects the social, economic, political, cultural aspects of the society of that particular country. India in its culture, traditions, economic conditions, political values, and social aspects has a very unique and wide legal system. A level system consists of certain basic principles and values (largely outlined by the constitution), a set of functional standards including rights and duties of citizens spelt out in the laws- Central, State and Local, institutional structures for enforcements of laws and a cadre of legal personnel endowed with the responsibility of administering the system.[2] In this research paper, the impact of global legal system on India is Studied and Recognised. It tells that how India's vast cultural, societal, political, and economic aspects have an impact of Global law. With this, it would consist how the global legal system is multidisciplinary, multicultural and multi-national in context to Indian legal system.

1.2 RESEARCH PROBLEM

If we try to look at the topic closely, we get to know that global legal System had a very wide scope, 'broader than legal fields like cooperative law, international private law, or international public law'.[3] We will come to know that global legal system has many objectives and structural characteristics. In this research project we are basically working on the objective to find the impact of global legal system on India and Indian Legal System. There will be three main objectives on which the whole research project would be emphasized upon. The first objective

[1] 'What is global law? ', Guiliana Ziccardi Capaldo, August 10, 2015, Oxford University Press's Academic Insights for the Thinking World.

[2] 'Structure of Indian legal system: Original Origin and Development', Dheeraj Kumar Tiwari, International Journal of Law and Legal Jurisprudence Studies

[3] Global Law: A Legal Phenomenon Emerging from the process of globalisation, volume 14 Issue 1 (article 7)

would be to work upon how the legal system evolved and how is it working today. It will basically tell how the system changed with the period of time and how it involved 'the law and its practice in a global environment.'[4] The second objective talks on the important aspect, relevance of Indian legal system with the global law. And third objective is the comparative study of various notions and global law.

1.3 EXISTING LEGAL SITUATION

It is true that the global legal system has evolved a lot till today but it's not wise to say that "global law has reached the status of a formal and structured legal system"[5]. It's still in its early stage and if far from the actual recognition and codified legal field. It is still developing and is changing according to the needs and expectations. It is true that the global legal system has evolved a lot till today but it's not wise to say that "global law has reached the status of a formal and structured legal system". It's still in its early stage and if far from the actual recognition and codified legal field. It is still developing and is changing according to the needs and expectations of the world. It varies every time at different time and different place, which makes it pretty unique every time.

1.4 LITERATURE REVIEW

1. The Reflection of Global Law edited by Shavana Musa *Eefje de Volder*. This book gave real help to the research project. It gave an inference on how to analyse the structural and basis of the Global law. The book gave the relation of global with various international institutions and organisations. It gave well thought facts about the features which are to be further reformed for the future reference and how it came to the position on which it is standing right now.

2. Concept of Law by *H.L.A Hart*. In this book, hart has basically given information about how the morality is connected to law and how the laws are formed on the basis of morals and values. He also talked about the theory of rules, the principles of the legal system and how the legal system differ in ancient times and in the modern times. This booked helped in understanding the basis of Indian legal system as well as the evolution of legal systems. "Laws, said Thomas

[4] Hauser Global Law School Program, Working Papers, Global Law Working Papers, http:// www.nyulawglobal.org/workingpapers/glwpsmain.htm (last visited Nov. 16, 2006) [hereinafter Hauser Global Law Working Papers].

[5] Le Golf, Pierrick (2007) "Global Law: A Legal Phenomenon Emerging from the Process of Globalization," Indiana Journal of Global Legal Studies: Vol. 14: Issue 1, Article 7

Hobbes, Jeremy Bentham, and John Austin, are expressions of will: they are the general commands of a sovereign"[6]- is what mainly the book emphasized upon

3. The New Global Law by *Rafael Domingo.* In his book, Professor and Former Dean of Navarra School of Law, makes a wide-ranging argument in favour of globalization.[7] He tells about historical, regional, political and economic changes in the Globalisation. Natural law obligations are recognized by many legal systems in the world that were based on Roman law. It is a binding feature on everyone's conscience, even though natural law is not enforced in a court of justice.[8] This book helped in analysis of the basic key legal terms which helped in basic defining of the different legal system on a common platform.

1.5 SCOPE AND OBJECTIVE OF THE STUDY

"A hungry Hindu man will let himself starve rather than slaughter and eat a cow, despite the fact that there are old cows roaming all over his village, blocking the streets for cars to pass. To the average adult American man, who eats over 50 pounds of beef each year, this seems illogical. If you have been hungry for months, then you should eat the cow! There are old cows roaming all over India, no one else owns the cows, and you know how to slaughter a cow!"[9] The example shows the difference of culture and practices in different parts of world. Every country has its own legal system which governed or guided by a global system of law. The Difference in the legal system in each country is due to presence of different cultures and traditional practices performed by the people. Sometimes the legal system differ within the country itself. The best example is India. There are different normative and customary practices followed in different parts of country. Hence the legal system works differently for different region, but giving them the equal opportunities in the rights and duties at the same time. This whole research paper talks about these kinds of aspects which effect the different legal systems and their objectives.

1.6 METHODOLOGY AND CHAPTERISATION

[6] See, e.g., THOMAS HOBBES, LEVIATHAN 311-35 (C.B. Macpherson ed., 1968); JEREMY BENTHAM, OF LAWS IN GENERAL. (H.L.A. Hart ed., 1970); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfred E. Rumble ed., 1995).

[7] RAFAEL DOMINGO, THE NEW GLOBAL LAW (2010).

[8] John W. Meyer, Globalization Theory and Trends, 48 INT'L J. COMP. SOCIO. 261 (2007)

[9] "Cultural Values: Definition, Examples and importance", Chapter-9, http://study.com/acdemy/lesson/cultural-values-defination-examples-importance.html (last visited- Oct.1, 2017)

The basic methods which we applied in our project purely based on the analysis and research on the scope of the research problem. The analysis is mainly focused on the qualitative nature as it was done using articles published by different philosophers and authors, various research papers by many authors who researched at different passage of time and helped in the comparative study of global law and legal systems. The books on global law and its impact on Indian legal system were also preferred.

The research project is divided in various chapters which explain the research topic systematically. Each chapter is showcasing different aspects of topic and explaining the previous issues and giving the scope for further reforms and development. Chapter-1 introduces the research topic and tells the research criteria of the project. It gave the existing situation of the world as well giving space for the scope of changes. Chapter-2 focuses on the first objective which explain the historic position and evolution of global law. Chapter-3 focuses on the second objective about the impact of the global legal system on the Indian legal system. Chapter-4 focuses on the third objective which give the relation between the various legal notions and the global law. And the last chapter, Chapter-5, give the conclusion of the research done in the project.

THE EVOLUTION AND DEVELOPMENT OF GLOBAL LEGAL SYSTEM

'Defining a relatively new notion such as global law with a definition that reflects, without gaps or surcharge, all the ramifications of the concept is not an easy task. The difficulty increases with the lack of a benchmark. Indeed, while our research does not pretend to be exhaustive, there do not appear to have been many efforts to date in scholarly works to define global law. As a result, there is no alternative other than to create our own definition. This leads us to make a proposal presenting global law primarily as a multicultural, multinational, and multidisciplinary legal phenomenon, which has not yet reached the maturity and formality of a structured legal system.'[10]Global legal system showed a very wide scope since the very beginning of its evolution. Several institutions show the evidence of substantial development of global law. 'United Nations, the European Union, the International Chamber of Commerce, international arbitration centres, and international professional associations'[11] are the few of the institutions.

Looking at the U.N. system at large, one quickly concludes that through their activities, institutions such as the World Bank, the International Monetary Fund, the World Intellectual Property Organization, the World Health Organization, or the United Nations Industrial Development Organization contribute to the emergence of norms, rules, or practices of direct relevance to the development of global law.[12] World Bank is a good example which have financed many international projects through its funds and developed series of standard of contract conditions. Another institution is *The European Union*[13], The European Union is a live example of a regional effort toward harmonizing legal systems. Over the years, these efforts have been in specific areas only.[14] More recently, the Commission issued a new communication setting forth a full action plan for the promotion of more coherence

[10] Global Law: A Legal Phenomenon Emerging from the process of globalisation

[11] The creation of global law, Global Law :A Legal Phenomenon Emerging From the Process of Globalisation

[12] For a chart of the principal organs in the U.N. system, see http://www.un.org/aboutun/ chartpdf/unsyschart.pdf (last visited Oct. 1, 2017).

[13] For general information on the European Union, see Europa, Gateway to the European Union, http://europa.eu (last visited Oct 1, 2017).

[14] A few examples include consumer protection, competition law, environment and customs.

between the national contract laws of the Member States.[15]Third is *The International Channel of Commerce*. The International Chamber of Commerce (ICC) presents itself as the "world business organization."[16]It has a great impact on development and evolution of Global Law. This impact can be checked and reviewed by the Quasi-legal instruments which regularly keep shaping the international legal system of global perspective.

The fourth one refer to the International Arbitration commission. International arbitration is a preferred way to settle international disputes.[17] The basic object of this commission is to increase and maintain the competency of the national courts in favour of the arbitration. It would be too cumbersome to give an exhaustive list of international arbitration centres, but the ICC International Court of Arbitration, the London Court of International Arbitration, the Stockholm Chamber of Commerce, the American Arbitration Association, the Vienna International Arbitration Centre, the Singapore International Arbitration Centre, and the China International Economic and Trade Arbitration Commission are certainly among the leaders in the field.[18]And the last one is *The International Trade Association*. International trade associations regroup individuals or companies that belong to the same economic branch and are involved in international matters.[19]

Well, these all Institutions tell how the global legal system evolved through the period of time. It is now developing towards the standard position where it has a codified dignity. To illustrate the role of these associations in the development of global law, a suitable field for

[15] Commission of the European Communities, Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law: An Action Plan, COM (2003) 68 final (Feb. 12, 2003), available at http://www.isda.org/c-and-a/pdf/com-2003-68_en. pdf

[16] International Chamber of Commerce Home Page, http://www.iccwbo.org (last visited Oct. 1, 2017).

[17] See Rudolf Liesecke, Die typischen Klauseln des internationalen Handelsverkehrs in der neueren Praxis, ZEITSCCHRIFT FDR WIRTSCHAFTS-UND BANKRECHT, Apr. 1978.

[18] For a presentation of various international arbitration centres and their applicable arbitration rules, see FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 557-77 (Emmanuel Gaillard & John Savage eds., 1999); Guy S. Lipe & James L. Loftis, The American Arbitration Association and the International Centre for Dispute Resolution (AAA/ICDR), in ARBITRATION WORLD: JURISDICTIONAL COMPARISONS xxxi (J. William Rowley ed., 2d ed. 2006); Michael Schneider, Schiedsverfahren in Streitigkeiten aus Bau- und Anlagenvertragen, in VERTRAGSGESTALTUNG UND STREITERLEDIGUNG IN DER BAUINDUSTRIE UND IM ANLAGENBAU 159 (Karl-Heinz B6ckstiegel ed., 1984).

[19] 7 ibid

the purpose of narrowing the analysis is international construction, since it is particularly active and dynamic.[20]

[20] For an overview of trade associations in the construction industry and an analysis of standard conditions or model contracts issued at national or international levels, see PIERRICK LE GOFF, DIE VERTRACSSTRAFE IN INTERNATIONALEN VERTRAGEN ZUR ERRICHTUNG VON INDUSTRIEANLAGEN 99-116 (2005)

IMPACT OF GLOBAL LEGAL SYSTEM ON INDIA AND ITS LEGAL SYSTEM

Legislations, laws and rules provide the guidance to each individual of the society as well as the social activities. And Not only the legislations but also the customary and normative practices, general principles of right and wrong, and of justice equity and good conscience.

Indian legal system is one of the oldest Legal systems and is the most important feature of the Indian Constitution. The Indian Legal system follows the common law system of the passed on by the British community and its infrastructure is totally inspired by the one prevalent in England. And the most important aspect of this matter is that India is one of the countries which follow the most powerful system of customary and cultural practices. These practices are turned laws either in the eyes of the members of society or enforced by the judicial decisions. Most of the judicial decisions are made by the common law followed in India. Nevertheless, the current situation tells us that global law is in motion. It is a fact, not just a theory, and we can all contribute to it.[21] These two powers of judicial review are distinct from each other and are exercised at two different levels.[22]

Before discussing how the global legal system has impact on India, we have to keep in mind the working of Indian legal System. We are living in 21st century and our country's colonial legal system is not that developed which was expected. 'The development of any country is measured by the economic and judicial system, governmental setup and living standard of people which includes fair and speedy justice. In India, the judiciary reforms are totally necessary because due to delay in deciding the cases, the whole democratic and economic structure of country is affected. The most famous example is *Harshad Mehta Scam* relating to securities market, the court finally punished Harshad Mehta after seven years of trials, but this order was appealed. The final decision was arrived after the death of Harshad Mehta.

Apart from this it's also known that the most basic concept on which the judiciary system relied upon was Natural Justice and natural Law theory. In a famous English decision in Abbott vs. Sullivan reported in (1952) 1 K.B.189 at 195 it is stated that "the Principles of Natural Justice are easy to proclaim, but their precise extent is far less easy to define"[23]

[21] 7 ibid

[22] V.S. Deshpande, Judicial Review Of Legislation, Chapter II

[23] Principles of Natural Justice, Lecture delivered by Justice T.S.Sivagnanam at Tamil Nadu State Judicial Academy on 01.06.2009

Article 22 of the article gives the rights of natural justice and rights of fair hearing to every person. Hence in the same notion, Indian legal system has a strong base which provides a better scope of improvement. The best influential example can be the fair hearing rights given to Kasab (one of the terrorists in 26/11 attacks).

Now, so we talked about how exactly the Indian Legal System works. We are concerned upon how the global law effects the India as a legal system. Till now it worked taking the Economic side as most important issue and has evolved a great deal in sector of business which started as Globalization in India. Globalisation also has great impact on the cultural aspects of India. India was going under a huge crisis until the policy of globalisation, liberalization and privatization came, which improved the economic sector suddenly.

RELATION OF GLOBAL LEGAL SYSTEM WITH LEGAL NOTIONS OF DIFFERENT COUNTRIES AS WELL AS THE ROLE OF DIFFERENT LAW PRACTITIONERS AND INSTITUTIONS.

Basically three types of legal systems prevail in whole world, i.e., Common law, code law and Theocratic law. The basis of common law is past practices, legal precedents, and traditions while code law was based on the written rules system and theocratic was based on religious teachings which are enshrined in the religious inscriptions. 'legal regimen of a country consisting of (1) a written or oral constitution, (2) primary legislation (statutes) enacted by the legislative body established by the constitution, (3) subsidiary legislation (bylaws) made by the person or bodies authorized by the primary legislation to do so, (4) customs applied by the courts on the basis of the traditional practices, and (5) principles or practices of civil, common, Roman, or other code of law.[24]The analysis of the concept of global law is per se controversial, like many questions related to international relations and legal theory.[25]While talking about the global law in the project, it seems necessary to talk about the relations of global legal system with various laws, that is, with International private laws, International Public Law, International trade law, Comparative law and Lex Mercatoria.

'International public law is traditionally defined as the set of norms and rules governing the relations between governments or state entities'[26]. The international treaties signed bilaterally or multilaterally by the state representatives comes under the category of International Public law. Among traditional topics falling within this field of law are the laws of war, international human rights, world intellectual property, and world health. The fact that it's the coordination and contract between the governments, make it a bit narrow scoped. International Private Law is a wider scoped than the public law. Having a set of

[24] http://wwwsinessdictionary.com/defination/legal-system.html

[25] A good example of such controversial issues is the debate over the years on the existence of the lex mercatoria (law of merchants) as a self-proclaimed set of rules and principles specifically developed for the needs of international commercial transactions. For a comprehensive analysis of this debate, see URSULA STEIN, LEX MERCATORIA-REALITAT UND THEORIE 179-252 (Verlag Vittorio Klostermann 1995); KLAUS PETER BERGER, FORMALISIERTE ODER "SCHLEICHENDE" KODIFIZIERUNG DES TRANSNATIONALEN WIRTSCHAFTSRECHTS: Zu DEN METHODISCHEN UND PRAKTISCHEN GRUNDLACEN DER LEX MERCATORIA 29-108 (1996).

[26] See MICHAEL SCHWEITZER, STAATSRECHT III: STAATSRECHT, Vi5LKERRECHT, EUROPARECHT 3, 7(1986)

rules facilitating the selection of the law governing an international contract or the court competent to settle a dispute between foreign commercial companies, to take just two traditional examples, is highly relevant to a global economy.[27] "It can generally be said that this field of law serves the purpose of establishing i) rules for the selection of the law applicable to an international situation or contract and ii) rules for the selection of the court competent to rule over an international dispute."[28] But one things need to be taken care of that it's not necessary that international private law has no role of government in it. Though these contracts are between the two private organisations or representatives but the consequences may affect the public or the conflicts between the two may lead to public insecurity, basically for which the global laws are made. So the conflicts in the International Private Law go to the national courts and are submitted therein. A few international conventions have enabled progress toward harmonizing at the international level the conflict of laws or conflict of jurisdiction rules applicable in national laws, but much remains to be done to make international private law more international.[29] Now the relation of global law with comparative law is important in the aspect of legal system as well as globalisation. As its name indicates, comparative law is about comparing, and the comparison is generally between i) national laws of different countries (e.g., comparing German law and English law) or ii) groups of legal systems (e.g., comparing common law and civil law systems).[30] Comparative law is also fundamental to the process of international harmonization, since it enables the identification of diverging views between national laws and the submission of proposals to make such laws converge toward a unified solution.[31] Due to the harmonizing

[27] 7 ibid

[28] See BERNARD AUDIT, DROIT INTERNATIONAL PRIVt 4-19 (2' 6d.1997); PIERRE MAYER, DROIT INTERNATIONAL PRIVt 3-4 (3' 6d. 1987); YVON LoUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVIl 5-23 (3me 6d. 1988)

[29] A typical example of an international convention aimed at harmonizing international private law is the Rome Convention of June 19, 1980, on the law governing contractual obligations. See H6lne Gaudemet-Tallon, Le nouveau droit international priv6 europien des contrats, REVUE TRIMESTIELLE DE DROIT EUROPIEN 9,215 (1981) (Fr.); Paul Lagarde, Le nouveau droit international privi des contrats apres l'entr& en vigueur de la Convention de Rome du 19juin 1980, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVt 287 (1991) (Fr.).

[30] See, for example, the excellent contract law analysis performed by P.D.V. Marsh on the English, French and German legal systems, which leads to a comparison between civil law and common law. P.D.V. MARSH, COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE & GERMANY (1994).

[31] The drafting of an international convention typically involves, as a preliminary step, a comparative law analysis for the purpose of i) assessing the differences between legal systems and ii) developing a consensus solution that will

Nature, the comparative law is healthier towards globalisation and global legal system. It is a more decent tool which develops the uniform code for wider application of Law. Though global law and comparative have different aspects but they seemed to have a same notions. The International Economic Law covers the wide region of the global law. It can be defined as the collection of norms regulating the organization of international economic relations, mainly at macroeconomic level[32]. It maintains the rules and regulation between the economic relations between the countries or foreign traders. This nature shows the multidisciplinary part of the global law of how it's working taking care of both private and public sectors of economy and politics. A typical example here is the field of international environmental law, which, mainly through international conventions, aims at regulating, among others, liability issues and damage compensation arising from cross-border pollution.[33] And lastly, *The Lex Mercatoria*. The lex mercatoria can be defined as a collection of transnational legal principles, which derive from international contract practice and are especially suited to meet the needs of international commercial transactions.[34] The fact that certain national courts and international arbitration tribunals expressly refer to principles of the lex mercatoria when rendering their awards is a good proof of such reality.[35] In connection with the process of globalization and its impact on international trade, the question has arisen as to whether a notion of global law, converging around common international practices and values, is emerging for the benefit of multinational economic

facilitate the signature and ratification of the convention. In order to perform this analysis, working groups in charge of drafting international conventions systematically include scholars coming from different jurisdictions. A perfect example of the process leading to an international convention is the detailed analysis made by von Caemmerer and Schlechtriem of the development and contents of the 1980 United Nations Convention on Contracts for the International Sale of Goods. ERNST VON CAEMMERER & PETER SCHLECHTRIEM, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (1995).

[32] See DOMINIQUE CARREAU & PATRICK JUILLARD, DROIT INTERNATIONAL tCONOMIQUE 2-3 (2° 6d. 2005).

[33] For a discussion on the need for harmonization of the rules of liability for damage to the environment, see Pierrick Le Goff, The French Approach to Corporate Liability for Damage to the Environment, and 12 TUL. EuR. & Civ. L.F. 39, 50-53 (1997). For an analysis of conflict of laws issues surrounding cross-border pollution, see Pierrick Le Goff, Faut-il supprimer les socictMs d risque limitl? Apport et critique de l'analyse &conomique ame'ricaine du droit des socit1s, 51 REVUE INTERNATIONALE DE DROIT COMPARt [R.I.D.C.] 593,605-08 (1999) (Fr.).

[34] See Bertold Goldman, La lex mercatoria dans les contrats et l'arbitrage internationaux: realite etperspectives, 106 JOURNAL Du DROIT INTERNATIONAL [J.D.I.] 475, 475 (1979) (Fr.).

[35] See UGo DRAETTA & RALPH LAKE, CONTRATS INTERNATIONAUX: PATHOLOGIE ET REMEDES 35 (1996).

players and the international community at large.[36] This has inspired the whole of the global law but it is not whole part but a key element of global legal system.

[36] This question was one of the topics debated during the Globalization of the Legal Profession Symposium at the Indiana University School of Law, on April 6, 2006. This article sets out in greater detail the views expressed by the author during his presentation at the Symposium

CONCLUSION

Basically, after all the analysis and structural research, we understood the various sides of global law or legal system and its effects on the different legal system. We studied the components and parts of global law and its relation with various legal notions as well as the legal institutions and organizations. It tells us how the small components helped global law to evolve and the scope of its further evolution as it is still in its developing stage. We also came to know about the Indian legal system and the reforms which still are needed to be put in the laws prevailing. And most importantly, the basic impact of global law and globalisation on the economic sector of India. One of the most reputable European international and comparative law specialists made the point that "the growing globalisation requires a harmonisation and unification of the rules of law governing world trade"[37]. Even so, there is a strong belief and an influential view that globalization is the road to development during the first quarter of the twenty-first century.[38]

[37] Ole Lando, A Global Commercial Code, 50 RECHT DER INTERNATIONALEN WIRTSCHAFT [R.I.W.] 161,161 (2004) (F.R.G.).

[38]See, for example, Sachs and Warner (1995), who were among the first exponents of this view. This prescriptive view of globalization is also set out, at some length, by Bhagwati (2004); Wolf (2004).

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LABOUOR LAW – UTILITIES, THEIR MEASUREMENT AND TRIBULATIONS CONFRONTED IN MANAGING THEM

Rutuja Purohit

INTRODUCTION

Utility is an economic term introduced in 18th century by the celebrated Swiss mathematician Daniel Bernoulli referring to the total satisfaction perceived by users by using (consuming) the goods or services of varied kinds including the legal matters created especially to streamline socio-economic-commercial and political fields. The economic utility of the labor laws on social security is imperative to understand because it directly influence the management of factors of production, in which, labor as a factor of production is vibrant and hence the same is made a focus of enquires; it facilitates smooth working of business and industrial peace. The utility of these laws (or any other laws) cannot be measured in quantitative terms but it can be determined indirectly with users (consumer) behavior theories, which assume that users will strive to maximize their utility by appropriately managing the administration of such laws. (Marshall Alfred, 1920). The utilities of such laws may be optimized only when the endeavors to manage them are hassle free. The end portion of this paper delineates this issue

The utilities towards the selected labor laws inheriting Social Security Initiatives are investigated through the perception of well experienced and qualified fifty sampled executives working in the Tata Motors. The utilities of such labor laws are measured by using Cardinal Utility technique developed by the neo-classical economists, who believe that **utility phenomenon** is measurable in given condition when respondent can expresses his satisfaction in **cardinal** or quantitative numbers, such as 1, 2, 3 or 10%, 20%, 30%, and so on. (Alchian, 1953)

Tata Motors Limited, a USD 45 billion organization having production and selling units at different places, is a leading global automobile manufacturer with a portfolio that covers a wide range of cars, SUVs, buses, trucks, pickups and defense vehicles. For the sake of this study, the Pimpri-unit is made the focus of enquiries.

Keywords: Utility, Social Security, Labor laws, Cardinal Technique, API –Average Perceived Intensity, APIs -Average Perceived Intensities,

Objectives of study:

- To measure the utilities of labor laws from the perception of management

- To evaluate hardship in managing the labor laws.

Research Methodology:

The same is based on judgment sampling selection technique which gives due Weightage to experience and qualifications of senior top level executives from TATA MOTORS on the day of interviewing. The selection of respondents is based on convenient availability of the desired respondents who are opulently prepared to respond to the questionnaire which is designed by using the Likert scale based extended into 100 points PEMT (Psychological Experience Mapping Technique). While using this PEMT, the sample respondent is asked to score his/ her Average Perceived Intensity (API) in the range between 0% and 100% where "0"% means "Nil" and "100%" mean "Fully" Positive; any percentage between these two extremes i.e. 0% and 100% indicates the API level as perceived by the concern respondent to the given statement. (Paul Pagers and Charles, 2011)

The APIs endorsed by the sampled group of respondents (i.e. n =50) to any given variable/s are classified in nominal ways as below for gaining the expediency in data analysis so far collected (https://www.statisticssolutions.com)

A. Grade :-Denoting Good level when APIs are >75%
B. Grade :- Denoting Fair level when APIs are in between 50% & 75%
C. Grade :- Denoting Poor level when APIs are in between 25% to 50%
D. Grade :- Denoting Deplorably Poor Level when APIs are < 25%

Profile of sampled executives: All the sampled executives numbering 50 functioning at the top level (mostly BoDs) with averagely aging 55 and above are having experience of > 10 years in Tata Motors and having technical/ managerial formal / informal qualifications As the virtue of this, they are having profound thinking and capabilities to respond the questionnaire confidently and realistically. **The sample size 50** is found logical and economical in data collection, since an additional i.e. 50 ahead numbers of respondents are found to give the similar answers to questions as given by earlier respondents so far interviewed. (Pl Bhandarkar & Ts Wilkinson, 2010)

Literature review:

The fundamental purpose of labor laws is the pursuit for justice; the same is to be administered and managed smartly as when it is mismanaged, justice and the utility of labor laws fly out of the managerial orbit. (C.K. Allen, 1955), This approach leads to and agrees utility as an ethical concern in the sphere of labor laws; which are happened to be a product emerged out of need to cool down the labor agonies during the industrial revolution of the Great Britain Brian (William Clapp, 2014), The utility and its management inked to utility theories of Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873)., an erstwhile economist experiencing labor unrest .These theories believe that human being is social by nature and is always motivated in life chiefly by the desire to gain happiness and to avoid difficulty in smooth living and the same are reason to evolute valuable legal frame work consisting of many laws besides labor laws contributing Utilitarianism in the favor of users (Kelsen's, 1957)

The value of Utilitarianism or utility of laws in any business enterprise can be measured through the cardinal utility measurement technique. (Alchian Armen A, March 1953). So far as the business organization is concerned the utility is envisaged in the following two ways:

1. The value of existing laws in-use (https://www.loc.gov/law/help/current-topics.php)
2. The value of laws to business in terms of what Labor gain in-exchange (Armstrong Michael, 1999).

The value in use for business enterprise connotes the use of particular law and their values benefitting the labor and management. Infact, the value of the particular labor laws in the eyes of management and labor may be differentially varied due to utility experiences instilled. As a result, the value of laws is relatively subjective. Value in exchange of a particular law in business enterprise indicates that what management and labor exchange after the execution of particular laws, say the Maternity Benefit Act, 1961 gives (a) satisfaction to the recipients, (women workers and the members in the family) of the benefits while (b) the management gets the resourceful work

performance after her return to work, besides gaining the social reputation amongst the industrial milieu (Alchian, Armen A, March 1953).

The range of utility of phenomenon has been dominated by two important theories: Expected Utility Theory [1] and Prospect Theory [2]. According to Expected Utility Theory, respondents rationally choose that level which presents a greater expected utility while in the case of Prospect theory, the Weightage is given to an anticipated utility. The utility level of the respondents over various labor laws has impersonated influence of these two theories that produces snowballing utility perception measurable by cardinal technique. (Tomas Bonavia 2018)

A utility of phenomenon and General principle of labor laws on social security refer to the rudiments that are recognized in all types of statutory labor relations, irrespective of the legal structure to which it belongs and manages. It is believed broadly that utility levels are identified by such people whose legal intellectual has accomplished a certain level of erudition although There have been theorists who disputed the possibility of drawing the distinction between laws and governing principles and their utilities to users. (Joseph Raz ,1972),

The principle of utility of laws connotes that actions or behaviors are right in so far as they promote happiness or pleasure. An application of labor laws is done because it breeds happiness amongst both labor/ management of the industry and the society in general. The utility of these laws is an outcome of teleological breeding, which may raise some of the basic issues pertains to quantitative as well as qualitative measurement (RonaldF.White, 2013)

The labor laws offer exhaustively a baffling predicament to intellectuals of all tones. Consequently their multidimensionality has always been a vibrant concern, especially for the management, labor-pleader and judge in the court of law. (M.K. Vyas, 2018)

The goal of user Experience Optimization is to help companies maximize the long-term profitability through reaping the "lifetime value" of inputs like labor factor of production and labor laws to gain industrial peace; this requires management without flaws. The goal is to optimize user satisfaction i.e. employees and

management by managing the labor laws without conflict. (Jerry W. Thomas) Conflict is a normal part of any industrial enterprise. It is a sign of healthy team interactions. However, business enterprise sometimes does not handle conflict on fitting ways. Sometimes they make bad legal decisions in order to avoid conflict rather than learning how to manage it effectively. (https://www.sagepub.com)

DATA ANALYSIS

Table N0-1 APIs of utility in % as perceived by the sampled executives to labor laws inheriting social security attributes

Labor Laws Inheriting Social Security Attributes	API's in % as envisaged by
1. 1. Delayed Payment Act, 1993	13%
2. Employees Provident Fund Act, 1952	86%
3. ESI Act & Regulation	88%
4. Companies Act, 2013 (Employees stock option)	07%
5. Equal Remuneration Act, 1976	93%
6. Factories Act, 1948	82%
7. Industrial Disputes Act, 1947	55%
8. Industrial Employment Act, 1946	53%
9. Maternity Benefit Act, 1961	33%
10. Minimum Wages Act, 1948	00%
11. Payment of Bonus Act, 1965	43%
12. Payment of Gratuity Act, 1972	53%
13. Payment of Wages Act, 1936	23%
14. Sales Promotion Employees (Conditions of Service)	73%
15. Trade Union Act, 1926	63%
16. Weekly Holidays Act, 1942	100%
17. Workmen's Compensation Act, 1923	59%
• *Mean*	57.75%
• *SD*	28.58%
• *CV*	49.49%

*Wages are paid more than the rates fixed under the Minimum Wages Act, 1948

i Amongst the various labor laws inheriting social security, the maximum utility count in terms of APIs is attributed to of Weekly Holidays Act, 1942 (100%) followed by Equal Remuneration Act, 1976 (93%), ESI Act & Regulation(88%), Employees Provident Fund Act, 1952(86%), Factories Act, 1948 (82%), Sales Promotion

Employees Conditions of Service) Act, 1976 (73%), Trade Union Act, 1926 (63%), Workmen's Compensation Act, 1923 (59%), Industrial Disputes Act, 1947 (55%), Industrial Employment Act, 1946 (53%), Payment of Gratuity Act, 1972(53%), Payment of Bonus Act, 1965 (43%), Maternity Benefit Act, 1961(33%), Payment of Wages Act, 1936 (23%), Delayed Payment Act (interest on delayed payments) (13%) and Companies Act, 2013 (Employees stock option) (07%),

ii. APIs % of utility as perceived by the sampled executives are as high as 57.75% with 28.58% SD accompanied by 49.49%CV; SD and CV levels indicate that the utility of various labor laws is not more or less similar widely varying. The APIs for each and every significant labor laws are delineated categorically as ahead.

1. Delayed Payment Act

This Act facilitates the interest payment to the labor on their delayed wages. (IDPIUs Apr 2, 1993) However, it is noticed that there are very few occasions of delaying the payment of wages by Tata Motors since they have adequate funds for the use of labors . In view of this, the management does not envisage a frequent need to observe/ administer the above law. Hence, APIs of utility in % for this law reported by sampled executives stand in D Grade i.e. 13%.

2. Employees Provident Fund Act, 1952

This Act is perceived useful by the both i.e. management and labor on account of two reasons: Firstly, the labors are assured by way of their savings supported by the management with its monetary contribution that generates confidence amongst the labors towards the management and secondly, the management generosity by way of their contribution to employees' contribution in PF enhances positivity in the workers to perform their commitment as agreed. As a result of this optimistic feel (PM Narendra Modi, 2014), the sampled executives endorse their APIs of utility in % is as large as 86% which stands in "A Grade"

3. Employees State Insurance Act

This Act and allied regulations were first implemented at Kanpur and Delhi on 24th February 1952 and thereafter it has been a core part of social security laws in favor

of labor. This Act assures logically a good medical care to labors and their near dependants. However, the ESI facilities available are having salary/ wages ceiling. In other words, the labor availing basic salary > Rs. 25,000 is not eligible to avail the benefits of this law. As a result of this, the Tata Motors management tries to keep the wage limit below Rs.25, 000 for the majority of the workers with analogous compensatory monetary /non-monetary benefits so as to keep labors satisfied besides, making them eligible for the benefit available from the above Act. As a result of this, the reported APIs of utility endorsed by the management for this Act is as sumptuous as 88%. (Dezan & Shira Associates, May 27, 2019)

4. Companies Act, 2013 (Employees Stock Option)

Companies Act, **2013** under Section 62(1) (b) facilitates preferential stock option asking the joint stock company to accord preference while allotting new shares to its employees includes labor (Hull, J, and White, 204). In the case of Tata Motors, Pune there has been rare occasions during the last 30 years to favor the employees by allotting shares of company. Naturally, there has been little experience/perceptions to management causing low feel about utility *over stock option provision*; thus, the reported APIs of utility in % for the same is as elfin as 7%, which fall in "D Grade"

5. Equal Remuneration Act, 1976

The Equal Remuneration Act, 1976 is practiced in Tata Motors to give compensation for work to men and women so as to avoid the feeling of discrimination amongst different genders. This practice has inheritance in Article 39 of the Indian Constitution insisting equal pay for equal work for both men and women. *(Hari Manasa Mudunuri, 2018)* The APIs of utility for this law reported by sampled executives is as high as 93%., which stands in "A Grade"

6. Factories Act, 1948

The 1st **Factories Act** was enacted in India by 1881 having British origin. This **Act** on the whole protects children and also the health and safety of the workers in the factory. Factories Act thus has been evolved as late of 19th Century and has gradually practiced to protect and create the Good working condition

for Industrial labors with aim to create social security in for labors especially shunning of occupational hazards , accidents and diseases . It streamlines the working hours, weekly off, provisions regarding ladies and children and generate social security fee; the amendments Act of 1948 , facilitate safety at working place & machinery, medical aids , control over working hours, weekly off, paid leave etc. In view of this, the APIs of utility for this law reported by sampled executives is as high as 82%. (Nijara Deka, July, 2017)

7. Industrial Disputes Act, 1947

The input-output without dispute is the objective of the Industrial Disputes Act which aims industrial peace and synchronization by facilitating apparatus and procedure for the resolution of industrial disputes through conciliation, arbitration and adjudication apparatus. The major and final objective of this act is "Maintenance of non-violent ambiance in the Industry" APIs of utility for this law by the sampled executives as fair as 55% ; the same stands in "B Grade" The low utility count endorsed to this Act is due to the following reasons:

1. Its implementation is costlier.
2. It generates grievances against the deviations in executing the laws.
3. The labor seeks undue advantage by availing extra facilities.
4. The government supervisory Cedar under this Act is bribing for overlooking the loopholes detected in execution of this law.
5. The company, as alleged by the workers' leaders, has failed to keep an active abidance of this Act, especially as concern to various labor aspects (Tata Motors, January 15, 2018)

8. Industrial Employment Act, 1946

The purpose of the Act is necessitating the employers to describe specifically the Job conditions & to standardize the procedure of Recruitment, Selection, Promotion, Demotion, Disciplinary Action, Holidays, and Shift Working of the workers. This Act is obligatory to owners/ management and hence they get irritated while executing the above (Dr. Trilok Kumar ,2009) APIs of utility for

this law reported by sampled executives for this Act is as fair as 53% which stands in "B Grade" The low utility score is because of the following reasons:

1. It generates grievances against the deviations in executing the laws.
2. The labor seeks undue advantage by availing extra facilities.
3. There are many hardships in keeping the record under this Act for the inspection by the Factory Inspector and by ISO Authorities.

9. Maternity Benefit Act, 1961

The Maternity Benefit Act, 1961 has been enacted to control the job of women in certain establishments for a certain period before and after the child birth and also to provide for maternity and other benefits. Maternity Benefit Act, 1961 provides maternity leaves for women working in both private and public sector. After maternity Benefit –Amendment Bill of 2016, numbers of maternity leaves are increased to 26 weeks (> 27 weeks in Tata Motors) as against the earlier leaves of 12 weeks. (Business news, 12 Aug 2016) The number of women labor employees eligible to get benefit under this Act in Tata Motors at Pune units comprises of mainly of sweepers, messengers etc and few women from administrative cadre All these women are eligible for Maternity benefit. The APIs of utility for this law reported by the sampled executives for this Act is as poor as 33% which falls in "C Grade". The low utility tot up is because of the following reported reasons:

1. There is disturbance in the workflow on account of women going on maternity leave for long period.
2. After rejoining the work, during post maternity leave period, the women needs to exert to cope with the routine.

10. Minimum Wages Act, 1948

The Minimum Wages Act, 1948 states the minimum rates of wages in certain employments. Act was passed in 1948 and it came into force on 15th March 1948 this Act doesn't even exist in Tata Motors since the wages are paid more than the rates fixed under the Minimum Wages Act. Hence, the reporting of utility perception by sampled executives is Nil.

11. Payment of Bonus Act, 1965

The practice of paying bonus in India was commenced during First World War when certain textile mills gave 10% of wages as war bonus to their labors in 1917. The minimum bonus of 8.33% is payable by Tata Motors and establishments, under section 10 of the Act. Under this Act, the bonus shall not exceed 20% of the salary/wage. The Act is applicable to the whole Tata Group of Industries. The employees including labor seems to be unsatisfied about the bonus payment since the Management gives every time one common answer that the company is facing Difficulties and gives a small token amount of bonus. However, Tata Motors pays an average amount of bonus ranging from Rs. 6,000 to Rs.425,000 annually in which more than 80% employees get the bonus ranging between Rs. 6000 to Rs. 12000 annually.(Scroll in ,Saturday ,8th June ,2019)

APIs of utility for this law reported by sampled executives is as poor as 43% which stands in C Grade The low utility tot up is because of the following reported reason:

1. The general human tendency is to gain more and more than what they gain. Under this pretext, the labors of the Tata motors are not satisfied over the bonus amount they get and the Bonus Act is erroneously linked to human right and not to generosity of employer

12. Payment of Gratuity Act, 1972

As per above act, the Tata Motors gives Gratuity to their employees including labor for rendering the services continuously for > five years or (+). It is an old age social security benefit normally disbursed at the time of retirement. However, the Tata Motors have set certain rules that make an employee eligible to receive gratuity even before the age of retirement or superannuation (Preeti Motiani, 2018)

APIs of utility for this law reported by sampled executives is as fair as 53% which stands in "B Grade". The low utility tot up by the management is stands in "B Grade" and Not in "A Grade" because of the following reported reason:

1. It is fixed cost to be incurred by the company.

2. There has been lot of quarrels initiated by employees especially labor about the amount of gratuity and its disbursement.

13. Payment of Wages Act, 1936

This Act regulates the payment of wages to certain classes of persons employed in the industry like Tata Motors. The scope of this act in the Tata Motors is limited to the few persons employed on casual basis and whose monthly take over is not > Rs. 6500. The act is intended to stop unauthorized deductions made by employer and/or to hold unjustified delay in payment of wages. (GOI,. 27th June, 2009) APsI of utility for this law reported by sampled executives are as deplorably poor as 23% (i.e. in "D Grade") due to the reasons mentioned below:

1. Although the labors coming under the preview of this Act are elfin in size, they are creating much trouble in managing this Law.
2. The labors are always provoked by their relatives/ friends working in the Tata Motors to get employment under the rules applicable to existing labors/ employees.

14. Conditions of Service, Act, 1976

This Act is useful in satisfying sales Promotion Workers engaged in selling the products of Tata Motors. As per this Act the **conditions of service** of sales promotion employees are controlled.

APIs of utility for this law reported by sampled executives is as good as 73%which falls in "A" Grade,The good level of utility tot up by the management is because the sales promotion workers are being satisfied by the existence of this Act and it helps increase the organizational performance.(www.lncofirm.com)

15. Trade Union Act, 1926

The passing of The Trade Unions Act, 1926 is the results of formal recognition to the workers' right to organize; this Act, on one hand is much annoying to management due to number of cost increasing components of the Act, while on the other hand, the same is much pleasurable to management due to its inherent

potentialities to bring industrial peace; it (Act) is also inbreeding win-win position to both i.e. management and employees.

For e.g.: Under the particular agreement, each permanent employee working in Tata Motors is entitled for Rs 16,000 hike spread uniformly over the next five years; the same is satisfying the workers as well as keeping the industrial peace and get prepared in the payment of employees compensation for ensuing 5 years. (News June, 2017)

APIs of utility for this law reported by sampled executives is as fair as 63% which falls in "B Grade.

16 This Act provides weekly holidays to employees in Tata Motors. Both The management and employees are satisfied with this Act and hence the resultant utility score for the Act is 100%

17. Workmen's Compensation Act, 1923

The Workmen's Compensation Act, 1923, aims to provide workmen and/or their dependents some assistance in case of accidents emerging during the course of employment leading to disablement of workmen. This Act came into effect from 01/07/1924. It applies to entire India, including the State of J&K. The Act facilitates for the payment of compensation by specific types of employers to the workmen against injury by accidents (https://districts.ecourts.gov.in/sites) APIs of utility for this law reported by sampled executives is as fair as 59% due to its recurring costs payable to injured labors.

DIFFICULTIES IN MANAGEMENT

Labor laws administration and management in the Tata Motors are maneuvered by the personal manager in consultation with BoDs and Union Leaders with the help of managerial group consists of almost all senior executives and Executives below them . While executing these labor laws inheriting social security much hardship is to be exerted by the management on account of the following reasons:

1. We have seen that (Table no. 1) there has been much deviation amongst the executives about the utility of these laws. When the utility score is higher, the

management has to spend on higher side to get peaceful materialization of the laws. Such higher side spending is limited by the funds available for the labor welfare.

2. These laws are mostly designed to favor the workers for improving job security, working condition, amicable compensation settlement, upkeep of employees' health etc. In order to get more benefits, the employees under the shelter of these labor laws may go on unveiling their dissatisfaction, if the administration of such laws exists with shortcomings.
3. The rigorous Government control requires to keep extensive record for each and every law, since the same is used for settlement of disputes coming under the preview of industrial relations and labor Court.

An attempt is made ahead (Table No.2) to articulate the intensity of the above hardship in the

Table No-2 APIs of hardship in % while managing the labor laws as perceived by the sampled executives to keep the labor committed to work.

Labor welfare Laws	**APIs of hardship in execution % as envisaged by sampled executives(n=50)**
2. Delayed Payment Act (interest on delayed payments)	53%
2. Employees Provident Fund Act, 1952	55%
3. ESI Act & Regulation	60%
4. (Employees stock option) Companies Act,2013	62%
5. Equal Remuneration Act, 1976	63%
6. Factories Act, 1948	72%
7. Industrial Disputes Act, 1947	73%
8. Industrial Employment Act, 1946	58%
9. Maternity Benefit Act, 1961	54%
10. Minimum Wages Act, 1948	64%
11. Payment of Bonus Act, 1965	74%
12. Payment of Gratuity Act, 1972	71%
13. Payment of Wages Act, 1936	61%
14. Sales Promotion Employees (Conditions of Service)	73%
15. Shops& Establishments Act, 1953	60%
16. Trade Union Act, 1926	62%
17. Weekly Holidays Act, 1942	63%

18. Workmen's Compensation Act, 1923	60%
• *Mean*	63%
• *SD*	6.73%
• *CV*	10.68%

Note: Sample executives and labors are selected from the TATA MOTORS by using judgment sampling technique with due Weightage to their top level position/ experience/ education.

Table no. 2 unveils the following:

(74% APIs)

i. Amongst the various labor laws inheriting social security, the maximum hardship in administration and management in terms of APIs is attributed to of Payment of Bonus Act, 1965(74%) followed by Industrial Disputes Act, 1947 (73%), Sales Promotion Employees (Conditions of Service) Act, 1976(73%),Factories Act, 1948 (72%), Payment of Gratuity Act, 1972(71%),Minimum Wages Act, 1948(64%),Equal Remuneration Act, 1976(63%),Weekly Holidays Act, 1942(63%), (Employees stock option) Companies Act,2013(62%), Trade Union Act, 1926(62%),Payment of Wages Act, 1936(61%),ESI Act & Regulation (60%),Shops& Establishments Act, 1953(60%), Workmen's Compensation Act, 1923(60%),Industrial Employment Act, 1946(58%), Employees Provident Fund Act, 1952(55%),Maternity Benefit Act, 1961(54%) and Delayed Payment Act (53%).

ii. APIs % of hardship inherited in managing the labor laws as perceived by the sampled executives to keep the labor committed to work are as high as 63% with 6.73% SD accompanied by 10.68% CV; SD and CV levels indicate that the hardship in administration and management of various labor laws is more or less similar.

CONCLUSION:

From the following data, the conclusions are:

i. APIs % of utility as perceived by the sampled executives to the various labor laws are as high as 57.75% with 28.58% SD accompanied by 49.49%CV; SD and CV

levels indicate that the utility of various labor laws is not more or less similar but widely varying.

ii. APIs % of hardship inherited in managing the labor laws as perceived by the sampled executives to keep the labor committed to work are as high as 63% with 6.73% SD accompanied by 10.68% CV; SD and CV levels indicate that the hardship in administration and management of various labor laws is more or less similar.

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QUESTIONS ASKED TO SENIOR SAMPLED SENIOR EXECUTIVES:

1. As a senior executive, how much hardship is confronted while managing the labor laws? Answer in 100 point scale, where 0% indicates 'nil' hardship while 100 % indicate 'Full' hardship and any % in between these two extremes unveil the level of hardship.
2. As a senior executive, how much utility is perceived for the labor laws? Answer in 100 point scale, where 0% indicates 'nil' utility while 100 % indicate 'Full' utility and any % in between these two extremes unveil the level of utility.

Right to Information: Pride of Democracy

Vasundhara Kaushik

ABSTRACT

The RTI (Right to Information) Act of 2005, sets out a system that enables citizens to have access to data and information under the control and supervision of public authorities so as to advance accountability, transparency, propriety, and probity in the working of each public authority. The RTI Act gives a practical and general system for guaranteeing, securing citizens' right to information, which has been maintained by the Supreme Court in a few decisions as a crucial right, spilling out of Article 19 and Article 21 of the Constitution of India. An educated populace will be better prepared to keep a vital vigil on the instruments of government and make the administration increasingly responsible to the people governed. The Right to Information (RTI), by its nature, has an intrinsic clash with the legislature of the day, or better to say the other way around. By changing the RTI Act, the legislature has in a single stroke evacuated the constitutional role and importance of Chief Information Commissioner (CIC) and the rest of the information commissioners and made them subordinate to the executive, which is a total refutation of the idea of RTI and accountability and transparency in administration.

INTRODUCTION

The Right to Information Act, which was passed by Parliament on June 15, 2005, and came into power on October 13, empowers ordinary residents of our country to get data and information identifying with the working of the government, especially the executive, which the authorities may somehow or in any other crooked way cover-up. The fundamental object of the Right to Information Act is to engage the citizens, manage corruption, and make the democracy of our country for the individuals in its genuine sense. In Maneka Gandhi vs. Union of India,[1] Justice V. Krishna Iyar opined that "A government which functions secretly not only act against the democratic decency, but buries itself with its own burial." The RTI Act, 2005 reaches out to the whole of India. All those bodies, which are established under the Constitution or under any law or under any Government notice or all bodies, including NGOs, which are owned, controlled or considerably financed by the Government are also covered within this act. Every single private body, which is claimed, controlled or considerably financed by the Government are straightforwardly covered under TRI Act, 2005. Others are in an indirect way included in this act. The information commissioners are the last and final authority on whether or not governments must uncover data that had been asked for by the applicants of RTI. The

[1] AIR (1978) SC 597.

law has given them a fixed term of five years and pay rates comparable to their equivalent in the Election Commission of India.

This Right to Information Act of 2005 orders prompt reply to solicitations of the citizens for government data and information. It is an initiative taken up by the Department of Personnel and Training, Ministry of Personnel, Public Grievances, and Pensions to give an RTI Portal Gateway to the citizens for fast search of data on the details of first Appellate Authorities, PIOs, and so on among others, other than access to RTI related data/disclosures distributed on the web by different Public Authorities under the government of India and also as the State Governments.

The term Public Authority incorporates assortments of self-government set up under the Constitution of India, or under any notification of law or government. It additionally incorporates any entities claimed or owned, controlled or generously financed and non-government associations significantly financed directly or by implication by assets given by the legislature.

On the off chance that the citizen is obstructed from practicing such right during the process of implementation of the RTI Act, it would lose its trust in the working of the Chief Information Commissioner itself. The Act is a major advance towards making the residents educated about the functions and duties of the Government. This Act guarantees to destroy any sort of corruption in Public Authority by giving a compulsory obligation to the Public Authority to make a commitment to distribute the information and data sought by the citizens of India inside a specific timespan with a nominal expense. The right to speak free and expression incorporates the privilege to secure data and to scatter it. Along these lines, because of this compulsory dissemination of data in the available configuration, accountability and transparency can be established on the grounds that that information not just makes individuals aware of the system of administration but could also be admitted as a substantial piece of evidence in any legitimate procedures. The RTI Act, in this way, is a vehicle to encourage the usage of a major fundamental right.

The Act makes it compulsory for public authorities to unveil parts of their structure and working. This incorporates revelations on money related data, powers, and obligations of its representatives, and so on. The goal of such suo motu exposures is, that the general public should require the least recourse through the Act to get such data. Other than these suo motu divulgences, citizens are allowed to file applications requesting the supply of explicit data and information. This may incorporate data as reports, documents, or electronic records under the control and supervision of the Public Authority.

The Act has set up a three-level structure for enforcing and implementing the right. Public Authorities assign a portion of their officials as Public Information Officers. The first solicitation for data goes to them. These officials are required to give data to an RTI candidate within 30 days of their solicitation. Appeals from their decisions goes to the appellate authority. Such appellate authority is a senior authority working in a similar public authority. In this way, the first appeal is produced using 'Caesar to Caesar'.

The International Human Rights NGO Article 19 has portrayed information and data as "the oxygen of a democratic system" while the UNDP Human Development Report 2002 depicts educated informed discussion as the "lifeblood of democracies."

Section 2(f)[2] of the **RTI Act** defines Information as:

"Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for a time being in force.

Right to Information (RTI) is defined under **Section 2(j)**[3] as:

"Right to Information" means the Right to Information accessible under this Act which is held by or under the control of any public authority and includes the right to-

i. Inspection of work, documents, records;
ii. Taking notes, extracts, or certified copies of documents or records;
iii. Taking certified of materials;
iv. Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

HISTORY OF RIGHT TO INFORMATION IN INDIA

[2] The Right to Information Act, 2005.
[3] The Right to Information Act, 2005.

Sweden was the very first nation to give the opportunity of freedom of information to its residents through the Freedom of Press Act, which came into power in 1766. After a number of different nations, for example, Finland, the USA, Denmark, France, Canada, New Zealand, etc., India finally implemented the Right to Information Act in 2005. India is the 48th nation to uphold the Right to Information as a part of Fundamental Right under its Constitution. As of now, there are more than 90 nations that have authorized the Right to Information Act (RTI).

In the winter of year 1994, the town of Kot Kirana in Pali region of Rajasthan was the site of a public gathering that would sometime commemorate in a Bollywood motion picture. A young Indian Administrative Service (IAS) recruit, straight out of the Mussoorie institute, had discharged every one of the vouchers and assembled rolls kept up in government records for public works embraced in the area, as indicated by Aruna Roy's book The RTI Story: Power to the People on the beginning of the Right to Information (RTI) development. The public gatherings and meetings which pursued in many towns within the sight of hand-wringing government authorities is presently the stuff of legend.

In Kot Kirana, when the names of the individuals who supposedly dealt with public activities projects were read out, it rapidly turned out to be very clear that some of them were dead. Counterfeit and fake signatures were uncontrolled. Government records demonstrated that those public structures, where the citizens were sitting before, was finished; that payments were also made. Be that as it may, there was no rooftop or an entryway in these structures. The accumulated group started giggling.

In April 1996, a huge number of occupants of Beawar, another town in Central Rajasthan, walked to the workplace of the Sub-Divisional Magistrate. They had a very basic demand: "Humara Paisa, Humara Hisaab" (our cash, our account). This was a turning point for Indian culture. Rather than requesting the standard roti, kapda aur makaan (food, cloth and shelter), individuals were requesting the right to information. This agitation of Beawar began its 10 years-long struggle in the year 1996. It finally ended its struggle after the enactment of the Right to Information Act in 2005. Tamil Nadu turned into the very first state to start RTI, in 1997 pursued by Goa, Madhya Pradesh in 1998, Rajasthan, Maharashtra and Karnataka in 2000.

When it was first established, the RTI Act was hailed as a notable, individual-empowering enactment. From that point forward, each of the three wings of State — including the Judiciary — have made every effort to undermine it. Throughout the years, a determined civil society has figured out how to fend off most assaults on the enactment. The most recent fight appears to have been lost, for the

present. The Right to Information (Amendment) Bill, 2019, eats into the freedom given to Information Commissioners. As a result, it hollows out the Act without addressing any of the substantive rights or procedural rights the Act gives.

The Parliament perceived that appropriate and productive working of a democratically ruled system requires an educated populace and transparency regarding data and that such straightforwardness is fundamental for checking corruption and to consider administration and their instrumentalities responsible to the citizens of the nation. The Parliament was additionally cognizant that irregular and uncontrolled disclosure of data is probably going to struggle with other public interests including effective activities of the administration, ideal utilization of limited financial assets and safeguarding of confidentiality of delicate information and data.

In its undertaking to adjust and blend these clashing interests while saving the centrality of the democratic thought, the Parliament sanctioned the RTI Act.

The formal acknowledgment of a legitimate Information Act in India happened over two decades before enactment was at last instituted, when the Supreme Court of India observed in the case of State of U.P. v. Raj Narain[4] that the right to information is verifiable and morally justified to the right to speech and expression, unequivocally ensured in Article 19 of the Constitution of India. Justice K.K. Mathew observed, "In a government of duty, like our own, where every one of the operators and agents of the public must be in charge of their conduct, there can be, nevertheless, couple of secrets. The individuals of this nation reserve a right to know each public act, everything that is done in an open manner, by their public functionaries. They are qualified to know the points of interest of each public transaction in the entirety of its bearing".

RECENT AMENDMENTS TO RIGHT TO INFORMATION ACT, 2005

The Lok Sabha, on July 22nd 2019, passed a bill proposing alterations or amendment to the Right to Information (RTI) Act, 2005. The bill proposes to enable the government at the centre to make rules and regulations on choosing the pay, tenure, remittances (allowances) and different terms of administration of the information commissioners of the centre and state information commissions.

[4] AIR (1975) SC 885.

While the Lower House had passed The Right to Information (Amendment) Bill, 2019 on July 22nd, the Upper House of the Parliament gave its approval on 25th July, after walkout of opposition over what it was said "intimidation" strategies by benefit seeking benches to impact deciding on the movement to send the bill to a Select Committee for more prominent investigation.

UNDERSTANDING THE BILL

The Right to Information Bill is just three effective clauses long. The First clause amends Section 15 of the RTI Act and replaces the earlier statutorily fixed term of five years for the Chief Information Commissioner with a term to be chosen by the central government through the rules made under the law. A similar provision likewise expels the equality between the Information and Election Commissioners by having compensations, stipends, terms and conditions of administration and services controlled by principles surrounded by this effect by the central government. Notwithstanding anything, two admonitions (caveat) are available in the proposed amendments: first, the pay rates, recompenses, and terms and conditions of services can't fluctuate to the disservice of ICs (Information Commissioners) after the appointment, and second, ICs selected under the bill, moved towards becoming a law, will keep on being represented by the RTI Act as it remained before the revision. The change, regardless of whether it takes effect or not, will be imminent in nature and holds one significant security for ICs.

The subsequent proviso i.e. the second clause repeats the first statement, yet with regards to SICs (State Information Commissioners), and along these lines, amends Section 16, while the last clause alters Section 27 to give the central government capacity to make rules in regard to the issues referenced in amended Sections 15 and 16, and tenure, pay rates, and so forth of ICs. Fundamentally, the statements are the same as what one would discover in any laws identifying with statutory authorities, yet the distinction here is the obvious inference of this kind of amendment, that the executive, and not the law-making (legislature) body, will get the chance to decide the terms and conditions of services of the Information Commissioners.

The Right to Information (Amendment) Bill, 2019 was presented by the Minister of State for Personnel, Public Grievances and Pensions, Mr. Jitendra Singh, in Lok Sabha, on July 19, 2019. It endeavours to change some provisions of the Right to Information Act, 2005. Key highlights of the Bill include the following:

•Term of Information Commissioners: Under the Act of 2005, Chief Information Commissioner (CIC) and Information Commissioners (ICs) are designated at the national and state level to execute the provisions of the Act. The Act expresses that the CIC and different ICs (appointed and designated at the union and state level) will hold office for a term of five years. The Bill evacuates this arrangement and states that the central government will decide and communicate the term of office for the CIC and the ICs.

•Fixing Salaries: The Act of 2005 expresses that the pay of the CIC and ICs (at the central level) will be proportionate to the salaries being paid to the Chief Election Commissioner and Election Commissioners, separately. So also, the pay of the CIC and ICs (at the state level) will be identical to the salary paid to the Election Commissioners and the Chief Secretary to the state government, individually. The Bill tries to revise these arrangements to express that the compensations, stipends, and different terms and conditions of administration of the central and state CIC and ICs will now be controlled by the union government.

•Salary deduction: The Information Act of 2005 expresses that while the appointment process of the CIC and ICs (at both state and central level), on the off chance that they are getting annuity/pension or some other retirement benefits for past services in any government organization, their pay rates will be decreased by a sum equivalent to the annuity. Earlier government services incorporates as under (i) the union government, (ii) state government, (iii)corporation built up under a union or a state law, and (iv) government organization claimed or constrained by the union or a state government.

The Amendment Bill expresses that the union government will advise the term of office of Information Commissioners. Further, the pay rates, remittances, and different terms and conditions of administration of the central as well as the state CIC and ICs will be dictated by the union government. The reasoning provided for making this amendment to the information act of 2005 is not satisfactory.

The Statement of Objects and Reasons of the Act expresses: "The pay rates and recompenses and different terms and conditions of administration of the Chief Election Commissioner and Election Commissioner are equivalent to a Judge of the Supreme Court, along these lines, the Chief Information Commissioner, Information Commissioner and the State Chief Information Commissioner end up comparable to a Judge of the Supreme Court as far as their pay rates and allowances and different conditions of services are concerned." It further continues to say that, "the

order of Election Commission of India and central and State Information Commissions are not the same. Thus, their status and administration conditions should be rationalized and balanced in that manner."

CONSTITUTIONALITY OF THE RTI AMENDMENT BILL, 2019

Free and fair elections and free speech are Constitutional objectives and part of the basic structure of the Indian Constitution. The Election and Information Commissions go about as facilitators of these objectives. The Information Commission is basically an adjudicatory body that chooses whether an individual is qualified for getting access to any government data. The Commission settles disputes between the citizen and the government of India. It is, in this manner, very basic that the Commission be free from all the control and influence of the government. It is exactly this autonomy that is being attacked by the bill.

Deepak Sandhu, the first female Chief Information Commissioner, pointed out that citizens' right to information emerges from the right to freedom of speech and expression under Article 19 of the Indian Constitution and Information commissions, being the last adjudicatory body under the Act are entrusted with securing a major right and in this manner, their self-sufficiency and autonomy must be ensured.

The RTI amendment bill 2019 is a hit to the government's original plan of the RTI Act and the Constitution of India. This change will make two arrangements of laws applicable with respect to salaries being paid in the state Information Commissioners, one made by the state governments for staff members of State Information Commissioners under Section 27(2) of the Information Act and the other which the Centre would like or prefers to make for the State Information Commissioners.

In the states, the information commissioners' salaries are paid out of the Consolidated Fund of the concerned state over which the Centre has no control. The RTI Bill of 2019 consequently attempts to deal with state monetary and official (executive) powers by looking for intemperate delegation of power and authority by the Central government.

By subjecting the salaries and tenure of Information Commissioners to the impulses of the administration, the amendment adequately transforms them into a bird in a gilded cage, similar to the term 'caged parrots' that was broadly utilized by the Supreme Court for the Central Bureau of

Investigation (CBI). Regardless of whether the Supreme Court or other Constitutional Courts take care of this business is another issue. Given their ongoing record, one doesn't hold much expectation.

This right to information is a major fundamental right for the citizens of India. It is a part of Article 19(1)(a) of the Constitution which provides the fundamental right to free speech and expression. Information can be easily expressed in terms of 'expression' and consequently, it ought to be invaded free into society. The privilege to get information, in this manner, is – by important ramifications – involved within the scope of a substantive record of the right to freedom of speech and expression, without which the last would be illusory, much similar to the right to privacy that underlies various other civil rights or liberties –, for example, speech, association and so forth – and is important to make them successful. On the off chance that the widespread of information and data is throttled, at that point, it is in all respects liable to cause the demise of the freedom of a free and reasonable society.

The new change empowers the Centre to downsize the status of the information commissioners, which will be chosen by method of an executive order. The change enables the legislature to practically disturb the independent working of the RTI functionaries. With the possibilities of the Prime Minister's Office (PMO) engaging in the determination of these authorities, it is an easy decision that the PMO will enjoy overwhelming clout with the information commissioners, who won't have to either get up and go or have the tendency to ask for information from these authorities.

The administration's 'hold' on data isn't exactly at the central level, however, it stretches out to the states too. While the government framework conceives that the states will select their very own officials, the Centre has held authority over them as well, by giving that their tenure, pay and different conditions would be chosen by the central government. On the off chance that this can be extended, which looks especially inside the domain of plausibility, the Centre may even have the option to set up a differential framework by which it can have favoured officials doing its bidding.

VIEWS REGARDING THE AMENDMENT TO RTI ACT, 2005

Censuring the move, a couple of previous Information Commissioners of the Central Information Commission has released a statement, naming the alterations an immediate assault on the independence of information commissions and individuals' right to know. They have likewise asked the legislature to pull back the "regressive amendments".

Shailesh Gandhi, former IC, said that the legislature has given no conceivable purpose behind making amendments to the RTI Act. The RTI Act before being passed in 2005 alluded to a Standing Committee which inspected every one of the arrangements in detail and prescribed that so as to guarantee self-governance of information commissions, the chiefs ought to be given a status proportional to the election commissioners, which thus are proportionate to Supreme Court judges. He called attention to that few MPs of the BJP who had been an individual from the standing advisory group and in the present President of India – Ram Nath Kovind was likewise a part. He dismissed the other defence set forth by the legislature that since decisions of information commissions are challenged in high courts, therefore, their status being proportionate to Supreme Court judges was causing legitimate hindrances. He said that decisions made by all experts including those of the President and Prime Minister are tested under the high courts and that their status does not avert or suspend such difficulties.

Deepak Sandhu said that the RTI Act emerged through social development and it is incredible to see that the development is as yet alive to ensure the Act. She underlined the disappointment of the administration to hold any pre-authoritative consultation on the RTI Amendment Bill. She said that the bill ought to be alluded to a Select Committee to empower the public consultation.

Yashovardhan Azad, former IC, said that the RTI Act has been working throughout the last 14 years with no issue in regards to the tenure and status of commissioners. In the event that the amendments pass and the administration obtains the authority to fix the compensation and tenure of commissioners through guidelines, a situation could emerge where various commissioners will have different tenure and pay rates. In most cases decided by the commission, the respondent is the administration and hence, so as to guarantee that commissions can work autonomously, their independence must be secured. He said that as opposed to fortifying the RTI Act by legitimate usage of proactive exposure, more transparency in the arrangement of commissioners, the administration was amending the law. He asked that like the Prime Minister was welcoming recommendations for his show, he ought to request proposals of individuals on the RTI Amendment Bill.

MM Ansari, another former IC, observed that the beginning of the RTI originates from Supreme Court decisions on how the right to information is a pre-condition for educated voting and along these lines, equality between election and information commissioners isn't an abnormality. Addressing cases of the government's duty to the RTI Act and transparency, he underlined that an appraisal was

embraced in compliance with arrangements of proactive revelations by public authorities. The inability to select information commissioners in a proper timely way was prompting pendency expansion. He said that if there is a decrease in pay and tenure of commissioners, prominent individuals may not even apply for empty posts.

Annapurna Dixit, former IC, referred that there are different bodies like the CVC (Central Vigilance Commission) which are likewise statutory yet whose pay rates and status are at par with Constitutional bodies (for this situation the UPSC individuals) despite the fact that CVC isn't the final appellate body for the major fundamental rights and just has recommendatory powers, not at all like the information commissions.

Prof. Sridhar Acharyulu, former IC, terming the reasons given by the administration for the amendment bill as "illogical logic", said commissions could endure simply because their salaries and tenure were ensured by law. He further underlined that in the alterations the administration was not determining what status the commissioners would be given. He further called attention to the changes that will enable the union government to fix pay rates of even state information commissioners. There were serious questions and doubts on federalism as pay rates of state information commissioners originate from the assets of the state and whether states would enable the union to decide the assignment.

Wajahat Habibullah, former CEC, said that there was no purpose behind this alteration. Tenure and salary have never been a point of issue or conflict. He said that since the leading program of the government was on 'safai' (cleanliness), the RTI Act was the best device to guarantee swachhta in administration and in this manner, ought not to be debilitated.

Legal specialists state the revision, indeed, opens up the window for other statutory bodies to be undermined. "The government's argument is indefensible," said legal counsellor Prasanna S. "This does not justify the amendment. The information commission is a statutory body that is performing a Constitutional function. That is the reason it was at par with the election commission." Prasanna said that this part of the revision could be questioned in the court of law.

RIGHT TO INFORMATION AND THE INDIAN CONSTITUTION

Because of the Indian national movement against the imperialist colonial rule of the Britishers, the liberal democratic political framework in the form of a written Constitution incorporates rule of law, social equity, advancement, adult franchise, periodic elections, and a multiparty framework has appeared. For the straightforward working of the vote based political framework, the founding fathers of the Constitution incorporated the arrangements with respect to the right to freedom of expression to part three of the Constitution in the basic fundamental rights. While there is no expressly mentioned right to information or even right to freedom of press in the Constitution of India, the right to information and data has been perused into the Constitutional safeguards which are a significant piece of the Chapter on Fundamental Rights.

The Constitution of India does not explicitly make reference to right to information as a fundamental right. Yet, it is viewed as postulation of numerous experts that in various articles there are clear clues in support of this right. For instance, Art. 19(1)(a) of the Indian Constitution says that all citizens reserve the option to the right to have a free speech and expression. Yet, this privilege guaranteed by the constitution is not absolute.

This Right to Information (RTI) is fundamentally a subordinate of Article 19 of the Constitution of India which manages insurance or safeguards of specific rights with respect to the right to have a free speech and expression and so forth it says, "All the citizens shall have the right to freedom of speech and expression"[5]. Subsequently, if the privilege to the right to speak freely is a crucial right, the right to information is likewise a key right. Presently, if the rights given by Art. 19(1)(a) is ensured by summoning Article 32 of our Constitution, the right to information is additionally ensured by Art. 32. Article 32 of the Indian Constitution says that the citizens reserve the option to move the Supreme Court for the enforcement of this right. Henceforth, this right to information is likewise ensured by the highest court of the country. The thought is that on the off chance that we don't have information on how our Government and public offices work, no educated conclusion can be drawn. Since the legislature is kept running for the benefit of the individuals, they are the proprietors who reserve a privilege to be educated directly about its procedures. In this manner, the Right to Information turns into a sacred constitutional right, being a part of the privilege to free speech and expression which incorporates the right to obtain and gather data and information. This will likewise enable the citizens to play out their fundamental obligations set out as Fundamental Duties in Part IV-A, Article 51A of

[5] Article 19, Constitution of India.

the Constitution of India. A fairly educated citizen will surely be better prepared for the presentation of these obligations. In this manner, access to data would help citizens in satisfying these commitments towards their country. Our Constitution accommodates a parliamentary type of government. Individuals from the parliament and state assemblies are directly and legitimately elected by individuals. Now, the Election Commission has made it compulsory for each individual contesting elections to distribute certain essential information about him.

The Preamble to the Constitution of India additionally contains certain statements or in a way, certain guarantees some of which indicate the right to information. For instance, our Constitution guarantees to provide for Indians the freedom of thought, expression, belief, faith and worship. This guarantee given by our Constitution likewise in an indirect way bolsters the right to information and data.

Without data, belief and thought can never grow and have an effect on the brain of individuals. The Preamble further says that the individuals will have the purview to think anything. However, every conviction or belief will have a strong establishment which will be possible with the help of information. Thus, it is clearly evident that many parts of the Preamble are firmly associated with the right to information.

The lawful position as to right to information has been created through a number of Supreme Court decisions given with regards to every single fundamental right, yet more explicitly with regards to the Right to Freedom of Speech and Expression, which has been said to be the unfavourable side of Right to Know, one can't be practiced without the other.

The direction towards the acknowledgment of RTI within the constitutional ambit arose from the decision in Hamdard Dawakhana v. Association of Indian[6]. The Apex Court for the very first time proclaimed RTI to be an essential element of Article 19(1)(a) of the Indian Constitution. In the case of Bennett Coleman v. Union of India[7], where it held Newsprint Control Order of 1972-1973 issued under the Essential Commodities Act, 1955 to be ultra vires Article 19(1)(a) of the constitution. Ray, CJ in the majority judgment opined that "It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of press embodies the right of the people to read."

[6] AIR (1960) SC 554.
[7] AIR (1973) SC 106.

The major breakthrough was attained in S. P. Gupta v. Union of India[8] when the apex court imparted constitutional status to RTI. The point of contention in this case was again with regards to the claim for privilege laid by the government of India in respect to disclosure of certain documents including correspondence between Chief justice of India and the Chief Justice of Delhi High Court in connection with the confirmation of Justice Kumar who was an Additional Judge of the Delhi High Court. Justice Bhagwati, in this case, opined the concept of open government stating it to be the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a) of the Constitution. It was held by the learned Judge that, RTI or access to information is essential for an ideally successful democratic way of life. Hence, it is imperative that disclosure of information regarding the functioning of Government must be the rule and secrecy is justified only where the strictest requirement of public interest demands.[9]

The right to freedom of speech and expression, emerging out of Article 19 of the constitution of India, and its connection with RTI has been strikingly portrayed by the Apex Court in the case of Secretary, Ministry of I and B, Government of India v. Cricket Association of Bengal[10] in the accompanying words: " The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self - fulfilment. It enables people to contribute to debates on moral and social issues. It is the best way to find a truest model of anything since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy." In this case, the Supreme Court clarified that the right to procure data and to spread it, is incorporated into Article 19 (1) (a) of the Constitution of India. “Right to information is a vehicle of political discourse also essential to democracy.” This privilege has different shades with regards to the democratic system. Voters right to know predecessors of contesting individuals is additionally a feature of Article 19(1)(a) of the Constitution. For this situation, the right to give and get information from electronic media was incorporated into the right to free speech and expression. Therefore, the Judiciary has by interpretative craftsmanship advanced the right to information as an essential fundamental right.

[8] AIR (1975) SC 885.
[9] Rajeev Kumar Singh, “Right to Information: The Basic Need of Democracy”, Volume 1 Issue 2, JESP Page No. 93, 2014
[10] (1995) 2 SCC 161.

RIGHT TO INFORMATION AND DEMOCRACY

Numerous individuals state that the establishment of democracy is to be well-familiar with all the significant parts of the working of a democratic government in light of the fact that each such citizen has been provided with this right. The privilege to know about what's going on in the public arena is as important as oxygen for a democratic country. In the city of ancient Greek, individuals used to collect together and examine the significant parts of state. Individuals gathered together in an open assembly at a fixed date and time and gave their participation in the organization, including the law-making functions and duties. In this procedure there lies, the right to information, in a concealed structure. The participation by individuals was practical as well as helpful in light of the fact that there was a simple flow of data. Individuals requested to know the state and working of the administrations.

In contemporary times, the right to information has a unique significance in the modern system of democracy. We realize that the government is responsible to the individuals which implies that, the electorate can guarantee information/data about the workings of the legislature. To claim information or to require a clarification for the arrangement received by the legislature or work done by it, is additionally and necessarily a part of the right to information.

In light of changes in different fields, maintaining the system of democracy is basically a difficulty, especially in a country like India having incredible diversity. Be that as it may, individuals reserve the right to know the real and major part of society and this is their right to know. We can say, a citizen has every reason to know on what grounds and in what ways his cash gathered as tax is being spent.

The idea of right to information might be seen again from another point of view. Democratic system is the consequence of aggregate endeavours and these aggregate endeavours will never be conceivable without the right to information and data. Individuals will carry out their responsibility based on data they get from society. Behind each act there must be relevant and irrelevant data. The acts are just conceivable and would result into a success only with providing an opportunity of obtaining information to the individuals of a democratic country.

Now, it is broadly perceived that the receptiveness and availability of individuals to information about the administration's working is a crucial and vital element of democracy. When the residents are denied of the privilege to know about the working of their governments that can plainly be expressed as the refusal and an insult to the idea of democracy.

In a report of Administrative Reforms Commission it was said that the right to information is the bedrock of a democracy. It is based on the grounds that the significant parts of a democratic government are openness, transparency, availability of each citizen of such democracy, and the details of working of government. Also, with reference to the same, responsibility of the ruler towards the ruled. Presently, the ruled will have no scope to call for clarification in the event that they have no data about the working of the administration.

RIGHT TO INFORMATION AND TRANSPARENCY

In a wide sense, transparency is about how much access to internally-held data the citizens are qualified to receive, the scope, precision and practicality of this data; and what citizens, as "outsiders" can do if "insiders" are not adequately inevitable in giving such access.

With respect to the RTI Amendment Bill, the transparency activists state that this undermines the freedom of the information commissioners, which is basic for the effective working of the law. Only an autonomous magistrate will be capable to make rulings against the legislature in the public interest.

At the point when citizens can access key realities and information from governments, it is increasingly hard to shroud maltreatment of powers and other criminal operations, governments can be considered responsible.

Unnecessary and excessive secrecy can undermine the nature of public decision making and keep citizens from checking the maltreatment of public power. This can corrosively affect basically all parts of society and government. Transparency, both as data divulgence and dispersal and access to basic decision making, is significant as it better empowers common society to:

• hold government and additionally key leaders to account;

• advance good governance;

• improve public approach, policy and effectiveness;

• fight corruption.

Information in itself isn't control, yet it is a fundamental initial phase in the exercise of political and monetary powers. The people are, in a true sense, only capable to genuinely take an interest in the democratic procedure when they have information about the exercises and strategies of government,

and when individuals can perceive what advantages and services they are qualified for and whether they are accepting what is expected. Learning about what the state and different organizations do is major to the power of individuals to consider them responsible and improve the manner by which they work. Nonattendance or unavailability of data, regularly makes a feeling of debilitation, doubt and disappointment. Then again, access to important, updated information can make a reason for natural exchange, enabling both authority and people in general to have more access to decisions taken and arrangements executed. Only those individuals who need to stow away and keep reality shrouded will have any grouse with such a tool.

As noted in Transparency International's Global Corruption Report 2003, "information to promote transparency, is perhaps the most important weapon against corruption."

Studies have demonstrated that in nations where information streams openly in both ways:

•The information that procedures and decisions are available to public examination can make government bodies work better, by forcing on them a consistent order;

•Government adequacy is improved: even the most skilful and decision making bodies need criticism on how strategies are functioning by and by;

•Efficiency in the allotment of assets can likewise be improved: By guaranteeing that the advantages of development are redistributed and not caught by the elite class, transparency can bring about generous net savers of open assets and improved financial and human advancement pointers.

The right to information is quite essential for preventing corrupt practices as well. Having clear access to information assumes a key job and endeavours to check corruption and control its effect, since:

•Free and ensured access to data empowers citizens, the media and organizations oflaw enforcement to utilize official records as a way to reveal instances of corruption and maladministration;

•Increasing transparency expands the danger of location of degenerate or corrupt practices and this can go about as an obstacle to future corruption.

In this way the individuals of India reserve the option to think about state undertakings. Freedom of information acquires receptiveness in the organization which advances transparency in state issues, keep government progressively responsible and eventually diminish corruption. The free progression of data is must for a democratic society as it causes the general public to develop and to hold a

consistent discussion and talk among the individuals. However, the access to have data held by a public authority was not conceivable until 2005. Before that, the average citizens did not have any legitimate right to know about the expenditures and policies of the authorities.

FOUL CRITICISM

Criticism quits being reasonable when it depends on half-cooked or incomplete information. While it might be reasonable to contend that we ought to present constitutional status to the experts comprised under the Right to Information Act, 2005, given that genuine contentions can be sent by those for the contention and those against, it is horribly unjustifiable to state that the bill crushes the federal government structure because of the Centre's control over state level authorities, or pulverizes the essential structure of the RTI instrument, and gives unbridled powers to the Centre to 'hire and fire' specialists set up under the Act, or enables the Centre to control the experts set up under the Act, as the equivalent is without any legitimacy at all. But, this does not imply that all criticisms are valid.

The said amendment in the RTI Act is, as far as anyone knows, an empowering enactment which intends to organize and streamline the Act by neutralising the oddity with regards to the Act proposing comparability among the Chief Information Commissioner, Information Commissioner and State Chief Information Commissioner, with the judges of the Supreme Court.

Yes, the executive will have a lot more prominent say in the terms and states of administration ofthe ICs, yet that can't on its own, present a conclusion that there will be no autonomy of the ICs. For one, the legislature can't punish a broad and independent minded IC by expelling them. The arrangement of the RTI Act dealing with the removal of ICs isn't influenced by this alteration and the rules can't be changed to stop the tenure of any IC without falling afoul of the principle of RTI Act as likewise under Article 14 of the Indian Constitution.

Eminently, all arrangements that would be made preceding the notice of amended Act would be prohibited from the scope of the change, and the terms and conditions of the services as made before the amendment would keep on working in the same manner. It is not an ex-post facto revision.

Obviously, it is conceivable that the guidelines surrounded for the reasons for the RTI Bill here and there mess with the autonomy of the ICs but given that no draft standards have been circled or proposed, this is still in the domain of theory.

While the implied defence given by the union government for the RTI Bill has neither rhyme nor reason, some of the feelings of dread about the bill's effect may likewise be misrepresented. Example, the rules have not yet been structured, so it isn't clear how this may really influence the working of the Central and State Information Commissions, since the present arrangements have been exempted from changes under the proposed amendments. Also, the provisos identifying with expulsion have not been amended and the revision still commands that the salaries, remittances, and different terms and conditions of service can't be shifted to the ICs' disadvantage. This likewise implies that the dread that, some way or another this correction will enable the central government to punish a free-minded IC by cutting pay or expelling them are to some degree, unwarranted.

Given that a decision taken by experts comprised under the Act can be questioned in a high court, it is evidently clear that as far as the hierarchy is concerned, the authorities are set two rung underneath what was proposed in the Act. Subsequently, by expelling the similarity to equality by merely a technical change without tinkering with the substantive arrangements of the Act, the Parliament has had the option to streamline the Act in addition to other things.

CONCLUSION

Most often it is said that the poor don't need dark, inexpressible things, for example, freedom and transparency, they need food. He knows this better than any other person. They additionally realize that they have been denied their fundamental rights through a trap of untruths, lies dependent on archives that are cited, yet never uncovered. These reports were what the individuals of Beawar requested to see. These records are what RTI provided to them, and to us. What's more, these reports are definitely why we all must contradict any law which makes the Right to Information fanciful. These rights are for the common man on the street. Throughout the years, individuals have utilized the Act to enquire regarding why their benefits are trapped, why their endowments have been denied and why no cognizance has been taken on their protests or complaints. The RTI Act has been praised by advocates of democracy everywhere throughout the world, since it is at par, or even better than comparative laws sanctioned in nations in the West. For example, in the US and UK, the information disclosure acts require the candidate to uncover his own details, while in India, no such personal details are required. The RTI Act is one of the enactments that is to be sure the pride of Indian democracy. The RTI Act, as it stands today, is a solid device to maintain the soul of democracy. The need of the hour is that the RTI Act ought to be executed in the manner to guarantee that the objects and goals

of the Act are satisfied. Any endeavour to weaken the arrangements of the RTI Act will just suppress its prosperity. Since the initial phase in cleansing any framework is to uncover its disquietude, a similar strategy should be followed in RTI too.

RIGHT TO MAINTENANCE OF SECOND WIFE IN HINDU MARRIAGE: AN ANALYSIS

Srishti Sneha

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INTRODUCTION

In India, matters related to family are governed by the personal laws. In all personal laws except for the Sharia law bigamous and polygamous marriages are prohibited. In ancient India monogamy was the rule, except in cases where the former wife is diseased, barren or vicious. In the above mentioned cases having a second wife was permitted, however, the consent of the first wife was necessary before the solemnization of the second marriage. As the time passed, Hindu men married again without the consent of the first wife or even when the second marriage did not fall within the aforementioned exceptional cases.

The passing of Hindu Marriage Act 1955 (herein referred to as HMA) brought in several changes in the existing personal laws and laid down the following essentials for a valid marriage,

Section 5 (1) makes monogamy an important essential for a valid marriage. Moreover bigamy is now punishable under section 494 and 495 of the Indian Penal Code.

Maintenance by a Hindu wife can be asked for under two statutes, namely, Hindu Maintenance Act (HAMA) and Criminal Procedure Code (Cr.P.C)

Section 18 provides for maintenance of a Hindu wife. Section 18 (2) provides the grounds on which a Hindu wife is entitled to maintenance;

"*A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance— (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindu by conversion to another religion; (g) if there is any other cause justifying living separately*."

Section 125 of Criminal Procedure states that if any person who neglects or refuses to look after his wife or minor child, legitimate or illegitimate, the court, after examination of evidences, may direct the wrong doer to pay such maintenance. The section defines wife as woman who has either divorced her husband or has been divorced by her husband and had not married again

RESEARCH OBJECTIVES

1. To analyse various judicial decisions related to maintenance of the second wife.
2. To analyse the 178th Law Commission Report in light of maintenance to the second wife.

RESEARCH QUESTIONS

1. Is it necessary to incorporate the recommendations of the 178th Law Commission Report, if yes to what extent?
2. Should the second wife be given maintenance despite her knowledge of the subsistent marriage of the husband before marrying him?

RESEARCH METHODOLOGY

Qualitative method is employed for the purpose of this research. Primary sources of law such as legislations and case laws are used and secondary sources of law such as law reviews, law commission reports and academic books have been referred to while drafting this paper.

LITERATURE REVIEW

"*Men always try to restrict and deny the genuine case of the maintenance which may be awarded to the female*"[1]

According to the author of this paper, this situation gets worse in case where the marriage is void or voidable. They claim that by the virtue of the marriage being void (in case of bigamy) they are not liable to pay maintenance to their second wives.

"*In the conditions prevailing today in Indian society, it would not be just to deprive such second wife of maintenance even where she has been deserted or driven out by the husband.*"

[1] Kapoor Raina, Women rights of maintenance in India an Analytical Study, pp 416-451

According to the 178th Law Commission report provisions for maintenance of second wives should incorporated in the Hindu Adoptions and Maintenance Act. This will deter the husbands from taking another wife during his marriage with his first wife.

"*When social pressures compel a helpless woman to contract a second marriage knowingly, should she be denied the benefit of maintenance?*"[2]

According to the author of this paper, even when the second wife knowingly contracts to her second marriage, the circumstances in which she has contracted to such marriage should also be taken into account and it's not just to deny her maintenance only on the ground that she may have known about the first marriage.

JUDICIAL INTERPRETATION

After the prohibition of bigamy and polygamy under the Hindu Marriage Act there have been various judicial conflicts as to maintenance to be given to the second wife. Men took in second wives by representing themselves as unmarried men. When abandoned, they couldn't avail any legal remedies against their husband as bigamous marriages are void marriages. Initially courts refused to grant maintenance to second wives, but in a 2013 judgement, Badshah v. Urmila Badshah Godse[3] the Supreme Court upheld the judgement of Bombay High Court and held that in cases where the first woman is misrepresented by the husband and is kept in the dark regarding the first marriage she shall be entitled to maintenance. However it does not grant relief to those women who due some economic or social reason are compelled to be the second wives of these men.

In **Yamunabai Anantrao Adhav vs Ranantrao Shivram Adhav**[4] the appellant (wife) was married to the respondent according to Hindu rites. However the fact that he was previously married and his first marriage was still valid was not disclosed to her. After one week of her marriage the respondent started ill-treating her. She left him and filed an application for maintenance. Lower court rejected this application as her marriage was void under Section 5(1) of HMA. The Bombay High Court ruled against the appellant, after which an appeal was made to the Supreme Court. It was contended on behalf of the appellant that such marriage shall not be considered a void marriage as it was a custom under Hindu law. The court rejected this contention citing the overriding effect of section 4 of HMA. Here the issue was whether the

[2] 31, Jaya Sagade, Journal of the Indian Law Institute, pp. 336-345, (July-September 1989)
[3] AIR 2014 SC 869
[4] 1988 SCR (2) 809

term "*wife*" used under section 125 of Cr.P.C means "*legally wedded wife*". It was contended by the appellant that the aforementioned term must be given wider interpretation and must not be confined to "*legally wedded wife*". But the court rejected this claim that since there was a specific provision for illegitimate children, i.e. Section 16 of Hindu Marriage Act and if it was the intention of legislature for the statute to include second wives it would have specifically stated so. Here the court held that irrespective of the fact that the second wife was not aware of the subsisting marriage she will not be granted maintenance.

However it is pertinent to note that, if the intention of the legislation makers, was for it to be read as "legally wedded wife" it would have clearly stated so. Hence it must be read as a woman who has, undergone all the ceremonies necessary for such marriage.

In **Laxmibai v. Ayodhya Prasad @ Ramadhar**[5] the court held that the words "husband" and "wife" under Section 25 of the HMA refers to a Hindu man and Hindu Wife, who have undergone ceremony of marriage in accordance with the law and would have been granted the status of husband and wife if not for the provisions under Section 11 read with section 5 of HMA. In this case the Madhya Pradesh High Court granted interim maintenance along with litigation expenses to the second wife.

In the case of **Smt. Narinder Pal Kaur Chawla vs Shri Manjeet Singh Chawla**[6], the respondent married the petitioner without disclosing, that he was already married. After 14 years of maintaining the relationship of husband and wife this information was disclosed to her. The petitioner filed a case under Indian Penal Code for bigamy as well as HAMA for maintenance. In this case, the court pointed out that section 18 (2)(d) states that a Hindu wife can claim maintenance when her husband has another wife living at that time. The court used the maxim "*ut res magis valeat quam pereat*" according to which if there are two interpretations possible for a legislation the court must use the one which helps in smooth functioning of purpose for which such legislation was made. The court must use the wider interpretation as "*Parliament would legislate only for purpose of bringing an effective result*." Using this principle the Delhi High Court granted maintenance to the petitioner.

In the case, **Chanmuniya vs Virendra Kumar Singh Kushwaha**[7], the marriage between appellant and respondent was not done in accordance with section 7 of the HMA. Hence the

[5] AIR 1991 MP 47
[6] AIR 2008 Delhi 7
[7] (2011) 1 SCC 141

question here was whether the appellant can be considered wife under Section 125 of Cr.P.C? Here the court was of the opinion that the term "wife" must be given a broader interpretation. It must also include those cases in which a man and a woman have lived together for a long period and a strict proof of marriage is not required under section 125 of Cr.P.C.

Badshah v. Urmila Badshah Godse[8] is a landmark judgement in this regard. The facts of this case are similar to that of Yamunabai case. The court cited Chanmuniya case and stated that in the instant case the respondent (woman) would be considered as wife of the appellant. The court claimed that purposive interpretation must be used for section 125 of Cr.P.C. Here the purpose is to obtain "social justice" which is enshrined in the Preamble of the Constitution. The court further stated that while interpreting the legislation, not just its purpose but also "mischief" it seeks to supress must be taken into consideration. The maxim of "*ut res magis valeat quam pereat*" was used here as well. Hence, for the purpose of maintenance, a woman must be considered a "legally wedded wife" under section 125 of Cr.P.C.

However the court also stated that in cases where the second has the knowledge of the subsisting marriage the Yamunabai case will apply.

178TH LAW COMMISSION REPORT

Section 125 Cr.P.C

This report argued that, if illegitimate children are entitled to be maintenance, their mother who is not a "legally wedded wife" but a de facto wife must also be entitled to maintenance. The purpose of such provision is to protect the wife from false representations and also deter the man from making such representations. Thus the commission recommended the following amendment in section 125 Explanation b(i),

"*or whose marriage is void under section 11 read with sub-section(1) of section 5 of the Hindu Marriage Act, 1955 or under clause (a) of section 4 read with section 24 of the Special Marriage Act, 1954 or under section 4 of the Parsi Marriage Act, 1936, or under any other provision contained in any enactment corresponding to the aforesaid provisions as may be notified by the Central Government in this behalf, and has not remarried*"

Section 18 Hindu Adoptions and Maintenance Act

[8] Supra 3

While discussing section 18, one of the issued that arose was whether a second wife, when the first wife is alive, is entitled to maintenance under section 18 of the aforementioned act?

The commission opined that when the wife in the second marriage did not know about the subsisting marriage she must be entitled to maintenance. This change will help in achieving gender justice and in accordance with the principles of equity and fair play.

Further the commission also discussed the case where the woman contracts a marriage with the knowledge of subsisting marriage. The commission considered two opinions; one, as she was aware of the subsisting marriage she cannot claim for maintenance and second, taking into the account the conditions in Indian society it would not be fair to deprive the second wife to claim maintenance. The commission sided with the second opinion stating that she cannot claim for maintenance Section under 18(2)(d) since she is not a wife under HMA, however, she can claim maintenance under rest of the sub clause of section 18(2). This will deter the husbands from deserting or ill-treating their wives, under the belief that since their marriage is void they can treat their wives however they want to.

The law commission recommended the following changes in section 18,

First explanation of the aforementioned should state that, a woman who marries a man without the knowledge of his subsisting marriage should be entitled to live separately without forfeiting her claim under maintenance under section18(2) including 18(2)(d).

Second explanation should be added according to which, even if a woman marries a man with the knowledge of his previous marriage which is valid in the eyes of law, she should be entitled to live separately without forfeiting her right to maintenance under section 18(2), sub-clauses, (a), (b), (c), (e), (f), (g).

Incorporating these amendments is necessary as it would act as a deterrent to those men who marry, the second time and mistreat their second wives without the fear of the consequences as their second marriage is void.

SECOND WIFE ENTITLED TO MAINTENANCE DESPITE KNOWLEDGE OF SUBSISTING MARRIAGE

In India there is stigma attached to an unmarried woman. Sometimes they are even ostracized from the society for the same reason. Even economic conditions lead a woman to contract to the second marriage despite her knowledge of the first marriage. In these conditions would it

be just to shun them out when they seek justice? In Badshah v. Urmila Badshah the court held that in cases where the second wife knows about the subsisting first marriage she will not be entitled to maintenance under any circumstance. This will lead to men, living with women in domestic household, and they can, at any time, ill-treat them and throw them out without any consequences as their marriage is void and wife knew about the subsisting marriage. Section 2(f)[9] of Protection of Women from Domestic Violence Act (herein referred to as PWDVA) defines a domestic relationship.

Hence it can be said that the man and the woman in the present circumstance live in a domestic relationship and while seeking relief from the instant act, they are entitled to maintenance under section 20(d) aforementioned act the woman must be entitled to maintenance, if not under Section 125 of Cr.P.C or Section 18 of H.A.M.A. While dealing with such cases court must not reject the case for maintenance just because the wife knew about the subsisting marriage, it must take into account the circumstances of the woman as well and then come to a conclusion.

[9] ""*domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family*".

CONCLUSION AND SUGGESTIONS

Even though the Judiciary makes good attempts to remove the ambiguity and provide for the principals that suit need of the hour, however due to unavailability of laws, the same cannot not be implemented uniformly due to lack of legislations. In Badshah v. Urmila Badshah Godse[10] the Supreme Court held that in cases where the first woman is misrepresented by the husband and is kept in the dark regarding the first marriage she shall be entitled to maintenance. However it does not grant relief to those women who due some economic or social reason are compelled to be the second wives of these men. 178th Law commission report stresses on the need to incorporate such legislations, however the same has not been complied with by the legislature yet.

It is pertinent to note that under PWDVA act, the current scenario comes under a "domestic relationship defined under section 2(f) of the Act, and in cases of abuse specified in the aforementioned act, the second wife will be entitled to maintenance, hence it can be said that it is not the intention of the legislation makers to deprive women of their right to maintenance. Moreover taking into consideration the "mischief" principle, the second wife should be awarded maintenance as this would act as a deterrent to those men who marry the second time and mistreat their second wives without the fear of the consequences as their second marriage is void and she knew about the subsisting marriage.

[10] Supra 3

REFERENCES

CRIMINAL PROCEDURE CODE

HINDU MARRIAGE ACT

HINDU ADOPTION AND MAINTENANCE ACT

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT

SCC ONLINE

MANUPATRA

JSTOR

RIGHTS OF SEX WORKERS IN THE CONTEMPORARY WORLD

Ram Sharma

INTRODUCTION

The term human rights cover within its ambit the rights which are available to all the humans. They are also available to the sex workers in the same was as for the ordinary citizens. The term 'sex worker' was coined by the renowned sex worker activist Carol Leigh in 1970s, at the conference of Women Against Violence in Pornography and Media, held in San Francisco.[1] It refers to any person who may be involved in the sex industry, which involves both direct physical sexual contact between the worker and the client, and all indirect activities which are sexually simulated, which are often done in exchange for some materialistic consideration. Thus, their major work is to provide their clients with sexual experiences in exchange for money.

The business of sex workers is regarded as one of the oldest professions of the world which also existed in the ancient times. The biggest proof of the existence of such a sex-workers can be seen in the references found in Hebrew Bible in the story of Judah and Tamar[2]. The story is set in the ancient period, where a prostitute used to wait for travelers at the side of a road. The lady would have her face covered with a cloth as it signified that they were prostitutes/sex workers. If the lady was able to find a customer for herself, she would ask for a baby goat in return of her services. If the customer was not able to provide the goat, then the person was required to leave some of his valuables with her, till the time he gave her the baby goat.

There are various actors who are engaged in this business:

i. The first is the sex workers, who provide sexual experiences to their clients, in return of some consideration.
ii. The next actor is the client who approaches the sex worker for such experiences.

[1] Global Network of Sex Work Projects, *Carol Leigh coins the term "sex work",* 1 Jan (https://www.nswp.org/timeline/event/carol-leigh-coins-the-term-sex-work)
[2] Biblical Archaeology Society Staff, *Sacred Prostitution in the Story of Judah and Tama? ,* August 07, 2018, Biblical Archaeology Society (https://www.biblicalarchaeology.org/daily/ancient-cultures/ancient-israel/sacred-prostitution-in-the-story-of-judah-and-tamar/)

iii. The next actor is the person supplying such workers, who are also known as pimps. It is not necessary for all the sex workers to be involved with such people. But their involvement is always in contention as their involvement is often a result of a human trafficking or done without the consent of the worker.

iv. The next actor is the government of the state where the activity takes place. The government may regard the activity as illegal. If the same is declared to be illegal the business is often run in an illegal manner resulting in more problems for the sex workers and the people procuring services from them.

RIGHTS AND THE PROBLEMS FACED BY THE SEX WORKERS

The sex workers engaged in this profession also have rights available with them in the same way as any other regular citizen of the society. But the workers are denied these rights on regular basis and are at a risk of constant abuse. They often face discrimination, beatings, harassment and even rape attempts. Furthermore, the workers are often denied basic housing services and healthcare facilities.[3] The major problems which are faced by the sex workers are-

i. The problem of human trafficking which often takes place against some sex workers. In the context of the sex workers, trafficking occurs when a person may buy/sell the sex workers and make them do the work for which they may not give their free consent. This may be done with the use of some type of force or undue influence, with the person being in a position to dominate the worker. It may also be done by deceiving the worker into such type of business, for which they may not give their consent under normal circumstances. There have been reports which show that most of the women who are the victims of human trafficking fall into the clutches of forced prostitution.[4] Millions of women and girls are often claimed by this huge sex

[3] Catherine Murphy, *Sex Workers' Rights are Human Rights,* 14 August 2015, 09:00 UTC, Amnesty International (https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/)
[4] Nita Bhalla, *India's human trafficking data masks reality of the crime – campaigners,* December 4, 2017 2:10 PM, Reuters (https://in.reuters.com/article/india-trafficking/indias-human-trafficking-data-masks-reality-of-the-crime-campaigners-idINKBN1DY1PB)

trade in India as well.[5] This implies that there is the absence of free consent and will in case of these women.

This practice is completely against the dignity and worth of human beings and poses to be one of the biggest problems for many sex workers.

ii. The next major problem is of legalization of the business. This problem arises due to the policy of the government of making the business of sex workers as an illicit/illegal practice. Once the same is made illegal in nature, it is attached with penalties and sanctions against anyone who may be involved in such a business. This goes on to become another major problem for the sex workers.

Firstly, when the business is made illegal, the same is run in a discreet and illegal manner. This implies that all the sex workers who get engaged in the same, have no type of legal remedy, if they are being exploited by the people running the business or their clients, or if they face any type of other problems. It also gives a rise to illegal trafficking of such sex workers who also don't have any remedy under the law of the nation. The reason for the same is that the sex workers are themselves involved in an illegal business. Also, as such a business is illegal, no type of labor laws will apply on these workers which again goes on to infringe their rights and gives them no type of remedy for the same. Furthermore, this infringes their right of seeking legal remedy in case of infringement of their rights, which is a violation of a basic human right available to the workers on both the international and Indian level[6].

Secondly, the next problem faced by the workers is of the bad state of health. Most of the sexual activities which occur under such illegal business by the sex workers are all done after rushing through the whole process rather than discussing the intricacies of protected sexual contact against the sexually transmitted diseases (STDs),due to the fear of the law enforcement agencies.[7] This makes the sex workers prone to STDs due to their engagement with numerous clients. Additionally, they are often denied basic health care by the medical authorities. The same is not only for such diseases, but also other health care services such as birth care assistance

[5] Manan Vatsyayana, The Worst Place To Be A Woman In The G20, Amnesty International (https://www.amnestyusa.org/the-worst-place-to-be-a-woman-in-the-g20/)

[6] *Anita Kushwaha* v. *Pushap Sudan* (2016) 8 SCC 509

[7] Eleanor Goldberg, *Legalizing Prostitution Could Reduce HIV Infections Nearly In Half,* 25/07/2014 9:56 PM IST | Updated 07/12/2017 3:48 AM IST ,The Huffington Post (https://www.huffingtonpost.in/2014/07/25/legalizing-prostitution-hiv_n_5618887.html)

which has to be provided to pregnant women.[8] This shows that even in such cases, there is no remedy which can be provided to such sex workers due to their engagement in the business.

iii. The third major problem faced by them is of dejection or discrimination which takes place against them by the people of the society. This problem exists due to the taboo of the society against the profession as it is often assumed by the people that such workers are anti-social elements and a menace to the society. Due to this, they often face such discrimination from the other members of the society and are blamed for spoiling their cities with their practices. They have to face horrific discrimination, beatings and even rape assaults from the people of the society all across the globe, which involves the people from the law enforcement agencies as well.[9] This implies that not only the sex workers have to face discrimination from the society but they often get subjected to physical assaults as well. Furthermore, the lives of their family members even get affected. For example, in *Gaurav Jain* v. *Union of India*[10] a demand was made to set up separate educational institutions for the children of prostitutes. Though the court struck down the demand by emphasizing on the importance of right to equality for such children as well, the stigma of the society is still being attached to the same.

Even though there has often been a violation of rights, all the sex workers who operate in our country have been granted the same set of rights as every other normal citizen of the country. The rights guaranteed to all the sex workers under the Constitution of our country are-

1. The first right is the right of equality. Guaranteed under Article 14[11], the article guarantees equality before the law within the territory of India and provides that no one will be denied equal protection of law in the country. This means that the law of the country applies on them and protects them in the same manner as the other citizens. The same has been continuously infringed in the country as police officers often abuse sex workers, detain them illegally, assault them and torture them in the custody. The officers often book the workers under provisions of Indian Penal Code [12] for public nuisance[13] or obscene conduct[14], forming false cases against

[8] Laura MacInnis, *Lack of health care worsens women's life quality: WHO*, NOVEMBER 10, 2009 / 3:56 AM Reuters(https://www.reuters.com/article/us-women/lack-of-health-care-worsens-womens-life-quality-who-idUSTRE5A85BB20091109)
[9] Lin Taylor, *Sex workers suffer 'horrific' rape, beatings and discrimination: report*, MAY 26, 2016 8:22 AM, Reuters (https://in.reuters.com/article/rights-sexworkers-idINKCN0YH06W)
[10] (1990) Supp. SCC 709
[11] Constitution of India, 1950, art.14
[12] Indian Penal Code, 1860
[13] Ibid, s. 268

them. The sex workers must pay the officers heavy fines to escape all this, and due to all these reasons consider the law enforcement agency as the most repressive state agency.[15] Due to all such actions of the authorities the rights of the sex workers under Article 14 get violated.

2. The next right is the right to carry out any business/practice any profession under Article 19[16]. This means that the sex workers can carry out their activities till the time the same is not against the restrictions placed by the Article[17]or expressly made illegal by the Government. Even though acts like hiring/procuring any person for taking in prostitution[18], child prostitution[19], pimping etc. are illegal, the practice of prostitution has not been declared as an illicit practice in the country. This implies that their right to practice their profession and carry out their work as a sex worker is protected under the Article and can't be denied to them.
3. The next right is the right to life under the Article 21[20] of the Constitution. The Supreme Court has ruled that the right under Article 21 contains the right to livelihood within its ambit.[21] This implies that the sex workers of the country have the right to practice their profession under this article as their right to life gets infringed if they are denied the right to livelihood by practicing their profession.
4. The next right is the right to seek remedies in case any of these rights listed for them gets violated. This right is provided under Article 32[22] of the Constitution which gives the right to the citizens of approaching the court in case any of the rights guaranteed to them by the Constitution get violated. This means that the sex workers of the country have the right to approach the courts of the country in case any of their rights under the Constitution get infringed, and no one in the country can deny them of this right.

All these rights show that the sex workers in India have the same set of rights guaranteed by the Constitution as any other citizen of the country. These rights protect them from any type of

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[14] Ibid, s. 294
[15] Universal Periodic Review, *Violations faced by Sex Workers in India*, 9/20/2016 , Office of the United Nations High Commissioner for Human Rights, (https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/js9_upr27_ind_e_main.pdf)
[16] Constitution of India, art.19
[17] Ibid
[18] Immoral Traffic Prevention Act, 1956, s. 5
[19] Ibid, s. 4
[20] Constitution of India,1950, art.21
[21] *Olga Tellis and ors.* v. *Bombay Municipal Corporation and ors.* (1985) SCC (3) 545
[22] Constitution of India, 1950, art.32

discrimination in the country, gives them the right to practice their profession, and provides that the sex workers can also approach the court if they face any instance of violation of their rights.

INTERNATIONAL CONVENTIONS

Along with the countries making provisions for the protection of the rights for such workers, there have been many human rights declarations and international conventions on the international level. All the rights contained in these declarations contain the basic human rights which need to be made available to every citizen of the world, thus making the provisions indispensable and important in nature.

The Human rights aspect of the sex workers is protected by the Universal Declaration of Human Rights[23] (UDHR) and the International Covenant on Economic Social and Cultural Rights[24].

Universal Declaration of Human Rights

The Universal Declaration is the most comprehensive and important document for the preservation of human rights. The rights of the sex workers which are protected through UDHR are-

- The declaration provides that all humans are born free and equal in dignity and rights[25] and no one can be discriminated on any kind of distinction[26]. All people are equal before the law and are entitled to equal protection of the law [27] and no one can be subjected to arbitrary arrest/detention.[28] This means that the sex workers are also free and equal as the other citizens and are protected by the prevailing law in the same way as them.

[23] Universal Declaration of Human Rights, 10 December 1948 , United Nations General Assembly, (https://www.un.org/en/universal-declaration-human-rights/)
[24] International Covenant on Economic Social and Cultural Rights, 16 December 1966, United Nations General Assembly, (https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx)
[25] Universal Declaration of Human Rights, 1948
[26] Ibid, art.2
[27]Ibid, art.7
[28] Ibid, art.9

- The next right speaks that every person has the right to life, liberty and security of a person[29]. Furthermore, every person has the right to recognition everywhere as a person before the law[30]. This means that the sex workers also have the same legal identity as the other citizens of the world. They also have the right to livelihood granted to them under the right to life, giving them the right to practice their profession without being obstructed/interfered.
- The next right is that no person shall be subjected to slave trade/servitude[31]. Thus, no woman can be engaged in the business of prostitution until free consent has been taken from her. Also, no person shall be subjected to inhuman treatment or torture[32]. This implies that a sex worker is also protected from any type of physical violence which may occur against the worker by the public or even the law enforcement agencies.
- The next provision is that no one can be arbitrarily deprived of their property[33] and every person has a right of free choice of employment[34] and standard of living[35]. The sex workers have the right to carry out their business if the same is not against their will/choice, and they can't be adjudicated to a state of poverty. They have a right to maintain a standard of living and their own property.

International Covenant on Economic Social and Cultural Rights

The rights listed under this covenant are-

- The Declaration emphasizes on the right of the citizens to practice a profession of their own choice[36], giving the sex workers the right to practice their profession with their free will. Also, the Declaration emphasizes that the working conditions of the people should be safe and healthy[37], and focuses on physical and mental health being maintained[38]. Even though all over the world, the business is carried out in a very unsafe manner, even if the same is legalized, with

[29] Ibid, art.3
[30] Ibid, art.6
[31] Ibid, art.4
[32] Ibid, art.5
[33] Ibid, art.17
[34] Ibid, art.23
[35] Ibid, art.25
[36] International Covenant on Economic Social and Cultural Rights, 1966
[37] Ibid, art.7
[38] Ibid, art.12

the sex workers always being at the risk of being caught up with a sexually transmitted disease they have a right under the declaration to practice the same without any fear and conditions where their health is not compromised.

- Next the declaration talks about the right to form a union or associations till the time the same is prescribed by the law[39]. This implies that in all the countries where there is no express law declaring prostitution as an illicit practice, the sex workers have the right to form unions as well and practice their business.
- The next provision emphasizes that the standard of living should be adequate for all citizens and the state parties should always strive for improving the living conditions of the citizens[40]. So, the Declaration provides the sex workers the right to maintain an adequate standard of living along with adequate housing and food provisions. Also, it focuses on the state parties to try and protect the rights of such workers rather than infringing them.

This shows that under the Human Rights Declaration as well, the rights of the sex workers have been protected and it has been tried by these covenants that the state parties also make efforts in improving the conditions of people engaged in such business.

Some other protocols are-

Convention on the Elimination of All Forms of Discrimination Against Women[41]

The Convention was passed by the General Assembly to serve as an International Bill of Rights for Women. The rights under this are-

- It provides that the State Parties will take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women.[42]
- It is also provided that the right to work is an inalienable right of all human beings[43].

[39] Ibid, art.8
[40] Ibid, art. 11
[41] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 ,United Nations General Assembly, (https://www.un.org/womenwatch/daw/cedaw/)
[42] Ibid, art. 6
[43] Ibid, art. 11

- The next right is that the women have the access to health care services for themselves and their family,[44] which implies that the workers who may be denied the access to proper health care services, they all have a right to have the same and can't be denied of it.

UN Convention Against Transnational Organized Crime

The Convention aims to combat the offence of trafficking in the world[45] and tries to save all the victims of forced prostitution.

Palermo Protocol[46]

The aims of the protocol are to prevent, suppress and punish trafficking. Additionally, the protocol also includes protecting the victims of trafficking and providing them with assistance.

INTERNATIONAL SITUATION

The business of the sex workers has been treated differently in the countries over the globe. Some countries have adopted the policy of legalizing such activities whereas many countries still consider the same as an illegal business.

United States of America

- The prostitution history of USA extends back to the time of colonial era. During that time the practice of prostitution was not declared to be illegal under the American common law, the same

[44] Ibid, art. 12
[45] United Nations Convention Against Transnational Organization Crime, 2002, art. 2
[46] Palermo Protocol, 25 December 2003 United Nations, (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII)

was regulated by the government authorities.[47] After some time, the practice flourished in the parts of New York.[48]

- In the year 1875, US passed an act outlawing the importation of women into the country just for the purpose of prostitution. Then, in 1902 a report named The Social Evil[49] recommended that the regulation of the practice in the country should be reduced and made recommendations for improvements to housing, health care and increasing women's wages.
- *Keller* v. *United States*[50] was the first case in the history of the country in relation to rights of sex workers. In the case, the Supreme Court held that any resident alien of the country can't be deported if they become a prostitute after entering the country, as the same violates the Tenth Amendment of their Constitution.
- The Mann Act[51] or the White Slave Traffic Act was passed in the country which dealt with forced prostitution, harboring immigrant prostitutes, and the transportation across state lines. Furthermore, the Supreme Court in the case of *Hoke* v. *United States*[52] held that the Congress can regulate interstate travel for the purposes of prostitution/immoral purposes. The same was then allowed by the court in the case of *Mortensen* v. *United States*[53] if the purpose was not prostitution.
- In 1913, the Bureau of Social Hygiene Forms was made for the study and prevention of social conditions, crimes, and diseases which adversely affect the well-being of society, with special reference to prostitution and the evils associated with it[54].
- Under the Chamberlain-Kahn Act[55], the government had the power to quarantine any woman suspected to be suffering from a venereal disease for the purposes of protecting the naval and military forces of the country.
- In 2004, the people from the state of California voted for the decriminalization of prostitution in the state, whereas in the year 2008 San Francisco voted against the same.
- At the present state, prostitution is considered to be illegal in most of the states of the country, expect the rural parts of Nevada. The most recent development has been the Stop Enabling Sex

[47] Lisa Wondolkowski, *Prostitution: An International Handbook on Trends, Problems, and Policies,* 1993
[48] Timothy J. Gilfoyle, *The Urban Geography of Commercial Sex: Prostitution in New York City, 1790-1860,* 1996
[49] Edwin R.A. Seligman, *The Social Evil with special reference to the conditions existing in the city of New York*, The Committee of Fifteen (1900)
[50] 213 U.S. 138 (1909)
[51] United States Congress, Mann Act, 1910
[52] 227 U.S. 308 (1913)
[53] 322 U.S. 369 (1944)
[54] Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era*, 1980
[55] 65th U.S. Congress, Chamberlain-Kahn Act, 1918

Traffickers Act and Fight Online Sex Trafficking Act (FOSTA- SESTA) which was passed to deal with trafficking, has made the online sex websites to deal with their clients difficult.[56]

Germany

- Prostitution was illegal in Germany in the starting of the 20th century, even though, cities could regulate things like STDs tests etc. in areas where there was a risk of prostitutes operating. It was in the year 1927 that the same was decriminalized by the Law of Combating Venereal Diseases.[57]
- The practice was again criminalized in 1933 when the government criminalized any form of public solicitation pursued 'in a conspicuous manner or in a manner suited to harass individuals. The police officers also engaged in massive raids on streetwalkers, to eliminate it. It was in 1939 that the government made the establishment of supervised brothels compulsory for all cities and issued standardized regulations for the operation of 'public houses.[58]
- The next reforms came in 2002 when the German Prostitution Reform Law[59] was passed. It declared that prostitution is not immoral and emphasized on the need of increased access to state health insurance and pension schemes. Pimping was made legal if it could be enforced with formal contracts and a right was given to the sex workers to sue their clients in a case of non-payment.[60]
- Recently, a new law was passed which called for more control, penalties and compulsory registration of the sex workers with the local authorities. It has not been well received by the sex workers of the country.[61]

Britain

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[56] Dan Whitcomb, *Sex website shuts down in U.S., blaming 'dumb' trafficking laws,* April 26, 2019 4:47 AM Reuters(https://in.reuters.com/article/us-usa-prostitution-internet/sex-website-shuts-down-in-u-s-blaming-dumb-trafficking-laws-idINKCN1S12UP)

[57] Julia Roos, *Backlash against Prostitutes' Rights: Origins and Dynamics of Nazi Prostitution Policies*, Journal of the History of Sexuality, Jan.-Apr. 2002

[58] Ibid

[59] German Prostitution Reform Law, 2002

[60] Rob Broomby, *German prostitutes get new rights*, Thursday, 20 December, 2001, 14:08 GMT BBC News, (http://news.bbc.co.uk/2/hi/europe/1721434.stm)

[61] Astrid Prange, *Germany introduces unpopular prostitution law*, 02.07.2017, Deutsche Welle (https://www.dw.com/cda/en/germany-introduces-unpopular-prostitution-law/a-39511761)

- The prostitution practices were regulated in Britain and the regulation ended after a Royal Proclamation was issued by Henry VIII.[62]
- In 1866, Britain passed the Contagious Diseases Act[63] with the intention of removing venereal diseases from the naval and armed forces. The legislation allowed police to arrest prostitutes in ports and army towns and bring them in to have compulsory checks for venereal disease. The law was repealed in 1886.
- The Britain Criminal Law Amendment Act was passed in 1885, which made provisions for the protection of women and girls, the suppression of brothels, and other purposes.[64]
- On the recommendations of the Wolfenden Report, the act of prostitution was decriminalized in the country. But activities like solicitation were still considered to be an offence.[65]
- The most recent change made by the country's government is of making the report 'Paying the Price' to examine the various legal strategies towards prostitution.

The policies of some other countries are-

- The Canadian Court declared a ban on brothels and held that soliciting prostitution is unconstitutional.[66]
- The New Zealand Parliament passed the Prostitution Reforms Act [67] in 2003. Under this, prostitution was decriminalized, and the sex workers were given new rights. A system of regulation of the brothels of the country was also made.[68]

INDIAN SITUATION

[62] Henry Ansgar Kelly, *Bishop, Prioress, and Bawd in the Stews of Southwark*, Speculum, Apr. 2000
[63] Contagious Diseases Act, 1864
[64] Trevor Fisher, *Prostitution and the Victorians*, 1997
[65] *Off the Streets*, Monday, Aug. 31, 1959 ,TIME Magazine (http://content.time.com/time/magazine/article/0,9171,864882,00.html)
[66] Grainne Harrington, *Canada Supreme Court strikes down prostitution laws*, 21 Dec 2013 ,BBC News (https://www.bbc.com/news/av/world-us-canada-25474510/canada-supreme-court-strikes-down-prostitution-laws)
[67] Prostitution Reforms Act, 2003
[68] Hannah Belcher, *NZ votes to legalize prostitution*, Last Updated: Wednesday, 25 June, 2003, 11:48 GMT 12:48 UK ,BBC News (http://news.bbc.co.uk/2/hi/asia-pacific/3019896.stm)

The two of the most famous red-light areas where the practice of sex workers is carried out are-

Kamathipura

Established in the 18th century and located in Mumbai, it is the most infamous red-light area of Mumbai. There are more than 10 thousand sex workers residing in the area who mostly come from different parts of the country, Nepal and Bangladesh, most of which are usually victims of human trafficking, sold there by relatives or lured by someone into the business. They often get harassed by the policemen and to escape them, they pay them money on regular basis.[69] The buildings are in dilapidated state with the area being very dingy and dirty.[70]Small girls are also used at times in the business where they are dressed up to look like grown-ups for the clients. Even though the rates of such girls in the business have gone down, the problem still persists in the area.[71]

GB Road

Located in New Delhi, it is a large red-light district with more than a thousand sex workers working there. Most of the sex workers hail from the poor sections of the rural parts of the country and are often sold or lured into the business by deceit. The workers are bought by the people there on a price depending on whether the woman is a virgin or not. After that, every woman is made to engage in sexual activities with more than 20 men per day with all the money of the same going to the pimps.[72] The brothels also have hidden trap doors in the buildings. They are used to hide child

[69] Jason Burke, *Few grieve for the passing of Mumbai's red-light district*, Mon 22 Dec 2014 15.52 GMT Last modified on Fri 11 May 2018 13.16 BST The Guardian, (https://www.theguardian.com/world/2014/dec/22/time-running-out-mumbai-red-light-district-kamathipura)

[70] Ruchira Shukla, *A Fleeting Encounter: The Women Of Kamathipura*, 18/06/2015 8:13 AM IST Updated 15/07/2016 8:25 AM IST ,The Huffington Post, (https://www.huffingtonpost.in/ruchira-shukla/caged-within-the-women-of_b_7549848.html)

[71] Roli Srivastava, *Fewer child sex slaves in Mumbai brothels, but underground trade a concern: study,* JUNE 12, 2017 / 2:58 PM, Reuters (https://www.reuters.com/article/us-india-humantrafficking-child-idUSKBN1930XT)

[72] Nita Bhalla, *Delhi's trafficked sex slaves face "sad" and "horrible" life – official,* FEBRUARY 13, 2016 5:01 PM, Reuters, (https://www.reuters.com/article/india-trafficking-prostitution/delhis-trafficked-sex-slaves-face-sad-and-horrible-life-official-idUSKCN0VM0DR)

prostitutes in case the police officials organize a raid there,[73] thus promoting the practice of child prostitution.

Legislative Steps

The first statute of the country dealing with the issue in the country is Immoral Traffic (Prevention) Act[74]. The act states that prostitution per se is not criminal in nature. But the act does criminalize other acts in relation to this. For e.g. a person can be imprisoned for the period of one to three years under the act in case they are found keeping a brothel or allowing their premises to be used as a brothel.[75]Another act which has been criminalized by the Prevention Act is of procuring, inducing or taking a person into prostitution. So, if a person is found to commit such an act, the person would be liable for a rigorous punishment of about three to seven years in case the same has been done with the consent of the person. But if the same is done without the consent of the person, then the person can face an imprisonment ranging from seven to fourteen years.[76]The act also provides that on the direction by a magistrate a police official can enter a brothel and remove any person from there with the intent of removing them from there.[77] Here the statute punishes the third party for the offence rather than punishing the sex worker.

The Law Commission of India Report on The Suppression of Immoral Traffic in Women and Girls Act, 1956 [78] was also released which made observations about the same, which were:

I. Prostitution has, been tolerated as a necessary evil as no country in the world has been able to stop this institution successfully. So, instead of banning it totally, the law in every country has tried to regulate it so that it may be kept within its legitimate bounds without unduly encroaching upon the institution of marriage and the family.

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[73] Anuradha Nagaraj, *Rescued child sex workers in India reveal hidden cells in brothels,* DECEMBER 13, 2017 / 8:03 PM, Reuters, (https://in.reuters.com/article/india-trafficking-brothels/rescued-child-sex-workers-in-india-reveal-hidden-cells-in-brothels-idINKBN1E71WP)

[74] Immoral Traffic (Prevention) Act, 1956

[75] Ibid, s. 3

[76] Ibid, s. 5

[77] Ibid, s. 16

[78] Law Commission of India, 64th Report on The Suppression of Immoral Traffic in Women and Girls Act, 1956 , (March 1975) (http://lawcommissionofindia.nic.in/51-100/Report64.pdf)

II. When the Suppression of Immoral Traffic in Women and Girls Act, 1956 was enacted, it has been observed by the State that, abolishment of prostitution altogether is not possible through the legislative means, as the practice is deeply entrenched/rooted in the Indian social milieu.

III. Prostitution, in so far as it consists of secret acts of consenting individuals without exploitation, and in private, is not appropriate for penal sanctions, and the fact that the pleasure derived from such prostitution is one which is socially disapproved, is not in itself a sufficient ground for the imposition of criminal sanctions.

IV. Laws which prohibit sexual acts when committed in private- assuming that the acts are considered appropriate for penal sanctions- are to be enforced only to a limited extent; however-much the conduct may be the subject of moral condemnation.

V. Repressive measures against prostitution are hampered by three (3) main considerations: the persistent demand for exclusive physical satisfaction which the prostitute offers; the existence of a type of women who is drawn to prostitution by virtue of her psycho-neurotic make up; and the social attitude towards sex. Socio-economic factors are still important in borderline cases.

Additionally, there are provisions in favor of the rights of children for their protection. Under the IPC a person will be imprisoned for the period extending to ten years if the person sells, hires or disposes of any person less than the age of eighteen years into prostitution.[79] Furthermore, if any person engaged in the business of prostitution is found buying such a minor, he can face rigorous imprisonment extending up to ten years along with fine.[80] Under both the cases it will be presumed that the minor is being given in prostitution till the time it is proved otherwise. Such acts also constitute a punishment under the Juvenile Justice (Care and Protection of Children) Act[81]. The rehabilitation and social reintegration of the juveniles of such juveniles has been provided under the Juvenile Justice (Care and Protection of Children) Rules[82]. All these provisions are in consonance with the rules provided under Declaration of Right of the Child[83], which provides that all the actions which are to be taken by the government of a nation need to be in the best interests of the children of the country.

[79] Indian Penal Code, 1860, s. 372
[80] Ibid, s. 373
[81] Juvenile Justice (Care and Protection of Children) Act, 2015, s. 81
[82] Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 32
[83] Geneva Declaration of Rights of Children, United Nations, 2 September 1990 (https://www.ohchr.org/en/professionalinterest/pages/crc.aspx)

Landmark Cases

There have been many cases in the country in relation to sex work in the country. Some major cases are-

- *State of Rajasthan* v. *Mst. Wahida* [84] - The court held that a person responsible for keeping/maintaining a brothel in India, is liable to be punished under the Immoral Traffic (Prevention) Act, 1956.
- *Mohan* v. *State of M.P.*[85]- The court held that it is no defence for rape that the girl was habitual of sex.
- *Shushil* v. *State of U.P.* [86] - If a prostitute lodges a report of rape and her evidence inspires confidence, then there is no rule that the statement of the prostitute cannot be believed. Nobody can commit sexual intercourse even with a prostitute under threat or compulsion.
- *Emperor* v. *Vithabai Sukha*[87]- It was held that, where a brothel keeper allowed a girl under 18 years of age to visit the brothel for two or three hours in the night, and allowed her to prostitute herself to customers for money, it was held that the brothel-keeper was guilty of an offence under IPC.
- The most recent judgment was given by the Supreme Court in the gang rape case of 1997, where the court held that even the sex workers have the right to say no.[88]

OTHER STEPS

There have been other attempts as well to recognize the rights of the sex workers in the world. Some of major efforts are-

[84] 1981 RCC 42
[85] 2001 Cr LJ 3046
[86] CRIMINAL APPEAL No. - 422 of 1994
[87] (1928) 30 Bom LR 613
[88] IANS, *Even sex-workers have right to say 'no': Supreme Court*, Published: 02nd November 2018 04:04 PM | Last Updated: 02nd November 2018 04:32 PM The New Indian Express (http://www.newindianexpress.com/nation/2018/nov/02/even-sex-workers-have-right-to-say-no-supreme-court-1893368.html)

- The First National Conference of Sex Workers in India was held in the year 1997 in Calcutta. By the conference an attempt was made to know the plight and pity of the sex-workers in the country. Some of the questions which needed to be considered in the conference were-
  - Can a sex-worker insist on having safe-sex?
  - Can sex-work be termed as an occupation?
  - Is it justified to see sex-work as morally sinful?
  - Is it possible to rehabilitate prostitutes?
  - Do men and women have equal claims to sexuality?
  - Is prostitution a means to promote 'free-sex'?

The observations made at the conference were-

  - Sex-workers, usually, are not in a position to negotiate with their clients
  - Sex-work is one of the oldest professions in the world. However, today, the term 'prostitute' is deployed as a descriptive term denoting a homogenized category, usually of women posing threat to public health, sexual morality, social stability and civic order.
  - Sexuality and sexual need are fundamental and necessary to the human condition. Pleasure, happiness, comfort and intimacy find expression through sexuality. However, the State and social structures acknowledge a very limited and narrow aspect of sexuality.[89]
- Many organizations promoting the rights of the sex workers across the globe have been formed. Some of the organizations are-
  - Sex Workers' Rights Advocacy Network (SWAN) [Hungary]
  - Global Alliance Against Traffic in Women (GAATW) [Thailand]
  - Call Off Your Old Tired Ethics (COYOTE) [The first prostitute's rights group in United States]
  - Friends and Lovers of Prostitutes (FLOP)
  - Prostitute Union of Massachussetts Association (PUMA)
- World Charter for Prostitutes Rights was adopted in the year 1985 by the International Committee for Prostitutes Right to protect the rights of the prostitutes worldwide. The Charter provided that the prostitutes have the same rights as the other citizens of the world and that the whole world should take a stand against forced prostitution.

[89] SEX WORKERS' MANIFESTO, First National Conference of Sex Workers in India, 14-16 November 1997, Calcutta (http://www.sacw.net/Wmov/sexworkmanifesto97.html)

MALE SEX WORKERS

Historically, the job of a sex worker was only practiced by a woman. Over the period, men have also started to enter the field of sex industry and work as a sex worker. But the life of a male sex worker is more difficult than that of a female sex worker. Such male workers in many countries are assaulted by people and it is very unlikely that the crimes are going to be reported to the police officials as the officials also treat them like a menace. Also, it is not uncommon for the male sex workers to be raped by their clients and often not paid for their services, bringing a lot of pain and misery to them.[90]The stigma of the male being a sex worker is always there attached with them.[91] Due to this they often find it difficult to reveal their identity to anyone.

The Male Sex Workers face many health issues as people often assume that they are homosexual in nature rather than bisexual. Due to this false assumption, the safety issues are often ignored due to which the male sex workers often get affected.

Just like the women sex workers, the male sex workers also have the rights which may be available to anyone working in the industry. The rights which should be available to them are[92]-

- Homosexuality need to be accepted in case of a male sex worker. The criminalization of homosexual activities often put these workers at the risk of being arrested for carrying out their work.
- The Male workers should have proper access to health care services. The stigma against their job should not come in between as the same can put the life of the male worker in grave danger.
- They should not face any type of violence from the general public and the law enforcement agencies for their profession.
- They should have proper access to justice and legal protection in case such a circumstance arises.

[90] Michael Cowan, *Life as a male sex worker in Britain today*, 13 December 2017, BBC News (https://www.bbc.com/news/uk-42265838)
[91] Diana Wanyonyi, '*The life I have lived has tortured me,' says male sex worker in Mombasa*, 18.06.2018 Deutsche Welle (https://www.dw.com/en/the-life-i-have-lived-has-tortured-me-says-male-sex-worker-in-mombasa/a-44099058)
[92] Global Network of Sex Work Projects, The Needs and Rights of Male Sex Workers (https://www.nswp.org/sites/nswp.org/files/Male%20SWs.pdf)

An initiative to provide safety to all male sex workers was taken up when an organization named HOOK Online was founded and led by male sex workers. The organization also takes care of their healthcare and finances.

By provided the male workers with the same rights as the female sex workers, we can ensure that the disparity/differences between them are eliminated and they are bought to the same level.

CONCLUSION

It can be concluded that the sex workers of the world have been granted many rights for their protection. But due to various reasons they are being violated. So, to curb this problem, some suggestions are-

- The first step which needs to be taken is that the activity of prostitution needs to be decriminalized in all the nations. It will give the sex workers their right to carry out the profession, keep a check on the human trafficking rackets and improve their health care situation.
- More stringent laws need to be made to completely curb the offence of trafficking, child prostitution or any type of prostitution without the consent of the person.
- Any instance of violence which is faced by a sex worker needs to be taken very seriously by the law enforcement agencies. They need to ensure that the lives of the sex workers are not threatened just due to the stigma against their job.
- Proper health care facilities and the access to such facilities need to be provided to all such workers and their families. It also needs to be ensured that the working and housing conditions of these workers are not dire.
- It should be ensured that the health factors of the sex workers are considered before and the sexual activities should be protected to avoid any risk of STDs.

- The rights should be equal for both male and female sex workers.
- Awareness needs to be spread amongst the general public about this profession. They need to be made aware that the sex industry is not composed of anti-social elements and the workers are also the same humans.

All this can help the sex workers to have the same kind of rights like the other citizens, which may go ahead and fulfill the main objective of human rights in the contemporary world.

The Future of Human Rights of Transgender Person in India

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ABSTRACT

Since childhood, we have been noticing a group of people who are dressed up as a female but their voices are more suitable to a male. As a child for me, they have always been someone whom I found very secretive. Something which all the time baffled me that why do the people laugh at them and tease them without any reason? As a grown-up person gradually I could understand their real difficulties and the reason of that anathema associated with them and tabooed them as "Hijra". Hijra is the individual who we comprehended were some way or another named as various. Even though they were ineffectively coordinated into society, Hijras in some cases came over when there was a promising occasion at home, for example, a marriage or the introduction of a kid.

It is also stated that getting the blessing from any Hijra is the matter of good fortune. It is very painful having seen that people in the society remember them only to grace the occasion for their benefits and afterwards they are treated misdemeanor.

In spite of being esteemed the harbingers of good karma, Hijras were frequently spotted asking for cash at traffic crossing points. While they were regularly treated with abhor, growing up, we didn't actually recognize what was unmistakable about them or why they were social outsiders. The strict English interpretation of Hijra is Eunuch, which could be misdirecting. In all actuality, "Hijra" is a name for an individual from the transgender network in North and Western India. Individuals from this network were relegated the male sexual orientation during childbirth however relate to the female sex, which as in wherever of the world, accompanies difficulties. As a major aspect of the MIT section of the Association for India's Development (AID), we were especially keen on finding out about the Hijras' socio-legal status.

Having been recognized them as third gender category, nothing has been changed. They are still the victim of molestation, eve-teasing, criminal force, acid attacks and other brutal offences. In this research paper, we will focus on the right of transgender persons under the purview of the Indian Constitution. We will also analyse their human rights and approach of India as a third world country for the protection of the rights of transgender persons.

Enacting the legislation is not only the change which is required to make the position of a transgender better in society but until the attitude of the society will be watertight against transgender persons no legislation will be working effectively in the absence of societal support.

Keywords: Gender justice, Human Rights, Police deviance, LGBTQIA+ protection, Laws against Gender discrimination, Third gender reservation, Violence against Transgenders

INTRODUCTION

From the time immemorial, Transgenders community has been the substantial group in the sub-continent which has its own historical significance. The Hijra group has been a part to indispensable but often ignored sexual diversity in the indigenous culture, as over 4000 years of civilization as per the account of ancient texts. While the Indian law recognizes transgendered people as a third gender, including Hijras, other South Asian nations such as Bangladesh and Pakistan only recognized Hijras as a third gender. Even when there are serious legal disadvantages facing by the larger LGBTQIA+[2] community the government in power has been very lethargic to give due recognition to the community like Transgenders including other members of the community of LGBTQIA+.

In ancient literature, the Hijra community, most well known as the Kama Sutra is a Hindi text written between 40 and 200 BEC on human sexual behaviour. In some of the most important Hindu texts, including the Mahabharata and the Ramayana, the Hijra characters have significant roles. A major Hindu god Shiva is one of several forms that involve him merging with his wife, Parvati, into the Androgynous Ardhanari, which is particularly important to many people in Hijra. During the Mughal era of India, from the 16th to the 19th century, Hijras held important court posts and various facets of government. They also were considered religious and blessed, especially during religious ceremonies. They are considered religious.

In 19th century, however, when the Indian subcontinent became a colonial state, British authorities tried to eradicate the hijra community by means of different laws. After Indian independence, these laws were later repealed.

Having been recognised as Third gender, the Transgenders' community is still treated as group having serious problems related to their normal lives as binary gender, they are often victims of abuse and discrimination. It is also the matter of great frustration that the hate crimes and other communal teasing against the community are common. This has been addressed by the government, which raises urgent demand for introducing laws, protecting transgender persons, and fixes the criminal activities

[2]Beatrice Howard, LGBTQIA+ - What do all the letters stand for? | Student Hut Student Hut (2018), https://studenthut.com/articles/lgbtqia-what-do-all-letters-stand (last visited Sep 23, 2019).

of the people who harasses Transgenders and put the concern person for such inhuman act in the prison and also put other penalties for offenders.[3]

EVOLUTION OF TRANSGENDER COMMUNITY IN INDIA

For millennia, transgender people have been integral part of Indian culture. In early texts of old India there were historical proofs of "Third gender" acceptance or individuals that could not be confirmed by men or women. In the Hindu mythology, poetry, the poem, and the late Vedic, and Puranic literatures was the notion of "tritiyaprakriti" or "napumsaka." The word "napumsaka" was used to describe the lack of procreative capacities, representing a distinction between male and woman indicators.[4]

Some of the early texts thus dealt extensively with sexuality and the idea of a third sex, an established idea. In reality, the Jain paper even cites the notion of "psychological gender," which stresses the psychological composition of a person, different from their personal features. A story came into light through epic Ramayana that after 14 years of banishment from the kingdom, Lord Rama was leaving in the forest, turns to his disciples and asks all the "men and women" to return to the city. The hijras alone felt compelled by this path and decided to remain with him among his supporters. Rama, impressed with their allegiance, empowered them to give favours on favourable times like childbirth and marriage as well as at the appointment duties, which were intended to provide a setting for the Badhai practice where hijras sang, danced and blessed. [5]

The only condition he had made was to spend his last night of life in marriage, Aravan, the son of Arjuna and Nagakanya in Mahabharata, offered sacrifices for Goddess Kalí for Pandavan's win in the Kurukshetra war.[6] Since none of the wives was prepared to meet a man sentenced to death, Krishna takes on the shape and has been marrying him as a lovely lady named Mohini. Aravan was the progenitor of Tamil Nadu and is called an Aravani.[7]

[3]Shane. Gannon, With Respect to Sex: Negotiating Hijra Identity in South India (review), 16 Journal of the History of Sexuality 328-330 (2007).
[4]*Id.*
[5] Trp.org.in (2019), http://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf (last visited Sep 11, 2019).
[6]M. Michelraj, Historical Evolution of Transgender Community in India, 4 Asian Reviews of Social Sciences 17-19 (2015).
[7]A Anusha&Dr.Rashmi Ram Hunnur, A Review on Status of Transgenders from Social Exclusion to Social Inclusion in India, 21 IOSR Journal of Business and Management 29-34 (2019).

WHO IS "TRANSGENDERS"

There have always been people who stand against gender norms in every culture. However the term "transgender," which dates from the mid-1990s, is relatively new. The general population often does not understand Transgender people well. The word "LGBTQIA+" is a helpful term that covers a range of individuals who reside significant parts of their life showing a feeling of sex other than that allocated at conception. This includes people who feel like their biological sex doesn't represent their real gender. Those who do not classify as gay can be called "cisgender," which means they associate with the born gender.[8]

Some transgender people say that they have been born in the wrong body. Therefore, some transgender people choose to have operation to use their required sex in physical shape. Sometimes this person is called a transsexual, after surgery. Somebody can also be preoperative (in this case she or he may be known as "no-op") or can never have an operation. Breast and facial hair, for example, are promoted through hormones to encourage secondary sex characteristics. The term "transition" is often used to define the time that you move back from the given gender. Physical transition may define operative, hormonal, or other bodily modifications. Social transition could include a legal change of title, requesting that mates use a selected pronoun, and other notification measures.

If it is essential to indicate someone is trans (though generally not): someone who has previously recognized him / her as a female and is now identifying himself as a male is regarded as an FTM transsexual, a trans man or a transgender man. Likewise, somebody who was once a man and now identifies as a woman may be labelled as a trans-sexual (MRT) or trans-sexual (MRT) or trans-sexual woman. Recalling that females are MTF, like FTM males, is highly crucial.[9]

The manner transgender people are handled (including their selected title and desired pronouns) exhibits honour. Some Transgender people may continue to use sexual neutral names, for example "ze / hir / hirs etc. Transgender people may identify as lesbians, bisexuals, gay people, heterosexuals, etc. They associate commonalities with LGBTQIA+ individuals, who have suffered discrimination,

[8]Preeti Sharma, Histprical Background and Legal Status of Third Gender in Indian Society, 2 International Journal of Research in Education and Science 44 (2012).
[9] Issues, National Center for Transgender Equality (2019), http://www.transequality.org/issues/resources/national-transgender-discriminationsurvey-full-report (last visited Sep 10, 2019).

bias, poverty, dread and disgrace. Like people from LGBTQIA+, aboriginal people must not conceal who they are to live safely and satisfactorily.

SOCIAL DISTRESS OF TRANSGENDERS

The Transgender be the class of LGBTQIA+ group. They belong to the marginalized cluster of the society that faces legal, social, cultural and economic difficulties. The issues faced by the Transgender community in India embody[10]

1) **Discrimination:** Discrimination is that the major drawback of Transgender. They're discriminated in terms of education, employment, diversion, justice etc.

2)**Disrespect:** they're disrespected in every and each facet of life except in few cases like once the birth of a baby for his or her blessings or to bless the new wed couple.

3) **Downtrodden:** These peoples are treated badly or laden by people in power. They're vulnerable to struggle for social justice thanks to their identity as Transgender.

4) **Child Nabbing:** This community invariably searches for those babies/ infants/ kids United Nations agency are born with this feature of Transgender. Once they are available to grasp, they struggle to nab the kid from their oldsters.

5) **Prostitution:** they're forced to enter the profession of prostitutions by their community, friends or relatives. Even, in some cases, it's seen that their oldsters' are concerned in it.

6) **Forced to depart parental home:** Once their identity is known, they're forced and pressurize to depart the parental home by the society as they can't be a district and parcel of traditional community and sophistication.

7) **Unwanted attention:** People provide unwanted attention to the Transgender publicly. They struggle to form the scene by insulting, punishing, abusing or give tongue to them.

8) **Rejection of entry:** they're rejected to urge enter in non-secular places, public places like hotels, restaurants, theatres, parks etc.

[10]Dr.Khushboo R. Hotchandani, Problems of Transgender In India: A Study From Social Exclusion To Social Inclusion, 4 International Research Journal of Human Resources and Social Sciences 73-80 (2019}.

9) Rape and verbal and physical abuse: this is often the foremost Transgender people face. They're vulnerable to face rape followed by physical and verbal abuse.

10) Lack of instructional facilities: Like traditional Transgenders, they're not entitled to require education in colleges and faculties. Even in terms of education, they're treated otherwise.

11)Problems with STI and HIVAIDS: The term "MSM" is used to describe men with men.As a result, the majority of transgenders have socio-economic problems like STI and HIV AIDS and are low in literacy.It aims at inadequate medical care.

12) Trafficking in human beings: Transgender is among the most neglected groups and is therefore also prone to the problem of trafficking in human beings.

13) Social Exclusion: The main issue in all the process is the social exclusion from society. They are excluded from social, cultural and economic participation. In brief they are departed from following perspectives: [11]

- Economy, jobs and livelihoods
- Exclude the right to abuse
- Limited access to schooling, medical care and private care
- Limited access to government space, collectively
- Citizenship Rights
- Excluded from decisions
- Failed to provide a social safety framework
- Limited access to community services

INDIAN CONSTITUTIONAL JURISPRUDENCE AND TRANSGENDERS

Fundamental rights was initially conceptualized in the American Constitution's Bill of rights[12] of and adopted in the Indian Constitution. Indian Constitution Preamble[13] mandates justice social, economic, and political equality of status. Essentially, the Indian Constitution is sex blind, which is that the

[11] *Id* at 4.
[12] Constitution of U.S.A, (1791).
[13] Indian Constitution, (1950).

fundamental principle of equality is founded on a constitutional mandate that the sex of an individual does not matter unless special arrangements are required by the constitution.

I. Right to Equality:

The Constitution gives every individual equivalent status before the law and equal protection of laws within India. Here the term "any person"[14] implies each individual, without discrimination depending on any of the categories that include caste, creed, religion, sex, etc. A transgender in India is included in the words "any person" and is given equal status to that of any cis-gender in India. The transgender community cannot be discriminated against on the grounds of non-application of any law within the country because of its distinctions and on the basis of any voluntary category.[15]

In National Legal Service Authority vs. Union of India,[16] The interpretation of the word person was extended and held that Article 14 of the Indian Constitution does not restrict the word "person" and its application to male or female only.Hijras / transgender people who are not male and female, have been subject to the term "person," and therefore are entitled to law-making security in all areas of state activity, including employment, health care, education, and the similar constitutional and civil liberties embraced by another citizen of the country.[17]

II. Equal opportunities and rights against all types of discrimination:

The main term in regard to the protection of Transgenders' is the term "sex." These societies, regardless of whether they fall under the classification of masculine or female, are included in the definition of the term "sex." The Indian Apex Court in a historic case[18] observed that both gender and biological characteristics are separate elements of sex.Genetic features encompass private parts, genes and other sexual features. However, gender features have included a self-image, a deep mental and social sense of sexual orientation and appearance.[19] The term "gender" is not restricted to masculine or woman biological sex, but is designed to include individuals who do not believe them to be masculine or female. Articles 15(2) and 16(4) have also been defined as providing for cultural quality

[14]D. D Basu, Introduction to the Constitution of India 36 (2008).
[15] Hannah Van Borm&StijnBaert, What drives hiring discrimination against transgenders?, 39 International Journal of Manpower 581-599 (2018), https://biblio.ugent.be/publication/8539582/file/8539583.pdf (last visited Sep 9, 2019).
[16]National Legal Services v. Union of India &Ors, 5 438 (2014}.
[17]*Id.*
[18]*Id* at 5.
[19]M Ramaswamy& Arthur Berriedale Keith, The law of the Indian constitution 85 (1938).

in these societies, such as equality in public employment, providing that States have the authority to create any space available to them.

III. Basic Freedom:

The basic and fundamental rights secured by the representatives of the transgender society under Article 19(1)(a) of the Constitution of India, are all fundamental principles of security, identity and independence and private integrity and must be protected, respectively, and recognized by the State as a citizen, in compliance with article 19(1) of the Constitution of India. Neither of the requirements stated as a condition of the acquisition of citizenship requires a certain sex or sexual identity. Therefore, a transgender has the correct and the obligation of protecting his emotions, conduct and character to culture. This expression cannot be restricted by the state as a basic freedom.[20]

IV. Live the Life Hassle-free:

The freedom to choose one's own name, under this Article, is one of the most essential contributions to existence with integrity. This element is discussed and shielded by this essay, as it symbolizes the most significant natural obligation, the freedom to reside, which the State needs to safeguard from violation.[21]Gender identification recognizes their obligation to privacy and non-recognition violates the freedom of them to communicate and to reside their lives without worry. [22]

The obligation to privacy also applies to the privacy of them. Transgenders were not seen with regard in our community, are often abused and torn up by the police that have degraded their standing in culture and their meaning in culture.

V. Protection against Exploitation:

Different inhumanities are proclaimed to be an offender and punishable under the law, including human trafficking and beggary. Article 23 of India's Constitution has a very broad range since it contains all forms of prohibited discrimination. In culture, immoral actions like slavery are generally seen. Everyone has a right to private growth, and this can only be ensured if reproduction is allowed to create a safe atmosphere for a person. Due to their decreased financial position, transgender people

[20]Ashutosh Gupta, Whether Section 377 of IPC Voilates the Fundamental Rights, Volume-2 International Journal of Trend in Scientific Research and Development 962-967 (2018).
[21]Id at 6.
[22]AparnaRayaprol&Sawmya Ray, Understanding Gender Justice, 17 Indian Journal of Gender Studies 335-363 (2010).

are the biggest victim of exploitation and are often considered to be taboo in the community as a result of prostitution and other immoral operations.[23]The aim of this Article is to ensure the independence of an employee status by not allowing people to be exploited.

TRANS "GENDER IDENTITY"

Transgenders need a combination of freedoms that other individuals hold for granted–key freedoms that acknowledge their legitimate person hood–to be recognized as natural humans. As noted out by the Global Commission on HIV, "Transgender people are refused legal recognition in many nations, from Mexico to Malaysia by law or by practice. A fundamental component of their identities–sex–is unknown this awareness of their gender is essential to respecting their inherent dignity and the right to health, including HIV protection. Trans individuals experience serious obstacles when refused access to adequate health knowledge and care. Recognizing a cis-person's gender requires respect of the person's ability to recognize –regardless of sex at conception a "third" gender, as demonstrated by many traditional trans-collections, such as hijras, in India, as men, women or girls who do not blend into male–female binaries.

For Transgenders to achieve complete individuality and citizenship, this is a key necessity. Granting sex recognition in formal government papers–visas and other identity cards needed for banking reports, education, accommodation or other agreements, employment, ballots, trips, social facilities or government grants–allows access to a variety of operations that are otherwise refused while being given for gender acceptance in formal government papers. This acceptance leads to a more full public involvement of and by the Transgenders.[24]

This represents a concrete move towards social integration, progress in the economy and official recognition of legal equality. It can promote and behave unbeatably as recognition of its status and personal value, altering the manner their homes, the community in particular, and the cops, public performers and health care workers are viewed in their everyday lives.[25] This essential freedom for

[23]SribasGoswami&SushwetaKarmakar, Transgender in India: Identified by Law Discriminated by the Society, 9 European Researcher 109 (2018), https://www.researchgate.net/publication/325742658_Transgender_in_India_Identified_by_Law_Discriminated_by_the_Society. [last visited September 21, 2019].

[24]Manoj Kumar Pathak, SrishtiRai&MadhuUpadhyay, Social, Medical And Human Rights Issues Related To Transgenders In India, 19 Journal of Punjab Academy of Forensic Medicine & Toxicology 5 (2019).

[25]Dr.AshwaniRana&Ms.RitikaRana, A Study of the Plight of Transgenders – A Life No Less Than A Living Hell, Volume-3 International Journal of Trend in Scientific Research and Development 621-625 (2018),

Transgenders to be recognized has been recognized by the UN treaty bodies. The UN High Commissioner for Human Rights suggested that States ' promote legal acceptance of the desired sexes of LGBTQIA+ people and create provisions for the reissue, without violating other civil affairs, of appropriate identification papers depicting the desired sex and names'[26]

NALSA JUDGEMENT "DAWN OF JUSTICE"

In its historical decision, given for the benefit of Transgenders, the Supreme Indian Court granted extensive rights and safeguards for transgendered persons in the case of National Legal Services v. Union of India &Ors.[27] This Social ruling was appreciated not only because it was the first of its kind globally, but also because it was a significant comparison with the 2013 judgment of the Indian Supreme Court in Naz Foundation v. Govt. Delhi's NCT, which efficiently re-criminalized homosexuality and seemed to show a change to a more liberal view of the justice system on LGBT problems.

In the event of NALSA[28], representatives of the transgender group who attempted legal confirmation of their gender identity were taken before the Indian courts. Since transgendered persons are not regarded as masculine or woman, nor as being of a third sex, theyarestripped many of the freedoms and benefits other individuals receive as nationals of the state of origin.Articles 14 (guarantying freedom before law) and 21 (guarantying protection of life and personal liberty) are efficiently infringed by such oppression.

In the Apex Court, it asserted that transgender people had performed a powerful historical role in Indian culture, people lore and spiritual texts,[29] that a wealth of global tools are required to protect the freedoms of transgendered individuals and that foreign decisions and legislation have provided respect to the transgendered person's sexual identity. In response, the Court reviewed the many types of repression experienced by transgendered individuals in India, including discrimination, prejudice and elevated levels of HIV infection.

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https://www.researchgate.net/publication/333689119_A_Study_of_the_Plight_of_Transgenders_-_A_Life_No_Less_Than_A_Living_Hell (last visited Sep 15, 2019).

[26] Glynn Custred, Individual rights and equality before the law, 10 Academic Questions 15-17 (1997), https://link.springer.com/article/10.1007%2Fs12129-997-1061-9 (last visited Sep 20, 2019).

[27] Supra note at 12.

[28] Orinam.net (2014), http://orinam.net/content/wp-content/uploads/2014/04/nalsa_summary_danish.pdf (last visited Sep 28, 2019).

[29] Supra note at 4.

Turning to the statutory obligations of India, the Court discovered that the present repression and discrimination confronted by representatives of the transgendered group conflicted with the provisions set in Articles 14 (Equality before the law), 15 and 16 (Prohibition of discrimination on grounds of sex), Article 19 (guaranty of certain basic freedoms) and 21 (preservation of personal dignity, personal autonomy and right to privacy) The Court ruled that their self-determined gender identity should be covered by state to ensure that transgendered persons benefit from these legislative provisions.

Thus the Court ordered that the Government view transgendered people, among other things, as a 'third gender' so that its freedoms can be safeguarded and some requests for entry to education establishments and public meetings extended to third sex individuals.[30] The Court also instructed the state to tackle the cultural and safety issues facing third-gender participants specifically, including the provision of focused medical treatment, social protection programs, public distinct bathrooms and other amenities.

All in all, it was a comprehensive judgement that reverberated in Indian society and could lead to modifications in Indian criminal, marriage and municipal laws. The NALSA decision,[31] however, poses at least as many concerns as it responds. Tension is mainly that: if people of the third gender (as well as homosexuals) can still be sued for having engaged in "carnal exchange against nature" (which the Naz Foundation Court considered to include sexual gender), and such criminalization promotes non-heterosexual stigmatization, how can the state expect to fulfil its legislative rig requirement?

IMPORTANT POINTS OF NALSA JUDGEMENT

1. Identifying as third gender.
2. Recognition of people who identify in the opposite sex based on self-identification. Includes female identifying as male and male identifying as female.
3. Non-recognition of gender identity amounts to discrimination under Articles 14, 15 and 16.
4. Discrimination based on sexual behaviour and gender identification would be deemed as sex-underlying discrimination Article 15.
5. No Sexual reassignment surgery required for recognition of gender identity.

[30]AnujaAgrawal, Gendered Bodies: The Case of the `Third Gender' in India, 31 Contributions to Indian Sociology 273-297 (1997), https://journals.sagepub.com/doi/10.1177/006996697031002005 (last visited Sep 17, 2019).
[31]Suresh Kumar Koushal&AnrvsNaz Foundation &Ors, 106 277 (2013).

6. Persons' gender identity based on their choice is protected under the constitution.
7. A series of directions have been given to the Centre and States based on the above.

MARGIN OF SATISFACTION AND NALSA JUDGEMENT

In fact, the much hyped NALSA decision[32] has caused a lot of confusion. Although the judgement was celebrated by mainstream media and civil society, many transgender critics pointed out its intrinsic issues and contradictions.

The fact that transgender is a word used to defines a variety of behavioural aspects like Kothi, transman, trans-woman, aravani, genderqueer, for people whose sex identity and/or expression differs from the sex that they are given at birth, especially in India.

Orinam has published an extensive roster of reactions from critics and collectives. In one, the decision is critically analysed in depth and its potential consequences by Gee ImaanSemmalar. The judgement which he calls "puzzled and awkward" brings together a range of trans-gender stereotypes, e.g. all hijras being called "third sex."[33]

The judgment does not address the issues of Trans-men and continually uses offensive phrases such as eunuch to outlaw transgender communities. Transgender organizations are not always the same.Gee ImanSemmalar[34] anticipated many of the conceptualization and execution issues that are now evident with the draft transgender rights law, such as the problem of accreditation or permits: "Would it be mandatory for trans women to obtain third gender identity to benefit from advantages like OBC reservation in employment and education? The method is not evident, nor is it their decision. What does a blanket OBC reservation imply for a society with many dalit transgender individuals? What is OBC classification for inner hierarchies?

He also claims that it is not evident from NALSA's judgement whether sex reassignment surgery is essential to legitimize the state's gender identity. In a published criticism of NALSA's judgement, AniruddhaDutta[35]also notes out that the decision on gender identity is far from straightforward.[36] "At

[32] *Id*at 10.
[33] Supra note at 26.
[34] Gee ImaanSemmalar, Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India, 42 WSQ: Women's Studies Quarterly 286-291 (2014).
[35] AniruddhaDutta, Dissenting Differently: Solidarities and Tensions between Student Organizing and Trans-Kothi-Hijra Activism in E, South Asia Multidisciplinary Academic Journal (2019).
[36] KruttikaSusarla, Trans rights in India : A policy brief , Kruttika.com (2019), http://kruttika.com/work/transrights/ (last visited Sep 29, 2019).

one stage, it mentions the Argentine model that enables self-identification without needing medical clearance, a model that many Transgender protesters praised. But at other times it seems to suggest that' psychological exams' would be essential, which is possibly very difficult considering the limitations of how gender dysphoria treatment operates in psychiatry and medicine.

EDUCATIONAL RIGHTS OF TRANSGENDERS

The' third gender' nomenclature is in itself a problem: it treats sexuality like a ladder in which the queering community takes over the lowest class. It does not alleviate their exact conditions, although it gives them legal recognition, since they remain part of the oppressed section of society and are considered not equal to the other indigenous people.[37] The inclusive principle, which has long been hoped for but has not acted on, is finally successfully adopted by India, which is important also to highlight the various forms of failure, and will be regarded as OBCs for the third sex person. The Indian Supreme Court said that they will receive reservations for education and work as OBCs. Special toilets and departments have to be set up to address their special medical issues by the Supreme Court.[38]

Transgender involvement in schools is a major challenge. It is so difficult to ensure that transgender education offers equal opportunities since there is an inclusion problem with gender students. An environment in which transgender feels safe is needed. Inclusion can have an important role for teachers and community workers. India faces a severe lack of skilled workforce in various industries. Professors and other school members must be provided with professional education and training.[39] The transgender should be given professional training at secondary and high secondary levels in the preparation of their job.

FREEDOM FROM VIOLENCE AND DISCRIMINATION

There are various stages of systemic approaches to decrease violence against trans-person, including accountability of offenders, enhanced legal or political reforms to eliminate crime, and overall support to make the uninformed awareness of Transgenders' problems. Increasing Transgender communities and activist groups' capacity to uphold their liberties can also counters legal protection from

[37]Romi Jain, Education for TheHijras: Transgender Persons of India, 6 Knowledge Cultures 51 (2018).
[38]Selladurai M, Empowering Transgenders Community through Education, SSRN Electronic Journal (2017).
[39]*Id.*

harassment.When Transgender individuals receive legal assistance and entry to legal proceedings, accountability can be enforced against offenders. It can be essential to sensitize the police to turn them into associates. When political will is present in extremely negative environments to promote such efforts, trans-organizations and partners may suggest using global human rights mechanisms, such as secondary reports on UN human rights procedures such as the Universal Periodic Review, to concentrate on problems of anti-trans aggression and other social rights crimes against trans-people.

It is essential to ensure that transgenders are considered equal in the provision of equitable entry to houses, schools, public facilities and job opportunities, the development and implementation of non-discrimination legislation and interventions to protect transgenders in these circumstances, including their protection.

TOUGH ROAD TO BE WALKED AS "THIRD GENDER"

The Supreme Court of India issued a commonly praised decision recognizing Transgenders' right and stating that they should appreciate all the basic freedoms enshrined in the Indian constitution. The judgement–National Legal Services Authority v. Union of India,[40] commonly called the NALSA judgement–offered the central and government authorities wide guidance on affirmative intervention, government hygiene, personal security and other enforcement to be created accessible to LGBTQIA+ individuals.

Following the judgement, the Trans woman came to a local tribunal in her town as a first move towards altering the sex mentioned in her formal papers. According to most records, the Supreme Court acknowledged that they have the right to identify themselves according to whatever they think fit for themselves. Thus it is illegal denying authorities their identities based on whether or not they had surgery as per medical certificate. As she quit, disappointed, she felt her laugh. Other events have occurred since the NALSA decision was adopted in April 2014.

Reports revealed in June 2014 that a transgender person died after an accident as doctors couldn't identify which unit –masculine or woman–to use for therapy. TelanganaHijra Transgender Samiti recorded 40 assaults on transgender people within six months in February 2015.[41]

[40] Supra note at 23.

[41] RamyaJawahar, Why transgender community is struggling in spite of NALSA judgment Dailyo.in (2019), https://www.dailyo.in/politics/transgender-nalsa-judgment-aadhar-card-gender-rights-self-identification/story/1/15462.html (last visited Sep 22, 2019).

In 2015, Human Rights Watch publish information several cases of police mistreatment of transgender people.A latest survey by National research institute was conducted on 60,000 transgender participants in 17 countries has found that police and other law enforcement officials are the greatest perpetrators of transgender violence.[42]

All this, and more, indicates that the alleged paradigm shift that occurred when the April 2014 NALSA decision was adopted has not yet transformed into fact. As the International Commission of Jurists (ICJ) training document on the application of NALSA's judgement states, "Indian Central and State Governments have not yet enacted some of the key instructions laid out in the judgement."[43]AniruddhaDutta, an educational and transgender rights activist, told that "Leave alone the application of concrete measures, even NALSA's essence.[44]

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016

The National Legal Services Authority v. Union of India[45] is a landmark decision of the Supreme Court of India, which proclaimed transgender people a' third gender,' stated that the fundamental rights given under India's Constitution will be similarly relevant to transgender individuals and grants them the opportunity to self-identify their gender as masculine, woman or third-gender. Navtej Singh Johar and other Indian vs. Secretary Ministry of Law[46] and Justice is another landmark decision paving the community's freedoms. This situation decriminalized all consensual sex among personal individuals, including homosexual sex, reaffirming LGBTQIA+ group freedoms. It retained Indian Penal Code Sec 377 as unreasonable, and hence hit. [47]

This decision paved the path for society rights and privacy. Only after these two significant decisions, the legislature gave some time and adopted the 2016 Transgender Person Protection Bill. This Bill also encountered much disagreement as the concept of the word transgender itself was derogatory and guidelines provided by the Supreme Court were not fulfilled in the NALSA judgement. This

[42] National Center for Transgender Equality (2015), https://transequality.org/blog/gender-based-violence-against-trans-women-claims-more-lives (last visited Sep 29, 2019).
[43]AniruddhaDutta, Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights, 5 Journal Of Indian Law And Society 225-236 (2014).
[44]AniruddhDutta, Gender, Women's and Sexuality Studies Clas.uiowa.edu (2019), https://clas.uiowa.edu/gwss/people/aniruddha-dutta (last visited Sep 29, 2019).
[45] Supra note at 33.
[46]Navtej Singh Johar v. Union of India, 76 14961/2016 (2018).
[47]RatanlalRanchhoddas. et al., Ratanlal&Dhirajlal's The Indian penal code 1541 (32 ed.).

proposal was written very poorly. After 27 changes, Loksabha passes the Transgender Person Protection of Rights Bill 2018 and is proceeding before RajyaSabha. This Bill had attempted to rectify the entire 2016 Bill's errors and lacunas, even though the Bill requires much enhancement.[48] The revised definition omits the reference to a' neither male nor female' formulation and covers any person whose gender does not match the gender assigned at birth, as well as trans men, trainwomen, those with intersex variations, gender-queer, and those who designate themselves on the basis of socio-cultural identities such as hijra, aravani, kinner, and jogta. There are all 8 sections in the Bill, but even then this proposal is not farsighted, hardly sufficient to meet society expectations. This issue required severe scrutiny and transparent legislation, but the legislature succeeded.

MAJOR DRAWBACKS OF THE BILL

There is a need to render a glimpse of new introduced Bill on Transgenders rights and also have a discussion related to the chapters which have some textual problems or errors related to their interpretation.

Chapter II talks about "Prohibiting certainacts"it suggests that transgender should be treated equally in terms of public work, education, but it does not mention how to accomplish this objective. So this section has neglected to address the larger query as to how equality can be established.

Chapter III talks of "Recognition of Transgender Persons identity" to be recognized as a Transman / Woman, it recommends a complicated, tedious method. A compulsory sex reassignment surgery must be performed to recognize someone as a man / woman. This is a breach of NALSA's judgement policy.

Chapter V talks about "Obligation of Establishment and Other Person," this section has curtailed transgender liberty of motion, rendering it mandatory to live with relatives at home. Transgender Persons ' battle is not only against the state, but sometimes also against their own relatives who hesitate to recognize and object them to physical and sexual abuse.

The Bill also discriminates on offenses and punishments at Chapter VIII. Severe discrepancies exist in penalties for sexual violence against transgender individuals and females.[49] Where IPC inflicts severe

[48] Danish Sheikh, The New Transgender Bill Fails the Community The Wire (2019), https://thewire.in/gender/failures-of-the-new-transgender-bill (last visited Sep 17, 2019).
[49] Annie Banerji, India's transgender community says new bill violates their rights OPENLY (2018), https://www.openlynews.com/i/?id=4044cfb5-ce3f-4b82-b00e-63adc9758468 (last visited Sep 20, 2019).

penalty for crimes against females, on the other side it only offers for a two-year penalty for transgender people, which is far less (e.g. Section 376 IPC offers for 7 years of rape penalty).[50]

Adding to its faults, the Bill criminalizes Begging's deed. Many transgender groups operate and maintain by praying, which is also a usual social ritual. It's their way of lives to dance, sing, and gain cash.[51]

SUGGESTIONS& RECOMMENDATIONS

The third gender group of India needs to be reformed urgently. Reforms are needed to guarantee that India's third gender is correctly reasoned and free to reside. For their betterment, the suggestions are as follow:[52]

1. The Government and Society must plan and adopt an inclusive attitude to Transgender. Policies are, however, structured but not enforced adequately.

2. There should be a focused strategy to ensure that their issues are addressed.

3. Legal system in relation to problems of the transgender group must be enabled and sensitized.

4. The persons who commit violence towards Transgender should be punished by criminal and judicial intervention.

5. Parents should be rigorously tackled who for their biological distinction neglect, accuse or abandon their Trans kids.

6. For the Transgender society the provision of free legal assistance must be assured and made easily accessible.

7. Schools and Universities must serve an important and positive part in offering transgender education and value.

8. It is necessary to ensure the provision of social rights.

[50] Supra note at 40.
[51] *Id* at 14.
[52] AnithaChettiar, Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police, 5 International Journal of Social Science and Humanity 752-759 (2015).

9. It must be enabled to establish a career planning and advice helpline, professional options and an online investment scheme.

10. Liberal loan and economic support must be assured to begin up your profession as a merchant or entrepreneur.

11. In all personal and government schools and clinics separate health service strategies must be formulated and conveyed.

12. In the society awareness programs must be organized at a mass stage on or for Transgenders.

13. The school curriculum and university curriculum should include a comprehensive sex education program for learners at beginning stage.

CONCLUSION: "FUTURE OF TRANSGENDER IN NEW INDIA"

The LGBTQIA+ community in India had an historic moment in September 2018. Section 377 was struck down by the Supreme Court and enabling sexual relations between adult people of the same sex. It was unlawful before that. That's why for New India doing so was important. It shows a change in the belief and set principles of the society.

This is the first step towards countries that are more integrated and tolerant. Present government emphasized the importance of including the many groups and identities of India, which remained on the fringe under the previous ruling parties in India. More importantly, the present government has recognized that society is changing rapidly and that nobody should be isolated. The Transgenders has gradually but certainly acquired more tolerance and recognition in India over the last five years as part of the new government.

As of 2014, Transgenders started identifying themselves as "Third Gender". On 6 September 2018, with the reference to Section 377 of the Indian Penal Code, the group was legally accepted. Under Indian Law it is not forbidden to make symbolic same sex marriage.

By 2019 Transgender women have the right to record their marriage according to the 1955 Hindu Marriage Act, through the decision of Madras High Court. The Ruling party upheld the Supreme Court's ruling on the decriminalization of homosexuality.

It could be believed that the Transgender community will see greater inclusion, tolerance and eventually normality rapidly with the new government. Since it is a rule of law, people know and must honour the diverse community and group in the society. Those who do not "accord" are still needed by law to do so.

The stigma of the Transgender group will therefore be diminished. The movies are right source to ascertain the mind-set of the society. In early cinema Transgenders were rendered in comic and hatred character whereas in present cinema, many moviespresented true agony of the Transgenders. These movies can be deemed as the changing perspective in the society towards Transgenders or can be considered as right medium to change the outlook of the society towards this community.

Credit must be given to the judgment of Section 377; the society is becoming far more aware and aware of what it speaks for. Transgender groups and alliances for their justice have been found in schools, colleges and universities and are recognized.

The young people of India are the key players to remove this stigma. The enhanced availability, visibility and consciousness of young individuals that did not occur before are of course more respectful. With most of India made up of young people, it does not take long to increase tolerance and respect for this group.

At the end of the day, if we tolerate all groups and diverse identities, New India can really make progress to its fullest potential. Only with regard can tolerance arise. It is up to citizens to understand and respect the Transgenders community as much as any other group, as the Supreme Court establishes the foundation for respect for this community. Contacts with highly different groups and identities have given me a tremendous feeling of tolerance for someone like myself who has been in several cities worldwide. The researcher knows that tolerance for others may not be so straightforward. This disclosure is the easy way to achieve this. The differences among other groups and identities must be learned to our citizens.

In short, New India can only advance to its fullest potential by recognizing, tolerating and respecting all groups of New India likely Transgenders are now included.

Researcher is not in favour of people having to take on accessible weapons distinctions. We must, however, be aware of the differences of each other and show respect. Human beings come in with rigid, uncomfortable mind-sets are the harmful thing that can happen in New India. As we witness in

our democracy, when times are changing, it's important for us to positively adapt changes. Change is worthy of development, to accept and embrace transition. It begins by the person. It extends to a group, then to a society, then to a country.

RIGHTS OVER BELIEFS: THE SABRIMALA TEMPLE JUDGEMENT

Khajit Thukral

Aishwariya Chaturvedi

ABSTRACT

"The best protection any woman can have… is courage"—Elizabeth Cady Stanton[1]

Women, since time immemorial have been the epitome of Power, sophistication and bravery. From fearless attitude in powerful positions to relentless hustle in the household chorus, they carry forward the journey of life beautifully even after facing the never ending stigma of the Patriarchal dominance. In this paper the Author has discussed the landmark judgement of The Sabrimala Temple. The Authors have critically analysed the facts of the case of the dispute entry barriers of Women in the premises of the Sabrimala Temple and the petition related to it. Further, the Authors have critically analysed the Individual Judgement of the Bench and the precedents that have been relied upon them.

At last, the Authors have tried to analyse the overall context of the Judgements along with the series of changes that occurred or have the future possibility to occur after the verdict of Sabrimala and the aftermath and impact of it on the lives of people

INTRODUCTION

1.1 Overview

It is true that Human is the most beautiful creation of God, but the irony is it is also true that the most humiliating creature is also Human. Society was supposed to protect Man, but the society nurtures to impose rules so improper, unjustified and subrogating that it tends to question the very subject matter of life. The history of mankind started with the inception of different theories into different mythological texts, all of which had one similar attribute that women shall be treated as goddess and the irony lie where the same texts stated that women are the vulnerable origin of the society.

"Men, their rights, and nothing more; Women, their rights, and nothing less"- Susan B. Anthony[2], a well-known feminist states that Women have been treated with inequality and inappropriate rationality since the ancient ages. The phrase metaphors it as, in the theatre of life men have given autographs and women does not even have a place of signature. The path of Divinity is full of inequality. The

[1] Available at https://www.britannica.com/biography/Elizabeth-Cady-Stanton (last seen on 04/08/2019)
[2] Available at https://www.britannica.com/biography/Susan-B-Anthony (last seen on 05/08/2019)

world evolved and hence came various activists and feminists in order to fight for the right of women and to fight against the evils of gender inequality and abuse of womanhood by the men.

The ancient Indian historical portfolios have various evidences clarifying that during the 3rd and the 4th Century B.C. the status of women was as degraded as compared to men. Women were not just treated as objects but were also reconciled to be the epitome of the growth of the community. They were given equal educational rights and were also asked in for opinion when required. The status quo of women gradually started deteriorating with the advent of Muslim Era. Although, it has never been clearly interpreted but the holy books of Muslim provide for certain rituals that prove to be the reason for dreading the respect of women in the eyes of men as well as the entire society. The Muslim rulers treated women with sheer disrespect and considered an object of pleasure. This also led to the downfall of the Medieval Muslim period which was later succeeded by the era of British Rule in India, more often called the Modern history or the Pre- Independence period. The British ruled India for 200 years and they ruled the fear in the soul of women for just as double the number of years. Indian women were slaves who nurtured the British family, their kids and their choruses. Although, the British colonials also helped curb the ill- hypocrisies prevent in India during the late eighteenth and the nineteenth and twentieth centuries including female foeticide, female Infanticide, Sati, Menstrual Dilemma, abuse of minor girls in Child marriages, Immature pregnancies, forceful adoptions, parda system, to name a few.

India gained Independence in the mid- twentieth century and ever since, the inception of various legislations, it is shocking how the stratum of women is still the same as the Middle aged illiterate times. One such disbelieve has recently been treated by the apex court of justice proving that nothing stands unequal when it comes to the home of the Lord, birth the Judicial lord and the Almighty. The relationship of Human with the creator is beyond all the artificial boundaries and does not sustain on negotiations and terms and conditions. The Constitutional tests do not recognise the socio- cultural myths and the psychological and biological rigidities. Pure devotion shall not be minted by the patriarchal beliefs of the religion and one shall not be restricted in following, practising and professing one's own religion and beliefs.

The Universe accepts the truth that faith and religion go hand in hand but cultural and religious practices sometimes ungratefully inclined towards the patriarchy thereby enunciating the garbage of suppression and inequality in the name of God. People need to understand that religion is just a way of life and a path of one's approach to serenity and closeness to divinity.

1.2 THE REFERENCE

A writ petition was filed under Article 32 of the Constitution of India seeking issuance of directions against the Government of Kerala, Devaswom Board of Travancore[3], Chief Tantri of Sabrimala Temple and the District Magistrate of Pathanamthitta.

- To ensure entries of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabrimala in Kerela as this has been denied to them in lieu of certain local customs.
- To declare unconstitutional Rule 3(b) of the Kerela Hindu Places of Public Worship (Authorization of Entry) Rules, 1965[4] (hereinafter mentioned as "the 1965 Rules") which was framed in exercise of the power conferred by Section 4 of the Kerela Hindu Places of Public Worship (Authorization of Entry) Act, 1965[5] (hereinafter mentioned as "the 1965 Act") as it is violative of Article 14, 15, 25 and 51A(e) of the Constitution of India.

The three judge bench in the present writ petition '**Indian Young Lawyers Association & Ors. V. State of Kerela & Ors**[6]., observed the following list of events:

- **Year 1951**

The Travancore Devaswom Board who are the sole administrators of the hill shrine of the Sabrimala Temple issue the following notification, restricting the entry of women in the Sarbrimala Temple premises:

[3] Available at http://travancoredevaswomboard.org/ (last seen on 06/08/ 2019)
[4] Available at https://indiacode.nic.in/bitstream/123456789/9853/1/7a.pdf (last seen on 07/08/2019)
[5] Available at https://indconlawphil.wordpress.com/2018/09/28/the-sabarimala-judgment-i-an-overview/amp/ (last seen on 07/08/ 2019)
[6] **(2017) 10 SCC 689** Available at https://indiankanoon.org/doc/163639357/ (last seen on 08/08/2019)

"In accordance with the fundamental principle underlying the ***prathishta*** *(installation) of the venerable, holy and ancient temple of Sabarimala, Ayyappans who had not observed the usual vows as well as women who had attained maturity were not in the habit of entering the above-mentioned temple for Darshan (worship) by stepping the Pathinettampadi. But of late, there seems to have been a deviation from this custom and practice. In order to maintain the sanctity and dignity of this great temple and keep up the past traditions, it is hereby notified that Ayyappans who do not observe the usual* ***Vritham*** *(vows) are prohibited from entering the temple by stepping the* ***pathinettampadi*** *and women between the ages of ten and fifty five are forbidden from entering the temple."*[7]

- **Year 1991**

It was for the first time that the Kerela High Court upheld the age old monotonous restriction on the entry of women aged between, 10-50. The two judge bench held that the prohibition by the Travancore Devaswom Board (administrators of the shrine) does not violate the Constitution or the Act of 1965 as the ban did not commute a class but only women between a certain age group.

- **Year 2006**

A well famed astrologer conducted an assignment in the temple called Devaprasnam and declared that he found the evidence of the entry of a women into the Temple.

A Kannada actress- politician Jayamala publicly claimed that she had entered the Sabrimala Temple premises and even touched the idol of the deity as a part of a film shoot at the age of 28 and claimed that all of this was done in the connivance of the Priest, in the year 1987

- Year 2008

A PIL was filed by a group of Female Lawyers raising the issue of ban of the entry of women in the Sabrimala Temple and the same supported by the Kerela Government by way of an affidavit.

- Year 2016

A PIL was filed in the Supreme Court of India by The India Young Associations contending that Rule (b) of the Kerela Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 stated the following:

[7] Supra 4.

"***Rule 3***: *The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bathe in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situated within or outside precincts thereof, or any sacred place including a hill or hillock, or a road, street or pathways which is requisite for obtaining access to the place of public worship-*

(a) Persons who are not Hindus.

(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.

(c) Persons under pollution arising out of birth or death in their families.

(d) Drunken or disorderly persons.

(e) Persons suffering from any loathsome or contagious disease.

(f) Persons of unsound mind except when taken for worship under proper control and with the permission of the executive authority of the place of public worship concerned.

(g) Professional beggars when their entry is solely for the purpose of begging."[8]

In the Rule, sub clause (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship completely violate Article 14, 15, 17 and 21 of the Constitution of India which guaranteed equality, non- discrimination and religious freedom.

An affidavit was again simultaneously filed by the Left Frontier Government of Kerela which favoured the entry of Women in the premises of the Sabrimala.

It was in the year 2018, that the five judge Constitutional bench of the Supreme Court headed by the Chief Justice of India, Deepak Mishra, J., pronounced a landmark judgement by a 4-1 Majority, on the Sabrimala Temple's practice of barring entry of Women between the age of 10 and 50 as per Rule 3(b) of the Kerela Rules, 1965 marking it as Unconstitutional.

[8] Supra 5

1.3 ISSUES FRAMED

The following questions were framed by the learned bench after recording all the submissions by the learned counsel for Petitioners and the learned counsel for the Respondents and the learned Amicus curiae for the purpose of reference to the Constitutional Bench:

1) Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by morality as used in Articles 25 and 26 of the Constitution?[9]
2) Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?[10]
3) Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?[11]
4) Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?[12]
5) Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and, if treated to be intra vires, whether it will be in violation of the provisions of Part III of the Constitution?"[13]

THE HISTORICAL JUDGEMENT

[9] "*Young Indian Lawyers Association v. Union of India (2017) 10 SCC 689*", Available at https://sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf (last seen on 09/08/2019)
[10] Supra10.
[11] Supra10.
[12] Supra10.
[13] Supra10.

The author has made an attempt to discuss the judgement into four broad parts. The paper shall further discuss the judgement of different learned justice in individual parts for the between understanding of the reader.

2.1 PART- I

(JUDGEMENT BY CJI, DEEPAK MISHRA AND A.M. KHANWALIKAR, J.)[14]

1. The Constitution Bench in the case of "**Indian Young Lawyers Association & Ors. V. State of Kerela & Ors**."[15] gave various given factors and previous judgements in order to embark the present Writ petition. The five judge bench sought the assistance of various Amicus Curiae; the two eminent with the present circumstances are Mr. Raju Ramachandran and Mr. K. Ramamoorthy, Learned Senior Counsels.
2. The Bench analysed the entire case with the help of previous decisions of the Kerela High Court as discussed Further:
    - **S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram and others**[16]

Similar contention were raised in the abovementioned case, and the Division bench of the High Court of Kerela, upheld the restrictions on women as to barring of entry into the Sabrimala Temple between the age group of 10 to 50 years, during any time of the year. The High posed framed various issues for discussion, such as:

a. Whether women between the age group of 10 to 50 years be permitted to enter the Sabrimala Temple at any period of the year and during the time of festivals and poojas?[17]
b. Whether the denial of the same is in violation of Article 15, 25 and 26 of the Constitution of India?[18]

[14] Supra7.
[15] Supra7.
[16] **AIR 1993 Kerela 42**, Available at https://indiankanoon.org/doc/1915943/ (last seen on 10/08/2019)
[17] Available at https://indiankanoon.org/doc/1915943/ (last seen on 11/08/2019)
[18] Supra10.

c. Whether the court has the power to issue directions to the Devaswom Board and the Government of Kerela in the matter of restriction of the entry of women to the temple?[19]

The following questions were recorded with conclusions:

a. The restriction so imposed on women aged between 10 and 50 years from visiting the premises of the Sabrimala Temple and offering worship is in accordance with the usage prevalant from time immemorial.
b. The restrictions imposed by the temple authorities are not in violation of the Article 15, 25 and 26 and hence not Unconstitutional in nature.
c. The restrictions are also not in violation of the constitution in a way that it does not prevent any one or another section or any one particular class or classes of people and thus only restricts of entry of women of a certain age group and not Women as a class, altogether.

3. The Petitioners submitted various contentions on their behalf cited various case laws, in order to support their case. The following cases and their respective decisions were cited:
   - **Sardar Syedna Taher Saifuddin Saheb v. State of Bombay[20],**
   - **Raja Bira Kishore Deb v. State of Orissa[21],**
   - **Shastri Yagnapurushadiji and others v. Muldas Bhundardas Vaishya and another[22]; and**
   - **S.P. Mittal v. Union of India and others[23]**

The Court had discussed the concept of religious denomination. The petitioners contended that merely because of difference in practices at different Hindu Temples does not construed separate religious denomination. Hence, the petitioners stated that the practices at the Sabrimala Temple does not construed to be a separate religious denomination but the everyday ceremonies like the Puja performed is similar to any other Hindu place of Worship and the same is governed by the Travancore-

[19] Supra10.
[20] **(1962) Suppl. 2 SCR 496**, Available at https://www. galcrystal.com/case/642186/sardar-syedna-taher-saifuddlein-saheb-vs-state-bombay (last seen on 12/08/2019)
[21] **(1964) 7 SCR 32**, Available at https://www.casemine.com/judgement/in/5b65a2ba9eff430bc0f90e12 (last seen on 13/08/2019)
[22] **(1966) 3 SCR 242: AIR 1966 SC 1119**, available at https://www.legalauthority.in/judgement/shastri-yagnapurushdasji-vs-muldas-bhudardas-vaishya-36215(last seen on 14/08/2019)
[23] **(1983) 1 SCC 51**, Available at https://indiankanoon.org/doc/312939/ (last seen on 16/08/2019)

Cochin Hindu Religious Institutions Act, 1950' which is a statutory authority and has been vested with the powers alike by the government.

4. The Petitioners placed further reliance on the following case law:
    - **The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt**[24]

The Court had entailed reliance on the Doctrine of Religion giving freedom under Article 26 stating that whatever is protected under the law are only the essential part of the religion and not every practice of Denomination per se. Hence, the petitioners stated that before questioning the practices of religious denomination under the constitution it shall be ascertained whether the pith and substance of the same is of the nature that would make it an essential part of the same.

5. The Petitioners further took the help of the following case law to ascertain the position of Constitutional question of law in the matter:
    - **Durgah Committee, Ajmer v. Syed Hussain Ali**[25]

The Court clarified that clause (c) and (d) of Article 26 does not create any new right in favour of the religious denominations but only safeguard such rights. The religious sacraments may include various ill practices such as superstitions and concluding from the same the petitioners contemplated that the ill practices of shall be protected under the ambit of Article 26 (c) and (d) of the Constitution.

There were various other contentions given in order to substantiate the imposition of the restriction on women from entering the Sabrimala Premises. The Petitioners though state various possible reasons to not let the women in the temple and defend the counter contentions by stating that mere site of a women does not amount to requisitioning the celibacy of the temple, however, the temple authorities to cover the same by stating that it was believed that women did not have the physical strength to trek the dense forests and difficult hill clusters for weeks and therefore, the practice of not permitting them into the temple was started.

6. The following judgement was cited to deal with the question of religious denomination:

[24] **(1954) SCR 1005**, Available at https://indiankanoon.org/doc/1430396/ (last seen on 17/08/2019)
[25] **(1962) 1 SCR 383**, Available at https://www.scobserver.in/court-in-review/essential-religious-practices?slug=durgah-committee-ajmer-anr-vs-syed-hussain-ali-ors (last seen on 18/08/2019)

- **Sri Venkatramana Devaru v. State of Mysore and Ors.**[26]

The case was cited to state that religious denomination does no the authority to exclude or restrict any more class or classes of person or sections at all times. The entire purpose of religious denomination is that it might restrict a class of person in cases of certain rituals. The petitioners further contemplate that religious denomination may include ritual such as restriction or prohibition on entry of women into the temple premises during the night time or after sunset and before sunrise, which would amount to reasonable denomination, but citing a complete bar on the entry of women is arbitrary and unjustified.

7. There were various Interveners in the said Writ Petition so filed and contested that the restriction on the entry of women aged 10 to 50 is in complete violation of Article 14 of the Constitution for a classification does not have the constitutional object. The applicant further contemplated that according to the language of Article 14 of the Constitution of India, any law so made in the territory of India shall have two important elements that is the existence of Intelligible Differentia and must bear a rationale nexus in order for it to all under the ambit of a valid law. Hence the intervener averted that in the following case the polluting of the idol of the deity due to touch of a female is regarded bias and completely in contravention of the right to equality and liberty. Though, it can be stated that intelligible differentia can be established in case of Menstruation, yet there is no reasonable and rational discretion behind the same, as the same shall be held unconstitutional.
8. The Interveners supported the argument by referring to the following case:
    - **Deepak Sibal v. University of Punjab and another**[27]

The intervener with the help of the aforementioned case stated that any exclusionary practice of religion in the name of 'per se' does not constitute a rational objective and thus is in contravention with the constitutional provisions. They also averted that the burden to prove that the following practice at the Sabrimala Temple was not unconstitutional, which they had failed to establish.

9. The Interveners further stated the following case:

[26] **(1958) SCR 895: 1958 AIR 55**
[27] **(1989) 2 SCC 145**, Available at https://india.lawi.asia/deepak-sibal-and-ors-v-punjab-university-and-anr-2/ (last seen on 18/08/2019)

- **Shayara Bano v. Union of India & Ors**[28]

The Court had held that mere psychological factors do not constitute a valid practice of the law and hence it violates both the object and the purpose of the law. The practice at the Sabrimala Judgement is exclusionary in nature and hence is arbitrary.

10. The applicant placed further reliance on the following judgement to question the validity of the law with respect to Article 15 (1) of the Constitution:
    - **Anuj Garg and others v. Hotel Association of India and others**[29]
    - **Charu Khurana and others v. Union of India and others**[30]

    The applicant averted that to establish gender bias in any form is Unconstitutional. It was further stated that averting that the women of 10 to 50 would be polluted and untouchable creates a mental stigma over the women and thus affect their psychological health. The imparting of the title of Untouchable is also restricted under Article 17 of the Constitution and that the said practice which is prevalent in the Sabrimala Temple is against the provisions of Article 17 of the Constitution.

11. The following case included a total of four Respondents against whom the case of Ill subrogating practices was filed. The Respondents were: The Government of Kerela (Respondent No. 1), The Travancore Devaswom Board (Respondent No. 2), Pandalam Royal Family (Respondent No. 3). The Chief Tantri (Respondent No. 4)

12. Respondent No. 1 (The government of Kerela) has had a different version of story and stand since the year 1955.
    a) On 13.11.2007 they filed an affidavit in favour of the PIL standing for the rights for the women and disapproved of the discrimination against women.
    b) On 05.02.202016, the said affidavit was changed averting that the affidavit so filed earlier stands in contravention to the decision of the Kerela High Court.

[28] **(2017) 9 SCC 1**, Available at https://www.escr-net.org/caselaw/2018/shayara-bano-and-others-v-union-india-and-others-writ-petition-c-no-118-2016 (last seen on 20/08/2019)
[29] **(2008) 3 SCC 1,** Available at https://indconlawphil.wordpress.com/2014/02/20/grounding-a-progressive-jurisprudence-of-sex-equality-anuj-garg-v-hotel-association/ (last seen on 20/08/2019)
[30] **(2015) 1 SCC 192,** Available at https://www.casemine.com/judgement/in/58117ec52713e179478b8cae (last seen on 21/08/2019)

c) On 07.11.2016, when a query was made by the Court, the government stated that it wanted to stand with its original affidavit.

Hence, It was stated that the decision of the Government stands contradictory to itself at given number of times and has no reliability that can be established on the same.

13. Respondent No. 2 and 4 did not take help of any legal proposition but had simple codified the history of the establishment of the Temple and the birth of Lord Ayyappa. The Respondent stated that Sabrimala was born as a result of the relation of two male gods, Lord Shiva and Mohini, the female avatar of Lord Vishnu. They also emphasised on the Ph.D. thesis of Ms. Radhika Sekar of the University of Ottawa, Ontario which averted that the very reason of the existence of the Sabrimala Temple was based on strict penance and celibacy. The Respondent also drew attention towards the fact that the Ayyappa Temple is only open at certain period of time during the year and that is not open for pilgrimage throughout the year.

The Submissions of the Petitioners, The Respondents and the Interveners and the Counter Submissions of each party so involved in the case diverted the Court towards the aversions of the learned Amicus Curiae of the Court. The Submission of the Learned Amicus Curiae leaned towards the Constitutional validity of the Rules 3 of the Rules of 1965 and thus the following averments were made:

- **Learned Amicus Curiae, Sr. Advocate Mr. Raju Ramchandran and Learned Amicus Curiae, Sr. Advocate Mr. K. Ramamoorthy**

The Ld. AC with the help of the Submissions of the parties and precedents and upon his own differentia submitted that the Temple of Sabrimala is a place of Public Worship where the members of the public has a lawfully intended right which is not restricted to any religious denomination or any such part of the denomination, whatsoever. With regard, to the Freedom of Religion under Article 25, he mentioned that the right to practice and profess any religion provided that it is not unlawful and is recognised by the Constitution. He further stated that Article 25 also encompasses the ambit of freedom to every person to freely practice the religion and the same is not discriminatory. Thus, shall be provided to both men and women professing the same faith.

14. After analysing the Facts and Circumstances of the case, examining the Submissions of the Applicant/ Interveners, Respondents as well as the Ld. Amicus Curiae of the Court, The two judges CJI Deepak Mishra and J. A.M. Khanwalikar, the issues so framed were concluded in the following manner:

    1) The Devotees of Lord Ayyappa does not constitute a separate legal denomination as they do not have common religious tenants, the tenants are conducive and have been formed for their own convenience which are immoral as all the other tenants are common to other Hindu Places of Worship.
    2) Article 25 (1) of the Constitution embodies the word "all persons" interpreting it as each and every human being, whether a man or a woman has the equal right to profess and practice the religion of his/her choice and that mental or psychological factors does not have any stand, especially when it comes to the sanctity of a Women.
    3) The arbitrary practice being carried on the Sabrimala Temple is in violation of the Right and Equality of Women to practice any religion in any manner and thus is violative of the Constitution of India.
    4) The Rule 3(b) of the Rules of 1965 which establish the restriction on entry of women between the age of 10 to 50 is in violation of the Article 14 and 25 (1) of the Constitution of India.

The Court thus struck down the 1965 Act and Rules in contravention to the Constitution, giving Women non- discriminatory access to The Sabrimala Temple and enjoyment of their right of Religion and equality.

2.2 <u>PART- II</u>

(<u>JUDGEMENT- R.F. NARIMAN, JUSTICE)</u>

1. The present Writ Petition is filed raising the questions on violation of the Fundamental Rights of women in Article 25 and 26 of the Constitution of India by Rule 3(b) of the Hindu Temples and Places of Public Worship Act, Rules, 1965 formulated under Section- 3 of the Act of 1965, which contrasted that Women between the age of 10 to 50 into the premises of the Temple of Sabrimala, the deity of Lord Ayyappa.

2. The earliest judgement so stated which deal with the aforementioned questions is:

   - **Nar Hari Shastri and others v. Shri Badrinath Temple Committee**[31]

   A Representative Suit was filed under Order 1 Rule 8 of the CPC, 1908 on behalf of all the Deoprayagi Pandas who sought the Court for the declaration that they cannot be restricted from entering into the precints of the temple of Badrinath. The Court held that the right of the plaintiffs of entering the temple is a legal right and not a permissive or special right which shall be granted by the discretionary authorities of the Temple. Such entry into the temple was an exclusive legal right and the same can be exercised subject to restrictions so imposed by the temple administrators in good faith, for ensuring the safety, maintenance and security of the Temple Premises.

3. In chronological and the earliest to the latest, the next case that the judge cited was:

   - **The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**[32]

   In this case, the Court covered the ambit of Article 25 and 26 of the Constitution dividing it into three parts. In the first part the court dealt with the interpretation of Article 25 with respect to the Individual rights contained in Article 25. In the second part the court dealt with the definition of 'religious denomination' and what institutions fall under it as per Article 26 of the Constitution of India. In the third part the court dealt with what constitutes "'religion", "religious practices" and "essential religious practices" and its difference from "secular practice". Keeping in view the denominations from the same, the Court concluded that Freedom of Religion constitutes not just freedom of beliefs but also freedom of practice. As per, Article 25 (b) and (d) of the Constitutions, the religious denominations and institutions have arbitrary right over the practices and rites to be performed in the temple and no outside authority shall interfere with such right or power and the interference of the same would amount to the infringement of their rights.

4. Following the above mentioned judgement another close heel judgement was thus recognised:

   - **Ratilal Panachand Gandi v. State of Bombay & Ors.**[33]

[31] **AIR 1952 SC 245,** Available at https://indiankanoon.org/doc/801837/ (last seen on 25/08/2019)
[32] (**1954) SCR 1005**
[33] **(1954) SCR 1055**, Available at https://www.legalauthority.in/judgement/ratilal-panachand-gandhi-vs-the-state-of-bombay-and-others-and-connected-appeal-2838 (last seen on 25/08/2019)

In this case, two connected appeals were filed by the manager of the Jain Swetamber Public Temple and the Parsi Panchayat (trustees) questioning the constitutional validity of the Bombay Trust Act, 1950 and the same was dealt by the court under Article 25 and 26 of the Constitution. The line of issue was what shall be denoted as the matters religion and what shall not be denoted as the same? The Court concluded by connoting the judgement in the Madras case whereby Article 25 and 26 shall be entailed with respect of the right to religion related to not just belief but also the practice.

5. The next judgement that was focused upon was the famous Mulki Temple:

   - **Sri Venkataramana Devaru and Ors. v. State of Mysore & Ors.**[34]

In this case, the Venkataramana Temple was initially known to be formulated for certain Gowda Saraswath Brahmin but with due course of time it had become an open place of worship for all the Hindus. It was later found that the temple premises had excluded all the other ceremonies except for those of the rites of the Gowda Saraswath Brahmin Community, and so it was held that the same was in violation of the worship rights of the public under Article- 26 of the Constitution.

6. Various other Precedents were taken into account why discussing the issue of applicability of Article 25 and 26 along with the definitions of religious denomination, but one very interesting fact that came forward was an affidavit by the Chief Tantri of the Sabrimala Temple on 23.04.2016. The affidavit states that there were two Brahmin Brothers from Andhra Pradesh who were tested by the Rishi Parsuhram and names as "Tharanam" and "Tazhamon" and that the Tantri is in the lineage descendants of the Tazhamon. He gave various excerpts from various ancient texts of different religion, in which different versus called for different words to state the impurity that Women extradite during the time of Menstruation including the Bhagvata Purana, the Holy book of Qu'ran, The Bible, etc. It was although, the most recent texts of Sikhism and Baha'i' Faith, a positive and pragmatic approach towards menstruation has been taken into account. The Sri 'Guru Granth Sahib' deemed menstruation be a natural process considering it free from impurity and the most pure and essential form of procreation.
7. Hence, keeping in view the contentions of the Applicant and the Respondents and taking into account all the Precedents, it was concluded by the Court that:

[34] **(1958) SCR 895**, Available at https://www.casemine.com/search/in/sri%20venkataramana%20devaru (last seen on 26/08/2019)

1) It was contested that in order to establish a religious denomination there are three necessary requirements that are to be fulfilled that there must be people who have common faith, a common organization and are designated by a distinct name. When called for the answer of the three, it was concluded that the Sabrimala Temple did not constitute to be a separate religious denomination.
2) The practice of usage is hit by Section 3 of the Act of 1965 and it has been clear that the Act has been formed under Article 25 (2) (b) of the Constitution and hence is in violation of Section 25(1) and Section 3 of the said Act and must be struck down.
3) The right of religious practice of Women between the age of 10 to 50 is envisaged by the Constitution and the local Act and Rules of Kerela has been obstructive and not in mandate with the Constitutional Provisions safeguarded under Article 25 (1) of the Constitution of India.
4) The judgement was thus concurred with the judgement of the learned CJI and hence the custom and rituals restricting the entry of women in the Sabrimala Temple was help in violation of the Constitution. Further that rule 3(b) of the Rules of 1965 and Section 3 of the Act of 1965 were rules unconstitutional and were repealed.

1.4 PART- III

(JUDGEMENT- Dr.Dhananjay Y. Chandrachud, J.)

The judgement so concluded was divided into 11 affirmative parts.

1. Our preamble envisages the importance of Equality of status as well as Equality of opportunity. It also upholds the dignity and fraternity of the citizens. The main aim of constitution is to give effect to the transformation of society as society is evolving continuously. It will be a question mark on the Judiciary and the quest for equality shall fail if the women are not given the right to entry in the temple.

2. The concept that Lord Ayyappa derives his powers by being celibate and Sabrimala temple depicting Lord as "Naishtika Brahmacharya" is popularly believed in Kerala. The birth of the Brahmacharya is embarked by the union of Lord Shiva and Lord Vishnu.

3. A certain time period has been stated when the temple shall remain open and is categorised in three phases;
    a. The month of Mandalam.
    b. First 5 days of Malayalam month.
    c. At the time of Makar Sankranti.

Features of the pilgrimage are also stated as follows;

a. The pilgrimage only allows womenwhe of age either less than 10 or more than 50 to take part in the temple rituals.
b. Even though it is a Hindu temple, it neither bars male members of any religion nor of any age.
c. The journey of pilgrimage is preceded by a course of 41 days, in which a person is obliged to refrain from meat and any other forms of intoxication. It also lay down that the devotee should observe celibacy.

4. Temple entry

a. The history of the entry of the Sabrimala temple and the restriction so imposed dates back to the issuance of two notifications by the Travancore Devaswom Board in the year 1955.
b. Then with the detailed analysis of Section 3 and 4 of the Act of 1965 it was established that the entry of Women between the age group og 10 to 50 years is banned.
c. The legality of the of ban was sought with the help of the case **S Mahendran v The Secretary, Travancore Devaswom Board, Thiruvananthapuram ("Mahendran")**[35]**,** wherein a Public Interest Litigation was filed and entertained by the High Court and on the basis of that petition the ban on entry of Women in the Temples was upheld.

5. Reference was given on the following issues
    a. Whether biological discrimination on the right of women's entry affecting the principles of Article 14, 15 and 17? Whether the practise is not protected by "morality" under the ambit of Article 25 and 26?
    b. Can a religious institute enjoy non-interference under Article 25 and deal with the affairs itself?
    c. Does the Sabrimala temple have denominational character? Also, since the state is providing funds, can it indulge in the affairs of the religious institution?

[35] Supra8.

d. Whether Rule 3 of the act would be unconstitutional for violating the principles embedded in Article 14 and Article 15(3)?

e. Whether the Rules are ultra vires of the Act? Whether the rules will affect Part III of the Constitution?

6. The Submissions before the court that the restriction on the entry of women aged between 10 to 50 is unconstitutional on the following grounds:

a. Under Article 26 of the constitution, the devotees do not form a religious denomination.

b. Under the essential religious practice test, the ban on women's entry is invalid.

c. As per the Devaru case, Article 25 and Article 26 should be in conformity with each other.

d. Rule 3(b) of the Act violates the provisions of Article 14 and Article 15 of the constitution.

7. Essential religious Practices- Whether the Sabrimala Temple practices fall under this category?

a. The doctrine describing the essential religious practices was for the first time concurred in **Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Shirur Mutt ("Shirur Mutt)[36],** wherein the Court under Article 26 (b) allowed a religious denomination to manage its own affair when it comes to the matters of religion and also framed a question related to ambit of the definition of 'matters of Religion'.

b. They also concurred that Right to religion does not just include right to liberty of opinion but also the right to use necessary means in order to practice the same.

c. Similar approach was followed in **Ratilal Panachand Gandhi v State of Bombay,[37]** and in the matter of **Sri Venkataramana Devaru v State of Mysore[38].**

d. The analysis of the list of precedents gave rise to the conclusion that Article 25 (b) though give rights to practice the profession in a desired manner but it also should also be ensured that the exception of practice of a certain custom or practice from time immemorial cannot be granted as a valid defence and hence, the practice of restricting women to rightfully enjoy their freedom to practice and profess any religion is being violated.

8. Religious Denomination

[36] Supra33.
[37] Supra34
[38] Supra35

a. One of the major contentions of the Sabrimala Temple was the grant of freedom to Religious Denominations under Article 26 of the Constitution. The Court held that the rights granted under Article 26 are unqualified and un interpreted rights and are contradictory in nature with that of Article 25.
b. It was later relied upon the Shirur Mutt case, where it was held that three tests shall be applied in order to determine whether a religious administration is a common religious denomination i.e., (i) existence of religious sect or body; (ii) a common faith and; (iii) the existence of a distinctive name.
c. The Court thus considering the inability of the individuals to enunciate the judicial requirements, the devotees of Lord Ayyappa cannot be constituted as a 'religious denomination'.

9. Article 17 and the notions of Untouchability

a. The very notion that women are impure during the menstrual period in it is a negation of the Untouchability that counts. Article 17 of the Constitution prohibits any kind of title in order to deteriorate or demolish the status of a any person in the society.
b. It was thus held that the notion of Untouchability of Women during Menstruation is a practice that violated the very nature of Article 17 of the Constitution and thus was held invalid.

2.4 <u>PART- 4</u>

<u>(JUDGEMENT BY INDU MALHOTRA, J.)</u>

1. Gender rights activists (registered association of Young Lawyers) pivoting on issues of sexuality, gender equality and justice, and menstrual discrimination in the light of the local custom which imposes restriction on the entry of women aged between 10 to 50 years in the Sabarimala Temple in Kerala, have brought the matter before the apex court in general public interest.

2. In this Petition, the Constitutional validity of Rule 3(b) of the 1965 Rules, as being ultra vires vide Section 3 of the 1965 Act, has been challenged and for the unrestricted entry of female devotees aged between 10 to 50 years, issuance of a Writ of Mandamus has been prayed directing the State of Kerala, the Chief Thanthri of Sabarimala Temple, the Travancore Devaswom Board and the District Magistrate of Pathanamthitta.

3. Advocate Mr. R.P.Singh and Senior Advocate Ms. Indira Jaising represented the following contentions on the behalf of the Petitioners:

   a. Centuries old custom of restricting the women's entry in the the Sabarimala Temple of Lord Ayyappa, backed by the codification of Rule 3(b) of the 1965 Rules and Travancore Devaswom Board 's notifications are violative of Articles 14, 15 and 21 of the Indian Constitution. Article 14 is affected due to arbitrariness practise which does not uphold any valid object and is merely based on physiological aspects.
   b. The object of Article 15(1) of the Constitution has failed due to the practise being based on gender only. Similarly the practise defeats the provisions of Article 15(2)(b) as Sabarimala Temple, being a place of worship for the general public and is partly funded by the state government under Article 290A of the Constitution.
   c. Every Individual is guaranteed with the Fundamental Right to profess any religion or not to follow any religion at all under Article 25 of the constitution. Based on the ground the 1965 act had been passed and it nowhere restricts the entry of women in public temples.
   d. Restricting the entry of women under Rule 3(b) of the 1965 Rules is in contradiction with the Act.
   e. The petitioners submitted that the devotees of Lord Ayyappa do not form a religious denomination under Article 26 as they are not unified and the Sabrimala temple does not have exclusive followers. This contention was backed by the decisions of the apex court in:

      - **Sardar Syedna Taher Saifuddin Saheb v. State of Bombay**[39]
      - **Raja Bira Kishore Deb Hereditary Superintendent, Jagannath Temple, P.O. and District Puri v. State of Orissa**[40]
      - **S.P. Mittal v. Union of India & Ors.**[41]

[39] **1962 Supp (2) SCR 496: AIR 1962 SC 853**, Available at https://indiankanoon.org/doc/510078/ (last seen on 29/08/2019)
[40] **(1964) 7 SCR 32: Air 1964 SC 1501**, Available at https://indiacode.nic.in/bitstream/123456789/5950/1/shri_jagannath_temple_act%2C_1955.pdf (last seen on 30/08/2019)
[41] **(1983) 1 SCC 51**, Available at http://thelawbrigade.com/constitutional-law/case-comment-on-s-p-mittal-v-union-of-india/ (last seen on 04/09/2019)

f. Supposedly, if Sabrimala temple is considered as a religious denomination, it is still not necessary to restrict the entry of women.

g. Imposing upon women that they are polluted due to menstruation and treating them as untouchables, violates the provisions enshrined under Article 17 and Article 21 of the Constitution.

h. Both men and women have equal right to enter the temple and as a citizen of the country, their right under Article 25 (1) cannot be discriminated upon. Also Article 25(2) provides for the substantive right wherein the restriction on the entry of women cannot be practised unless supported by any spiritual evidence by the Respondents.

i. Relying on the "impact test" laid in Bennett Coleman & Co. & Ors. v. Union of India & Ors., it is submitted that discrimination is only based on biological factor.

j. Lastly, it is submitted that the morality dealt under Article 25 and 26 is deemed as constitutional Morality.

4. **The Ld. Amicus Curiae presented the following submissions before the Court**:

- Travancore Devaswom Board, being a statutory body, manages and administers the Sabrimala temple and it clearly states it's usage for the benefit of the devotees. Hence, it falls under the scope of "other authorities" under Article 12 and thus it is the duty of the state to enforce the Fundamental Rights.
- Rule 3(b) of the 1965 Act is not only in contradistinction with Section 3 but also Section 4 of the 1965 Act as it discriminates on the grounds of class and section in the society.

5. Submissions presented by the Respondents:

a) The State Government cannot independently declare any custom invalid unless and until the final decision of the High Court is reserved, it is because any issues arising in the question of facts cannot be resolved without the proper examination of evidences.

b) Asserting the case of **Riju Prasad Sharma & Ors. v. State of Assam & Ors**[42] it was stated that ban on women's entry in the temple is a religious custom followed since a long time and hence reserves it's protection under Article 25 and Article 26 of the constitution.

c) This practise is centuries old and is backed by beliefs and customs. Respondents explained the origin and principles followed by the temple and how mandatory it is for them to follow this practise.

[42] **(2015) 9 SCC 461**, Available at https://supremecourtofindia.nic.in/jonew/judis/42764.pdf (last seen on 05/09/2019)

d) Emphasis was laid down that a custom when followed for a long time in continuity and accepted by the general public becomes the law of the society.
e) It is just a partial restriction on certain age group and is not a total restriction.
f) Women may go to other temple as Sabrimala temple involves a certain form of deity i.e. 'Naishtik Brahmachari'.
g) By the view of court in **Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan & Ors**[43]., it was argued that Religion does not merely provide a code of ethical rules but also modes of following the rituals and ceremonies for its followers. Hence such conditions are an integral part of the religion.
h) The contention of treating women as "Untouchable" is merely alleged disability and should be rejected.

6. After observing arguments of both parties of the Writ Petition, taking into account all the relevant tests and doctrines and examining the relevant case laws, it was held that the Writ Petition cannot be entertained:

1) The implications of this judgement would not only affect the people of Kerala but the entire nation.
2) Though the provisions of Article 25 confer freedom of conscience but are subject to certain restrictions as well.
3) Religion is a matter of faith and the petitioners should come to the court in the capacity of devotees in order to enforce their claim under Article 32, which however was not affirmatory.
4) Through the arguments of Senior Advocate A.M. Singhvi, it is evident that a lot of temples in India are following various restrictions.
5) Purview of Article 14 has to be viewed differently in the matter of religion.
6) As per Article 25(1) tenets of certain faith should be respected and followed.
7) Limited restriction on women's entry in temple does not violate the very essence of Article 17.

[43] **(1964) 1 SCR 561**, Available at https://www.legalauthority.in/judgement/tilkayat-shri-govindlalji-maharaj-vs-the-state-of-rajasthan-and-others-37090 (last seen on 12/09/2019)

8) Essential practise test has been applied as laid down in **Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** [44]and **Ratilal Panachand Gandhi v. The State of Bombay & Ors.** [45]

OBSERVATION AND CONCLUSION

3.1 Conclusion

The Sabrimala Temple case is one of the most important decisions that avert the importance of providing Equality and Equal Status to Women. India, from the very nature of its existence, has been devastated and respected both geographically and culturally, at the same time. The world is evidence that the cultural diversions of Indian are drastic in every consequent part of the Country. Religion, faith, belief all go hand in hand with the evolutionary human era but all that glitters is not always gold. India, since many years have been surrounded by Ill- faith, beliefs and superstitions, which in various ways cost the people and especially women and children. One of the most prominent of which was and has been the psychological factors constituting the impurity of women during Menstruation. The Sabrimala Judgement thus can be concluded by dividing it into different derivations. The aftermath of the Judgement, however created immense havoc in the State of Kerela which resulted in Strikes, Riots etc. The same was followed by a drastic flood which reiterated the entire situation of the State.

- In my personal view, it was highly effective of the bench to put forth the right of equality, as it is of acute importance in a secular country like India, where Democracy is the life and bread of the Nation.
- It has been of widespread conclusive that different religions have different beliefs and thus different way of professing and practicing the same. Although, the Constitution of India guarantees the freedom to every Individual to practice one's own religion it thus shall be according to the permissible boundaries of the Constitution.
- Rule 3(b) and Section 3 of the said Rules and Act of 1965 were Ultra Virus in nature and were in violation of Article 25 of the Constitution. The Rule imposed immediate restriction on the entry of Women between the age group of 10 to 50 at any given period of time.

[44] Supra34
[45] Supra25

- The said Rules were also in violation of Article 17 of the Constitution of India as Article 17 prohibits Untouchability and the Hindu Rites and Customs had an age old customs of considering women Impure during the Menstruation period. This not only infringed the provisions of Article 17, but also had a negative psychological imposition on the women of that particular age.
- The religious denomination in all the aspects was set forward by different perspective. Wherein the majority of judges decided that the Sabrimala Temple was not a separate religious denomination due to various factors including which was the most common factor that apart from the restriction on entry of women, all other practices and rituals of the Temple were common to those of the other Hindu places of public worship, however, at some point the view point of Justice Indu Malhotra, stood affirmed that the practices of Sabrimala were different due to the presence of Naishtik Brahmachari and the born and brought up environment of Lord Ayyappa which was not common to other Temples and hence the same is a separate religious denomination.

The ruling of the Supreme Court has thus attracted much praise, but at the same times more Criticism. It can be conferred that the young India is profound and has grown beyond the religious sanctities of the nation, but the age old traditions are still rooted in-depth into the blood of the Indian Communities. Religion has always been one of the greatest pillars of strength for the people, but it is also important to understand that with the growing age and evolving times, the narrow creations of false superstitions must be side walked and a new dawn of light can be nurtured. The Sabrimala Judgment has established one of the greatest examples proving the fact that even in a religious diverse nation like India Rights still stand over the Beliefs, and that a human being shall always conquer the ill faith that pollute the goodwill of the country & the people.

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SEXUAL HARASSMENT AT WORKPLACE

Nikhilesh Koundinya

ABSTRACT

Sexual harassment as a term has become extremely popular over the last decade in a negative way. The menace of sexual harassment arises due to various factors such as male ego, sexual objectification, insecurity amongst men etc. and is a direct result of the patriarchy which has existed in the world for a considerable amount of time leading to the concept of male dominance. The paper will cover the reasons for sexual harassment and will look into why incidents like this take place at the workplace. The paper will further go on to examine the cases under Indian law which promulgated specific regulations to counter this problem and will briefly look into the Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013 which was passed by the Lok Sabha on 3rd September 2012 and by the Rajya Sabha on 26th February 2013. In conclusion the paper will prove why such laws are needed while arguing for making prevention of sexual harassment as a gender neutral law.

INTRODUCTION

The United Nations has recognised sexual harassment as a form of discrimination and violence against women. In fact under the General Assembly resolution 48/104 on the Declaration on the Elimination of Violence Against Women defines violence against women to include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere (Art. 2(b)), and encourages development of penal, civil or other administrative sanctions, as well as preventative approaches to eliminate violence against women (Art. 4(d-f)).[1] By this definition we can clearly observe that sexual harassment includes workplace of any women and encourages nations to form provisions to tackle the problem. The Indian law being inspired by this definition has defined sexual harassment of workplace in the Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013 which states that sexual harassment refers to unwelcome sexually tinted behaviour, whether directly or by implication, such as: -

(i) Physical contact and advances,
(ii) Demand or request for sexual favours,
(iii) Making sexually coloured remarks
(iv) Showing pornography,
(v) Any other unwelcome physical, verbal or non-verbal conduct of a sexual nature[2]

[1] UN Women, virtual knowledge centre to end violence against women and girls, sources of international law related to sexual harassment (November 24, 00:33), https://www.endvawnow.org/en/articles/492-sources-of-international-law-related-to-sexual-harassment.html
[2] Section 2(n) of the Prevention of Workplace Sexual Harassment Act

There are two reasons necessarily how sexual harassment takes place. This can also be referred to as the types of sexual harassment. The first type of sexual harassment is "Quid pro-quo". When translated in English it means " a favour for a favour". The way it is used in workplaces is when an employer induces his workers or any individual to provide him with sexual favours in return of a promotion or preferential treatment in the organisation. Under section 3 clause (2) of the Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013 also called the (POSH) act it has been mentioned that when preferential treatment is promised by the employer in exchange of sexual favours it amounts to sexual harassment at workplace.[3] If the employee does not agree to this and refuses to provide sexual favours in exchange of a promotion then the employer takes the second step which is to either the punish the employee with an excessive workload or refuse promotion even though all criteria is met and the worst being removal or dismissing an employee on false grounds such as low performance or misconduct. Here also the employee can appeal to the court by filing a case as the POSH act states under section 3 clause (2) sub clause (ii) and (iii) that any detrimental behaviour by the employer or threat by the employer to the employee regarding her employment status may also amount to sexual harassment. Under the ambit of the POSH act an employer may be described as a person who is responsible for the management, supervision and control of the workplace.[4]

Another way sexual harassment is promulgated is by hostile working conditions. This means that the environment at the workplace makes it impossible for women to continue their employment in that particular organisation. There are certain examples of this problem such as unwelcoming sexual behaviour against the women which makes it difficult for her to work. Under the POSH act this also amounts to sexual harassment as mentioned under section 3 clause (2) sub clause (iv) which states that any employer who interferes with the work of an employee by creating a hostile environment or intimidates the employee will be held responsible[5]. An example of intimidation may be when a man is harassing a women he is necessarily not annoying her but reminding the women of her vulnerability which makes it difficult for the women to do her job.[6]

Another example of hostile environment would be derogatory remarks regarding the colour of the female, describing the dressing sense of a female sexually, writing or forwarding emails containing sexual content including pornography or making noises which are sexual in nature such as the sound of kisses through ones lips. It is believed that such sexual behaviour in a normal

[3] Section 3(2) of the Prevention of Workplace Sexual Harassment Act
[4] Section 2(g) of the Prevention of Workplace Sexual Harassment Act
[5] Section 3(2) of the Prevention of Workplace Sexual Harassment Act
[6] William Petrochelli and Barbara Kate Repa, Sexual Harassment On The Job: What It Is & How To Stop It, (4th edition)

circumstance will lead to the women feeling uncomfortable and this kind of treatment is bound to affect the health and stability of a woman's life. The women is protected by the POSH act which mentions under section 3 clause (2) sub clause (v)[7] any employer who humiliates the women leading to bad heath and feeling unsafe would have committed the act of sexual harassment.

Earlier the concept of sexual harassment was not as concrete as it is now. The concept was perceived differently by different individuals. The society as a whole believed that after a point of time you have to "sleep with someone" to advance your cause in an organisation. Thus there were three reasons why sexual harassment in the workplace actually became a global phenomenon as we know it today. The three key points are: -

1. Earlier an individual particularly a man felt that he was entitled to certain things in his life which included food, clothing, shelter and employment. But later man also started feeling that he was entitled to be close with the people he works with. This concept grew further where the man finally started believing that he was entitled to touch and hold a women physically as she works for him or with him.
2. In India there always existed the problem of " hiding facts". This means that whenever a women was sexually assaulted at her workplace she did not reveal anything to the outside world due to the fear of embarrassment and a bad name for the family. Revealing such information would also have made it difficult for the family to get the girl married and even if this happened the family would have been required to pay a huge amount of dowry as a consolation for acceptance of the girl.
3. The final reason why acts multiplied in the future was that men were not held liable for their acts and were never corrected by his family members. In fact there are many cases in which the women was still held responsible even though the man may have been in a position of power and may have committed the act without the consent of the women. In fact in one of the cases where the women approached a senior to complain about her manager's sexual advances the senior dismissed her from her role. In another case that took place in 2012 a former Haryana minister and businessman was held responsible for sexually assaulting an airhostess of his airline. He went underground for ten days after the publication of this news and later surrendered himself. He came out of jail one and a half years later and again joined a political party.[8] This goes to prove that though the man was

[7] Section 3(2) of the Prevention of Workplace Sexual Harassment Act
[8] Gopal Kanda- accused of rape and abetment of suicide, tax fraud; has taken the "right" call in joining BJP, National Herald, 25th October (2019)

arrested for sexual assault yet a year later he came back and was supported by people and was brought back to power which shows us that in the Indian scenario though a man commits the act of sexual assault yet he is not ostracised by society the way a woman is.

For all these reasons women hesitated to complain against sexual harassment and this is why sexual harassment started growing in the workplace. But a question to be asked is why do men indulge in such practices when they clearly understand what they are doing is false? The answer to this question is multi- dimensional: -

- Male Ego

In the olden times there was a system of patriarchy all around the world. Patriarchy as a concept refers to a social system in which men are predominantly in power and head all important institutions of society. They were considered to be the bread winners of the family and thus enjoyed a high self-esteem in society. Women on the other hand were looked down upon as individuals who depended on men for their existence. This indicates that there were some traditional roles in society and then suddenly there was a wave of feminism which questioned these roles. The wave advocated for equal rights and opportunity in society for both men and women. This changed the perception of men in society and took a hit of their respect and esteem in society.

- Insecurity in men regarding their position in the workplace

In the ancient times as stated before men enjoyed sole authority in the matters of employment and due to not facing any competition they became complacent and very confident in certainty of their jobs and position at work. But this was changed by the feminist drive for economic equality. Though women's entry into jobs was a result of necessity since many families could not make ends meet if the husband and wife did not work full-time yet it was perceived as a threat by men. Thus men started using sexual harassment as a way to harass women to express their resentment and try to reassert control as they started viewing women as economic competitors.

TESTS FOR SEXUAL HARASSMENT

There were two tests conducted by different researchers covering the ambit of sexual harassment. The first test was conducted by John Maner and Kunstman. In this experiment they had 74 participants who were divided into teams of two. They were later told to do an exercise where one person acted as a superior and the other was the subordinate. The test was conducted to see whether sexual arousal was a result of one person dominating the other and having the power to

do so. The test concluded that "power over an opposite-sex subordinate led to heightened perceptions of sexual desire from the subordinate." In turn, this led to the leader engaging in "greater sexualized behaviour within a face-to-face social interaction" with his partner.[9]

Another test was conducted by John Pryor who was a professor at the department of psychology in Illinois state university. He conducted the test in 1987 to reason out why men sexually harass females. His test was called "likelihood to sexually harass"[10] where he had 10 scenarios to judge how the man would react to these and whether he had an intention to harass. Through his experiment it was proved that a man in power is more likely to dominate the women if he believes that she owes him something for his job.

Slowly there has been a change in the way society looks at sexual harassment at workplace. We have started developing laws that protect women and allow them to speak up regarding any unwanted advances or gestures made against them without the fear of losing their job or facing problems in their employment. In fact the trend started changing in the early 1990s and specifically in India, companies started paying attention to the menace of sexual harassment. In one of the cases the CEO of Infosys was removed out of his position after two women brought a suit for sexual harassment at workplace and the company settled the case for 3 million dollars and fired the employee. Though the employee denied that he was involved in any sexual behaviour yet an inference could be made to the fact that no company will settle for such a large amount without any proof.[11]

THE VISHAKA JUDGEMENT

The change under the Indian scenario came in the year 1992 because of the Vishaka Judgement.[12] Sexual harassment under the UN has always been seen as a form of discrimination and under Indian law also it is seen as a phenomenon that promulgates discrimination between genders which is violative of fundamental rights under the Indian constitution. But the government did not pay enough attention to the menace of sexual harassment until the Vishaka judgement. The facts of the case are that there was a women named Bhanwari Devi who was a social activist/ worker in one of Rajasthan's villages. She was against the concept of child marriage and tried to stop the

[9] Miami University, In light of international headlines, psychology professor's research on sexual harassment receives renewed attention (November 24, 13:40 PM), https://miamioh.edu/cas/about/news/2018/01/kunstman.html
[10] William Wan, What makes some men sexual harassers? Science tries to explain the creeps of the world, Washington Post, December 23 (2017)
[11] Phaneesh Murthy, Wikipedia free encyclopaedia (November 24 13:23 PM), https://en.wikipedia.org/wiki/Phaneesh_Murthy
[12] Vishaka and Ors. V State of Rajasthan AIR 1997 SC 3011

marriage on an infant which was later performed. After this she was gangraped by the members of that family in front of her husband. She was taunted by the police constables in the station and the doctor refused to examine her. The trial court dismissed the case whereas the high court reversed the decision stating that gang rape had taken place. The case was taken to the supreme court by NGO's and women activists. The supreme court delivering the judgement stated that the women was entitled to a healthy working environment and was fundamentally guaranteed a safe working sphere under article 19[13] of the Indian constitution. This case led to the formation of the Vishaka guidelines where the courts developed regulations defining sexual harassment at workplace, providing steps to tackle the problem and punishments for perpetrators. The main aim of the supreme court was to ensure gender equality among people and also to ensure that there should be no discrimination towards women at their workplace. The Vishaka guidelines laid down the following rules: -

1. Express prohibition of sexual harassment as defined under the judgement must be communicated to every employee and employer in the workplace through notification, publication and circulation in appropriate ways. This means that every person in an organisation must understand the seriousness of the offence and must be cautioned about the punishments that will be pronounced if found guilty.
2. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
3. If any of the offences are in relation to the Indian Penal Code (IPC) then the organisation will make sure that such punishment is given to the person by handing over the person to the concerned authority. In fact under the IPC there are certain sections that relate to sexual harassment which are: -

   Section 354A[14]

   Sexual harassment is unwelcome physical contact and advances, including unwanted and explicit sexual overtures, a demand or request for sexual favours, showing someone sexual images (pornography) without their consent, and making unwelcome sexual remarks.
   Punishment: Up to three years in prison, and a fine.

[13] Article 19 (1)(G) Constitution Of India, (Right To Practice Ones Profession)
[14] Indian Penal Code, section 354 A (1860)

Section 354B[15]

Forcing a woman to undress.

Punishment: From three to seven years in prison, and a fine.

Section 354C[16]

Watching or capturing images of a woman without her consent (voyeurism).

Punishment: First conviction – one to three years in prison and a fine. More than one conviction – three to seven years in prison and a fine.

Section 354D[17]

Following a woman and contacting her or trying to contact her despite her saying she does not want contact. Monitoring a woman using the internet or any other form of electronic communication (stalking).

Punishment: First conviction – up to three years in prison and a fine. More than one conviction – up to five years in prison and a fine.

4. The most important aspect of the Vishaka guidelines was to develop a complaint mechanism. As discussed before there were many women who did not report acts of sexual assault as they were scared of the repercussions it may have on their employment. Thus under the guidelines it was laid down that an appropriate complaint mechanism should be created in the employer's organisation for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

POST VISHAKA- OTHER JUDGEMENTS

Vishaka was probably the key that unlocked the doors to the problem of sexual harassment. After Vishaka many women came out in the open and started taking the help of the law due to facing situations which were mentioned under the Vishaka judgement as sexual harassment. The first case after the Vishaka Judgement involved the supreme court holding a superior officer liable for harassing a junior female employee.[18] In this particular case the supreme court enlarged the definition of sexual harassment stating that for suing under sexual harassment physical contact was not considered to be necessary. The court also held that any act or attempt by a superior to molest the female may also amount to sexual harassment. This meant that a superior creating a hostile

[15] Indian Penal Code, section 354 B (1860)
[16] Indian Penal Code, section 354 C (1860)
[17] Indian Penal Code, 354 D (1860)
[18] Apparel Export Promotion Council V A.K Chopra, (1999) 1 SCC 759

environment for the female or overburdening her due to her refusal of giving sexual favours also amounted to sexual harassment.

In subsequent cases it was seen that due to the Vishaka Guidelines many women raised their voices regarding sexual harassment in the workplace. But in one of the cases it was pointed out that the guidelines were not being effectively implemented.[19] A letter was changed into a writ petition and the court ordered each state to show as to what it had done to uphold the Vishaka guidelines and any person who felt threatened still could approach the high court of that respective state directly. It ordered states to follow the steps to prevent sexual harassment as was laid down under the Vishaka judgement. Under the case of *Mrs. Rupan Deol Bajaj v Kanwar Pal Singh Gill*[20] it was laid down that any kind of harassment or inconvenience to a woman's private or public life will amount to the offence of sexual harassment.

In the case of *Patel Rajendrakumar Natavarla vs State Of Gujarat*[21] it was held that State functionaries and private and public sector undertakings/ organisations/bodies/institutions etc. shall put in place sufficient mechanism to ensure full implementation of the Vishaka guidelines and further provide that if the alleged harasser is found guilty, the complainant - victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred.

Under the case of *Union of India V Nisha Priya Bhatia*[22] it was held that The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the Vishaka guidelines. Similarly, Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by Vishaka. On receipt of any complaint of sexual harassment at any of the places referred to above the same shall be dealt with by the statutory bodies in accordance with the Vishaka guidelines.

Under a recent case heard in 2017[23] the court held that statement of the victim must be appreciated in the background of the entire case. The court in this particular case held that if the

[19] Medha Kotwal Lele and Ors. V Union of India and Ors. (2012) INSC 643
[20] 1995 SCC (6) 194
[21] R/CR.RA/341/2018
[22] W.P.(C) 2735/2010
[23] Sri Pankaj Kumar V Union of India W.P.(CRL) 3008/2018 & CRL.M.As. 33406/2018, 2262/2019 & 2271/2019

victim's testimony inspires confidence which happened in the present case then the courts are obligated to rely on it. An unmarried lady officer of CRPF, in her probation period made the complaint against her official superior for harassing her in different way making remarks in respect of her performance alleging that he will crush her and will ruin her career etc. The conduct/behaviour of the petitioner gives a clear impression that he behaved with the respondent in the manner as alleged only because she was a lady officer subordinate to him. There is nothing else to make any other inference from the facts and circumstances of the case. This testimony clearly inspires the confidence of the court to take action as it clearly implies sexual harassment under the POSH act and according to the Vishaka guidelines.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

It is a legislative act in India that seeks to protect women from sexual harassment at their place of work. It was passed by the Lok Sabha on 3 September 2012 and by Rajya Sabha (the upper on 26 February 2013. The Bill got the assent of the President on 23 April 2013. The Act came into force from 9 December 2013. This statute superseded the Vishaka Guidelines for prevention of sexual harassment introduced by the Supreme Court of India. The various features of the act are: -

1. One of the main features of the act is regarding the definition of an "aggrieved women". Any women can file for sexual harassment irrespective of her age, employment status, whether she is in the organised or unorganised sector etc. this means that the act covers all women and extends to the entire country including Jammu and Kashmir.
2. Under the Vishaka judgement workspace covered only traditional office but under the POSH act of 2013 workspace also covers organisations, departments, units in any sector of any industry. In fact in one of the cases the Delhi high court[24] held that workspace cannot include only your traditional set up where an employer and employee work together but stated that in the advent of digitalisation work from home as a concept has been rapidly growing where sitting at his/her residence a person can either communicate with his employer or employee. In fact there are CEO's who communicate through electronic medium to their employees sitting at their residence. Hence if a person sexually assaults an employee in his residence the term workspace will also apply to a person's home.

[24] Saurabh Kumar Mallick V Comptroller and Auditor General of India decided on May 9, 2008 [Citation not available]

INTERNAL COMPLAINTS COMMITTEE

3. One of the most important developments in the act was the setting of an Internal Complaints Committee (ICC) in every organisation for the redressal of complaints raised by women in the course of employment regarding sexual harassment. The committee would consist of one presiding officer, members and an external member. The term of these members shall not exceed 3 years. The presiding officer will be a women at the senior most level of the organisation. The members will not be less than 2 and will be from the organisation. The selection of these members will depend upon their experience with social work and the legal knowledge they posses about sexual harassment as a concept. Finally there will be an external member from an NGO or an organisation committed towards eliminating sexual harassment. It is the duty of the female to report the happening of harassment within three months of the incident. The committee should finish the enquiry within 90 days and must submit a report within 10 days of the completion of such enquiry.
4. When a woman wants to complain about any wrongdoing against her the committee under section 10 will try to resolve the matter amongst the people involved. Such matter should not be resolved through monetary compensation. If the woman refuses for conciliation then the committee under section 11 will institute an inquiry into the incident and find out whether there is prima facie evidence that can be made out in the case. If so the committee will hand over the case within seven days to the police under section 509 of the Indian Penal Code. Under the process of the enquiry the committee shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely:-

   (a) summoning and enforcing the attendance of any person and examining him on oath
   (b) requiring the discovery and production of documents
   (c) any other matter which may be prescribed.[25]

It has also been held in one of the cases that once the committee makes a decision regarding whether the act amounts to a punishable offence under law the management has no right to change the decision or influence the decision.[26] It is the responsibility of the management to follow the direction given and the management can only decide the type of punishment to be given. In one

[25] Section 11 clause (3) sub clause (a),(b) and (c)
[26] The Management Of Christian vs Mr.S.G.Dhamodharan W.P.No.29012 of 2018

of the cases the committee found a person guilty under sexual harassment and the management dismissed the employee.

For universities there was a procedure laid down in a particular case where the court held that when someone complains about sexual harassment in a university the following rules will apply: -

- Two persons to be nominated by the Vice Chancellor from a panel prepared by the Committee.
- One person with known contribution to gender issues to be nominated by the Vice Chancellor.
- The Chairperson (woman) to be nominated by the Vice Chancellor.[27]

Under section 14 of the act if it is found by the internal committee after their enquiry that the allegation made by the women is malicious or the complaint was made by the woman even though she knew it is false then the committee may recommend to the employer to take action against the woman in relation to the rules and regulations of the organisation. In one of the cases the same incident took place where the court instituted contempt of court due to no evidence being presented by the woman of sexual assault. Under the case the doctor could not be convicted of sexual assault as his timings were different to the lady and they had never interacted.[28]

The POSH Act prescribes the following punishments that may be imposed by an employer on an employee for indulging in an act of sexual harassment:

i. Punishment prescribed under the service rules of the organization
ii. If the organization does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service
iii. Deduction of compensation payable to the aggrieved woman from the wages of the respondent.[29]

The POSH Act also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on:

[27] Meenakshi V University of Delhi,1989 SCR (2) 858
[28] Dr. Punita K. Sodhi vs Union Of India & Ors. W.P. (C) 367/2009
[29] Section 13 of the Prevention of Workplace Sexual Harassment Act

i. The mental trauma, pain, suffering and emotional distress caused to the aggrieved employee
ii. The loss in career opportunity due to the incident of sexual harassment
iii. Medical expenses incurred by the victim for physical/ psychiatric treatment
iv. The income and status of the alleged perpetrator
v. Feasibility of such payment in lump sum or in instalments.[30]

If the organisation fails to appoint an Internal Complaints Committee (ICC) there is a penalty of 50,000 rupees imposed on it and the organisation should immediately constitute a body for redressal of complaints. A repetition of the same offence could result in the punishment being doubled and/or de-registration of the entity or revocation of any statutory business licenses.

PROBLEM WITH THE POSH ACT

Under the POSH act all the laws are made with reference to women and to protect interests of women. The act fails to consider that in the 21st century even men can be sexually assaulted and no Indian law provides them the protection. This also carries with it another problem as it does not set a bar for what classifies as sexual assault. There is a growing tendency in the judiciary and the police system where if the women feels threatened an immediate enquiry is ordered into the problem and more or less the man is convicted. The law does not stop to understand the perspective of the man and is inclined towards women. Under one judgement it was stated that Complaints Committee to be headed by a woman and had also directed that 50% of members of the Complaints Committee should be female and exactly same is the composition of the Committee set up in Ordinance XV-D of the University which provides that the Chairperson is to be elected from amongst the members and would be a woman and at least 50% of the members in each of the categories specified in the Ordinance should be women. This indicates that the Ordinance was intended to apply only to the cases of sexual harassment of women and inquiry into the allegations of sexual harassment of males was not envisaged when the Ordinance was promulgated. In the growing era of offences taking place against men the act should be made gender neutral to include the other gender also.

[30] Section 15 of the Prevention of Workplace Sexual Harassment Act

CONCLUSION

Sexual harassment at workplace is highly prevalent in India and there is a need to provide a positive environment to the women workers. New strategies should be made by the employers and managers to protect the organisation from this evil. Government and employers should ensure that women should be treated equally and gender discrimination should not take place at the workplace. Effective implementation of the policies can reduce the manifestation and mutilation of the sexual harassment to the minimum. One organisation can alter its approach to handle sexual harassment by viewing other organisations tactic. This will reduce or eliminate glitches caused by this harmful transgression. In the end only thing is left to say which is that women should not accept anything as it is because now it's the time to speak out against all the injustice done to them.

"Six of one, and half a dozen of the other"- Exploitation of section 498A

Muskan Verma

Sanskriti Shalini

ABSTRACT

India being world largest democratic country is known for its laws regarding equality and non-discrimination. To promote the concept of this equality many gender specific laws were introduced such as domestic violence act, 498A IPC, Triple talaq bill, The Dowry Prohibition Act, 1961. etc. but sometime the provisions which are meant to be of protective nature and ameliorative becomes a source of injustice and harassment. Many women protective legislatures particularly 498A is infamous for its notoriety. Women in the under the label feminism and empowerment tend to harass their husband and in-laws.

The cases filed in the court under 498A or domestic violence act by women against her husband and her in laws are mostly for claiming maintenance money under 125 of CrPC or other kinds of remunerations. This section has created a law which are discriminatory and unjust against men as well as women who are actually the victims and is suffering from these kinds of social evil. Due to these false cases men not only has to face legal sanctions that is only on the basis of complaint by the women her husband and in-laws can be prosecuted under s.498A which can penalise the accused for not less than seven years and can extend to life imprisonment, but also the stigmatization of society which in some cases leads to suicide attempts as well as mental health issues such as depression, anxiety etc. Increasing number of false cases of Dowry harassment against the husbands is now become so serious that the Government of India is proposing to amend Sec 498A to make the offence as 'compoundable'.

This research paper seeks to analyse various reports submitted and judicial decisions and trends in nexus with section 498A and how it is necessary for legislators to ament the laws in such a way so as to curb its misuse.

Keywords**: -** Domestic violence, dowry, Equality, harassment, Legislature, misuse

BACKGROUND

The position of women in society is the best way to determine the progress and development of that country. The Constitution of India provides freedom in order to live a life of dignity for all its people, in particular those oppressed by Article 15. In addition, India has ratified international conventions such as the Convention to Eliminate All Forms of Discrimination against Women (CEDAW). India therefore got special laws for females to counter this imbalance. In India many campaign and moments

were held by women's organisations to amend the provisions into more women protective ones, due to which new changes were introduce especially in IPC, Dowry prohibition act, Domestic violence act etc. but as every laws is underutilised or abuse same is the conditions with these laws that on one hand the women who are underprivileged or uneducated can't get access to these rights and on other hand there is growing and widespread notion of these laws being used by daughters-in-law or women to hold their in-laws for maintenance money .

Now a days, in-laws and husbands are seeking the help of various organisations and authority about the harassment they face or go through due to misuse of laws especially 498A and 406 of IPC.

BACKGROUND AND COMMITTEE REPORTS

Section 498A: Cruelty by Husband or Relatives of Husband

Whoever, being the husband or the relative of the husband of a woman, subjects such a woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: for the purpose of this section, 'Cruelty' means:

a) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the women; or

b) Harassment of the women where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security is on account of failure by her or any person related to her to meet such demand.[1]

The criminalization of violence against women in India initiated a massive propaganda campaign by women's rights groups and female activists across the world in the initial 1980s. This movement received great impetus, particularly after the Supreme Court's much-criticized judgment in the Mathura rape case.[2] The request for the criminalization of dowry death and violence against women

[1] < https://www.ncib.in/pdf/indian-penal-code.pdf> accessed on 10 November 2019
[2] Tukaram vs State of Maharashtra (1979), 2 SCC

resulted in the effective implementation of Sec 498A in the IPC in 1983, Sec 304B in 1986 and in the Indian Evidence Act, 1872. [3]

It was held in ***Kaliyaperumal v. State of Tamil Nadu***, [4] that in offenses under both IPC provisions 304B and 498A, violence is a general element. The two parts are not mutually compatible, yet both are separate offenses and individuals exempted under Section 304B for dowry death offense may be prosecuted for an offense under IPC Section 498A.

Section 304B doesn't really include its definition, but Section 304B also incorporates the concept of oppression or abuse as set out in Section 498A. Within section 498A of the IPC, violence alone contributes to an offense while, under section 304B, dowry death is an offense and killing must have happened within seven years of being married. However, Section 498A does not specify any such time.

Types of cruelty described through this provision includes following:

(a) Cruelty by vexatious lawsuits

(b) Cruelty by neglect and excessive behaviour

(c) Cruelty by constant demand

(d) Cruelty by extra-marital relationships

(e) Harassment by non-dowry demand

(f) Cruelty by non-acceptance of baby girls

(g) Cruelty by unfounded attacks on chastity

(h) Removal of children [5]

The law was enacted by legislature to provide protection to women who are subjected to cruelty by their husband or his relatives.

[3] Jayna Kothari, "Criminal Law on Domestic Violence: Promises and Limits", Economic and Political Weekly, Vol. 40, No. 46 , pp. 4843-4849

[4] 2003 Cri L.J.4321 (SC)

[5] Dr. Prativa Panda, "Constitutional Validity of Section 498A of Ipc", Indian journal of applied research Volume: 6, Issue: 3

CONSTITUTIONAL VALIDITY OF SEC 498A

The Indian Government is liable for ensuring that all its people are protected in order to live a life of decency and integrity, particularly the most traditionally exploited. Article 15 under the Indian Constitution and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), that India acknowledged the discriminatory position of women and hence making special laws for women to counter this injustice. Sections 498A, 304B, Dowry Prohibition Act (DPA) and Protection of Women Against Domestic Violence (PWDVA) are all laws addressing the gender nature of gender inequality and also highlight the government's stance that marital institutions are not excluded from State interventions, particularly when abuse against females occurs within these systems. The constitutionality of Section 498A is repeatedly called into question.[6]

Inder Raj Malik and others v. Mrs. Sumita Malik[7],this case is claimed section 498A to be ultra vires to the Articles 14 and 20(2) of the Constitution. There is the Dowry Prohibition Act, which sometimes deals with specific sorts of cases; thus, together, these laws create a system popularly known as double threat Nevertheless, Delhi High Court dismissed this claim and stated that this provision did not create a condition of dual threat. Section 498A is distinctive from Section 4 of the Dowry Prohibition Act as in the former pure request for dowry is illegal and there is no need for dimension of cruelty, while Section 498A concerns with the enhanced nature of the violation. It penalizes the wife or her family with such requests for property or essential protection as are synonymous with violence to her.

This provision provides the courts wide discretion in determining the terms that appear in the laws and also in penalty matters. This is not an ultra-virus clause. It will not give discretionary authority to the courts.

In case of ***Sushil Kumar Sharma vs. Union of India,*** A petition was lodged pursuant to Article 32 of the Constitution to find Section 498A unlawful or ultra-vires so that the victims completely innocent people cannot be convicted of false charges [8].In regard to this argument hon'ble Supreme Court ruled that, "if a statutory provision is otherwise intra-vires, lawful and legitimate, mere possibility of abuse of power in a given case would not make it intolerable, ultra-vires or unconstitutional. In

[6]Ibid 5
[7] 1986 (2) Crimes 435; 1986 (92) Cr LJ 1510
[8]2005 (6) SC 266

such instances, "action" may be vulnerable, not "chapter". If so, the court can still set aside the action by upholding the rule of law; order or decision and give the aggrieved person appropriate relief."

Justices Arijit Pasayat and H.K. Seema on July 20 2005, of the Supreme Court acknowledged Section 498A Constitutional. The goal is to strike at the dowry danger root. But a new legal terrorism can be unleashed by abuse of the law. The law is meant to be used as a shield rather than the arms of an assassin. If the cry of "wolf" is made too often as a joke, when the real wolf appears, assistance and security may not be available, the Bank said. The Act's non-compound power is a principled position it takes and is vital to the context in which it was passed, i.e. aggression is in no way negotiable and undesirable. Any alteration to Section 498A, to put it mildly, would revoke the constitutional obligation of Articles 14 and 15(3); the State will fail to produce its expected objective of gender equality. The courts have affirmed the legitimacy of the separate law and executive actions for women (e.g***. in Laxman Ram Mane Vs. State of Maharashtra[9], Nripen Roy and others v State of West Bengal[10]; Satya Narayan Tiwari @ Jolly & Anr. Vs. State Of U.P[11]; Inder Raj Malik And Ors vs Sunita Malik[12]; Gurbachan Singh vs Satpal Singh & Ors[13]***).It could be noted that, via the Criminal Procedure Code (CrPC) Amendment Bill 2010, the police are now subject to limitations on arrests; the detention can only be carried out after thorough investigation into the alleged matter.

MISUSE OF LEGISLATION

Since adopting s.498A, it has been limited to a means for bullying and trivial requests, no regardless of how good the legislature's purpose could have been. Misappropriation of women's orientated laws are nothing new that has not yet been proposed for remedial approaches. Nonetheless, there are several committee reports that discussed and recommend many of these issues, especially the national crime report, the report of the Justice Malimath Committee and several law commissions reports.

NATIONAL CRIME REPORT 2012

NCR is the annual publication of the National Crime Records Bureau "Crime in India 2012" was released in the first week of June 2013, well ahead of the target date 30th June, 2013. Publication of

[9] (2011)1SCC (Cri) 782
[10] C.R.A. No. 397 of 2008
[11]<https://www.lawyersclubindia.com/judiciary/Satya-Narayan-Tiwari-Jolly-Anr-Vs-State-Of-U-P-2877.asp> accessed on 15 October 2019
[12] 1986 CriLJ 1510
[13] 1990 AIR 209

crime in India is a significant document that offers extremely beneficial country crime statistics. NCRB has undertaken several steps to update the "Crime in India" format to have more IPC crimes as well as other special exemptions to satisfy the requirements of various parties. Such a report would help us determine preventive measures and legislative initiatives to prevent such heinous acts. Crime in India publication is a vital tool in the hands of such researchers, criminologists and officers of criminal justice system in the county as it provides ample statistical data to conduct such studies. The NCRB 2012 Report demonstrates the extent to which the section is misused. As per the report, the rate of charge-sheeting was as high as 93.6% while the conviction rate was as low as 15%.[14]

JUSTICE MALIMATH COMMITTEE REPORT

- The Committee was created by the Ministry of Home. It has been led by both the Karnataka and Kerala High Courts Justice V.S. Malimath, former Chief Justice. The panel proposed that statements produced before a police officer be admissible as evidence in a criminal court. The Committee further recommended that a National Judicial Commission be formed and that Article 124 be amended to appeal to courts are less difficult. 158 guidelines had been made by Malimath committee was addressed at the annual conference of Police Directors General (DGP) conducted early this month in Tekanpur, Medhya Predesh wherein Prime Minister Narendra Modi was attending. The Centre is revising the committee report.

  As per the study, on even a trivial act, a FIR might be lodged in less accommodating reckless woman. As a result, the husband and his wife may be immediately arrested and a termination or job loss may occur. The crime has been claimed to be accidental, innocent people stagnate in detention. e husband is unable to pay, there might be a maintenance statement contributing fuel to the flames. She might change her attitude and get into the mood forgetting and forgiving. The partner may recognize the errors incurred and come forward for a caring and cordial partnership to turn a new leaf. The woman might want to try resolution. Yet given the legal barriers, this might not be feasible. Even though she wants to amend by dismissing the petition, as the crime is non-compoundable, she cannot do anything. Therefore, this segment does not support the woman or the spouse. The crime is non-bailable and non-compoundable creates the prejudice and suffering of an innocent family. Callous clauses that make the crime

[14] <http://ncrb.gov.in/StatPublications/CII/CII2012/Compendium2012.pdf> accessed on 14th September 2019

irrefutable and irrefutable work against accruals. Furthermore, this crime must be (a) bailable and (b) compoundable in order to give the partner an opportunity to come together.[15]

Committee further observed that Sec.498A, being non-bailable and non-compoundable, works against either the interests of both the husband and wife because-

- This poses a significant obstacle to restarting marital relationships between both the strangled spouses as such grievances needlessly antagonize life partnerships.
- argument against both the husband / family members remains non-compoundable despite the fact that there is resolution between parties.
- In case of baseless allegations, it causes significant hostility to the husband / parents.

Disrupted by the blatant misuse of this redistributive provision, "The crime is not liable and compoundable causes an innocent person to suffer shame and suffering," the Committee recommended that 498A be a reprehensible and compounding offense.[16]

LAW COMMISSION REPORT

The Law Commission's 243rd Report was on the gross misapplication of Indian Penal Code section498A. The issue was complied with during compliance with both the claim made in **Preeti Gupta Vs State of Jharkhand**[17] through the Home Ministry and the rulings of the Supreme Court amid allegations of misconduct of Provision 498A and either more changes were needed to this law as well as other related Cr.P.C laws and what measures might be taken to track alleged abuse and relationship conflict

Throughout the 237th Report, the Commission articulated the belief that the breach will be made compoundable with the approval of the Court. So, render it compoundable, there's a great view. Until granting authorization, several procedures are encouraged and followed. Nevertheless, the Commission also indicated that this really remains non-bailable. Use of it to the extent that empirical knowledge may not describe itself does not explain its usefulness, despite the wider public interest.[18]

[15]<https://mha.gov.in/sites/default/files/criminal_justice_system.pdf> accessed on 14th September 2019
[16] ibid
[17] AIR 2010 SC 3363
[18] 243rd report on section 498A-Law Commission of India, 2012
<http://lawcommissionofindia.nic.in/reports/report243.pdf> accessed on 15th September 2019

JUDICIAL PERSPECTIVE

The Honorable Judges of the Supreme Court and High Courts have consistently shown concern over the violation of the laws relating to violence against women in India. It has been argued that women implicate false accusations against the remote husband's family with malicious intent simply to put leverage on the husband and in-law to satisfy their requests.

In case of ***G.V. Rao vs. L.H.V. Prasad & others***[19] Court held that it should be rescinded in marital cases where all family members were involved in conjugal litigation. However, hon'ble justice noted that "in modern times there seems to be an explosion of marriage conflicts. Marriage is a spiritual ritual whose primary purpose is to allow the young couple to live peacefully and settle down in life. But little matrimonial battles unexpectedly escalate which often develop serious consequences culminating in atrocious crimes where the elders of the family are also involved with the consequence that all those who could have counselled and purchased in connection with reconciliation are made helpless as accused in criminal proceedings. There are many grounds not to be stated here for not promoting marital lawsuits so that the spouses can find their defaults by mutual understanding, rather than battling it in a court of law in which it takes decades to settle and in that phase the plaintiffs lose their "young" days in pursuing their cases in various courts."

In landmark judgement of ***Geeta Mehrotra & another vs. State of U.P. & another***[20]**,** the truth is that the plaintiff allegedly wed Shyamji Mehrotra. It was reported that shortly after the plaintiff's marriage husband and in-laws began to torment her for not bringing dowry mentally and physically. The plaintiff lodged a grievance toward her husband and in-laws within section 498A (marital conflict), including the name of the unmarried mother. Hon'ble court overturned the case claiming that against the co-accused there was no prima facie evidence, yet they cannot be held accountable. However, Court noted that if large numbers of family members were included within the FIR by adamantly denying their names and materials did not reveal their active involvement, there would be no reason for cognizing the case towards them.

Hon'ble Supreme Court in case of ***Onkar Nath Mishra vs. State (NCT) of Delhi***[21], when it was not even possible to prove that there was a suggestion of wilful abuse, it was observed that the section

[19] (2000) 3 SCC 693
[20] (2012) 10 SCC 741
[21] (2008) 2 SCC 561: 2008 Cr LJ 1391

was implemented with the stated purpose of countering the risk of dowry death and harassment of women by their in-laws. Nevertheless, the clause ought not to be permitted to use it as a tool for impressionistic motives.

In ***Kulwinder Kaur and Anr v. Manjit Kaur and Anr***[22] - In Punjab and Haryana, the high court took note of the fact that the claim was against uncle and aunt of the plaintiff's husband, who had both lived separately from the strangled pair for the past 14 years, and quelled the charges filed at 498A because there were no room for the suspected intrusion in the marriage home.

The high court held that perhaps the accusations didn't inspire confidence observed-"Recently, a propensity has emerged to roping all dowry cases relationships to browse and ventilate the husband's close family. Therefore, sometimes even the claims are false and distorted".

In case of ***Preeti Gupta vs. State of Jharkhand***[23], The Supreme Court stated that the terms of section 498A have to be reviewed. However, it is a question of understanding that in a significant number of claims, distorted descriptions of the case are expressed. In a very lot of these cases, the propensity to an over-implication is also expressed. It is therefore high time that the government took this into account and made necessary adjustments to the situation.

Law commission of India in its 243rd report recommended following suggestions:

- The crime under 498A must be rendered compoundable with court approval and subjected to a three-month cooling period.
- The violation is not to be non-bailable. Nevertheless, the protection against arbitrary and unjustified detention lies in strict observance of the letter and spirit of the requirements laid down in Articles 41 and 41A of CrPC[24] pertaining to the power of arrest and in raising awareness among the police of the methods to be followed in such cases.
- A police department reporting system should be in place. To keep records of case in section 498A and comply with the guidance.
- The prosecutor and the judiciary must pay particular regard to use of prompt resolution of cases pursuant to section 498A.

[22] 2011(5) R.C.R (Criminal) 26
[23] AIR 2010 SC 3363
[24] <https://www.hyderabadpolice.gov.in/acts/CrPC.pdf> accessed on 18 October 2019

In another landmark Judgement of ***Rajesh Sharma & others vs. State of U.P.***[25], Hon'ble Supreme Court observed that "it is of grave concern that a large number of cases appear to be lodged pertaining to provision 498A in which married women are abused. For order to rectify the situation, we agree that civil society's participation in the application of the law could be one of the measures, besides the sensitization of the arresting officers and the appropriate courts. It is therefore necessary to create the termination of proceedings where substantive agreement has been established, rather than allowing parties to transfer High Court for that reason only."

Sushil Kumar Sharma* v. *UOI[26] – In compliance with Article 32 of the Constitution, a petition was rendered before the Hon'ble Supreme Court to find 498A unconstitutional and as an alternative to framing rules to limit its abuse. In addition, the plaintiff sought to take strong action against such females who contacted the judiciary with impure intended. Referring to an array of decided cases, the Supreme Court came to the conclusion that merely because there is possibility of abuse of a provision of law, it would not render it unconstitutional.

More specifically, it could not be struck down as the purpose of section 498A was to avoid the risk of dowry. The Supreme Court did not back down from the fact that a large number of instances have come to light where the grievances under section 498A IPC were not bona fide, but because it is the legislature's duty to legislate before structures have been established to resolve spurious grievances under 498A, the courts will remain operational in compliance with the specified legal parameters .

In ***Saritha* v. *Ramachandra***[27]- In A.P. The family court denied the wife's petition for separation on the basis that the claims against the husband had not been established. It emerged to the court's knowledge in the middle the trial that the wife had lodged a criminal complaint toward the husband.

The high court, voicing via Justice B.S.A Swamy, has reported "For nothing the educated women approach the courts for divorce and resort to proceedings against their in-laws under 498A IPC involving not only the husbands, but also the members of their families, whether they are in India or abroad. To prevent the unreasonable use of U / S 498A IPC arrest, the Supreme Court in ***Arnesh Kumar* v. *State of Bihar***[28]*-SC*, applied some far-needed guidance on ' where police can arrest without the need for a warrant ' and contextual matters to that effect. In this situation, as his effort to seek

[25] 2017 SCC online SC 821
[26] Criminal Writ Petition No. 361 of 2010
[27] 2002 (6) ALD 319
[28] (2014) 8 SCC 273

such remedy had been rebuffed by the high court, the petitioner who apprehended arrest in a case registered u/s 498A favored an SLP before the hon'ble Supreme Court.

The claims towards the appellant-husband was that, along with other things, he accepted of her in-law's request for Rs.8 lakhs, a Maruti car, an air-conditioner and threatened to marry again if such demands had not been met. Justice Chandramauli Kr. Prasad, The implementation of the judgment on behest of the Honorable Supreme Court made mention of the blatant misuse of s.498A, noting that the fact that s.498-A is a recognizable and non-recognizable offense gave it a dubious position of pride among the laws used as arms instead of as defences by frustrated women. The easiest way to threaten is to arrest the husband and his family. In a quite number of cases, bed-ridden grand-fathers & grand-mothers of husbands, their sisters living abroad for decades are arrested".

In specifying the content of s.41 and 41A Cr.P.C, the Supreme Court stated that just because an offense is unrecognizable and non-bailable doesn't really give the cops the right to arrest, it must also be sure that the detention is permissible and that the requirements mentioned above are fulfilled by u / s 41 Cr.P.C.

The court ordered the police not to render instant arrests u / s 498A but to arrest CrPC only if criteria is met. The court also affirmed the sacred nature of the obligation of the magistrate to reassure themselves that requirements u / s 41crpc were satisfied when police bring accused to the magistrate for further custody.

The court concluded by forewarning the police officers and magistrates that failure to comply with the stated directions would attract departmental action.

CONCLUSION

In the case of ***Savitri Devi v Ramesh Chand & Ors***[29], The court clearly held that the laws had been misused and abused to such a degree that they reached the pillar of marriage itself while proved not to be so good for the overall health of the nation. The court claimed that in order to prevent such incident, officials and legislators had to evaluate the situation and legal standards.

This provision has been depicted with respect to ensure the welfare of the married woman from disreputable husbands, but is evidently abused by few women, and this is again strongly denounced

[29] 2003 CriLJ 2759

in ***Saritha v R. Ramachandran***[30] Where the court noted the reverse trend and ordered that the Commission and Parliament make the crime unrecognizable and reimbursable. It was the court's responsibility to denounce misdeeds and shield the survivor, but what happens once the victim becomes the abuser? What is the husband's solution here? The woman gets to divorce her husband on this issue and marries again or even obtain financial support in the form of compensation. Most women's rights groups oppose the idea of rendering the crime unrecognizable and bailable, believing that this offers the defendant an opportunity to escape prosecution. But what this might do is to give these people a fair opportunity and, most of all, to better fulfil the purposes of justice. Justice must safeguard the vulnerable and ensure that the wrongdoer has the ability to revoke his / her debt. Whenever women charge their husbands through S.498A IPC by rendering the crime irrefutable and obvious, if the man is honest, he won't get a fast opportunity to get justice and' justice delayed is denied justice.' The lawmakers must therefore recommend a way to make this section fair for any offender so that the guilty person is prosecuted and justice is served to the wrong person.

The women's status in India is indeed grim. We really need freedoms in community to relieve themselves, but many times we fail to recognize the rights of others as long as their rights are guaranteed. Today's literate woman has to cooperate with the justice slogan and suggest the same thing, but the pattern is slowly reversing. Women take full benefit of the premise that they are considered the ' weaker sex ' and infringe on the rights of others on grounds of the rights guaranteed to them.

"The greater the power, the more dangerous the abuse."

-Edmund Burke

[30] Ibid27

Technological Development: Reshaping the legal fraternity

Anshuman Shrivastava

Aamir Raza Khan

INTRODUCTION

The sociological situation in today's world is changing constantly which is severely affecting the population at large. Because of such social pressures people are committing numerous heinous and grievous acts, which in turn intensify the burden on the field of law. Thus, nowadays the subject of law needs all kinds of modification it can get. Among all relevant options, advancing technologies can prove to be the game changer for the field. Several modern techs like case law databases, e-journals, legal Chabot's etc. are providing new dimensions to the field. Therefore, to maintain the prominence; both the field should work in synergy and must also go for regular checks so as to avoid various negative outcomes.

BROAD IDEA ON TECHNOLOGY AND TECHNOLOGICAL DEVELOPMENT

The word technology has always been interpreted differently by different scholars, but the common point which each one of them wanted to convey was that technology is the use of innovative and unique thoughts in providing substantial outcomes which in turn resolves our day to day obstacle.[1] The etymological meaning of the term 'Technology' is the knowledge of various arts and expertise which comes from the Greek term **'technikos'** and **'ology'**.[2] Now if we go in depths, technology has a vast relation with science. Technology takes the help of scientific knowledge in bringing out everlasting results which helps in societal evolution.[3] The scope of technology is quite extensive; it affects the life of every person existing in a society, whether a farmer ploughs his land or a businessmen working at his office.

As we know that, since time immemorial the human civilization has shown continuous advancement. This advancement was seen in different fields like art, agriculture, trade, etc. To make this advancement possible, technology played a major role. Thus with changing times technology also changed and got modified. There are some pre-historic periods in which we can divide the stages of

[1]Computer Hope, "Technology", *available at:* https://www.computerhope.com/jargon/t/technolo.htm (Last Modified March 03, 2019).
[2]VikramKarve, "The meaning of technology", july 24,2009, *available at:* http://karvediat.blogspot.com/2009/07/meaning-of-technology.html (last visited on March 2, 2019).
[3] "What is the meaning of science and technology?" *available at:* https://www.reference.com/technology/meaning-science-technology-afc82b0b03a960eb (last visited on March 5, 2019).

technological development which are namely, Stone Age, Bronze Age and Iron Age.[4] In modern times one of the most prominent example of technological development is the Industrial Revolution which occurred in the 18th century. Karl Marx's view on technological development was a visionary one, he explained **the progress of machinery from simple tool to system of machines having automatic engine, and these progress gave rise to an objective need for mass production and use of machinery in industry for the welfare of society.[5]**

EMERGING TRENDS IN LEGAL INDUSTRY-

The concept of law is such a natural concept, that no one can predict its origin. Some idea about its origin has been mentioned in the Manuscript (a primitive Hindu text). Law is a kind of Grundnorm or elementary norm which can never be ignored. It acts as an invisible pillar which helps in keeping the society balanced. But the contemporary situations which are prevailing in our society are totally going against the established norm (which is important for the society). People have found several ways to escape from the purview of law, which pushes the legislative authorities to make a set of more stringent laws.

The expectations from the legal system are really high and for that to be achieved the system needs to embrace every kind of service which is suitable for its augmentation. The reason because of which the field of law is of high importance is because of its ambit, as it has a duty to protect every citizen (whether rich or poor) whose rights are infringed, thus the previous connotation is enough to validate that the legal system should be flawless in its activities.[6]

UNDERSTANDING THE RELATION BETWEEN TECHNOLOGY AND LAW

From the very beginning, technology has helped in multiplying the productivity of its users and among the different beneficiaries, legal industry is also one of them. Both the fields are interlinking well with each other and providing us effective solutions. Technological enhancement has played a major role

[4]Love to know Corp, "History of Technology", *available at:* https://www.yourdictionary.com/technology (last visited on February 28, 2019).
[5]Farlex, "Technology Develop- Research and Development", *available at:* https://encyclopedia2.thefreedictionary.com/Technological+development (last visited on February 21, 2019).
[6]Emerging Trends in Educational law: Leading lawyers on Understanding Recent Developments on K-2 campuses (inside the minds), *available at*: https://store.legal.thomsonreuters.com/law-products/c/Emerging-Trends-in-Education-Law-Leading-Lawyers-on-Understanding-Recent-Developments-on-K-12-Campuses-Inside-the-Minds/p/100222140 (last visited on February 25, 2019).

in wiping out the lapses occurring in legal profession. Modern day technologies (like DNA testing, Forensic autopsy etc.) have helped the legal fraternity in improving its criminal justice systems, as a result; now these implacable criminals are tried and sentenced properly. The advancement has brought an era of stability in the legal field and has also boosted the moral of lawyers and judges working in the field.

There are some stats which would throw some light on the relationship which exists between the two subjects. According to a survey**(Robert Half Legal)** conducted at Canada and US, almost 75-80 percent law firms are planning to buy legal based software's, almost 50-60 percent law firms are planning to purchase Desktops and laptops, almost 55-60 percent law firms are planning to introduce data depositories and almost 50-55 percent law firms are planning to invest on cloud computing. There was also a project started by the Harvard Law School in which they digitized their library which resulted in a computerized record of cases (dating back since 18th century). And, also according to **'Outside Counsel's In-House Technology report: 2007'**[7] several legal conglomerates are considering technology as a breakthrough for them.

The automation and simplification which is introduced in the field has lessen the burden of councils and solicitors but as we know that excess of anything is bad, therefore in the same way these people due to excessive use of technology have started to lose their inner abilities related to the fields.[8] There are many such drawbacks which are now coming up because of the amalgamation of the two subjects, but that doesn't mean we will let go such improvements. In affect to this we must come up with different algorithms which would help us to bring both the concepts at par with each other.

POSITIVE VARIANTS SEEN IN THE LEGAL INDUSTRY DUE TO TECHNOLOGICAL DEVELOPMENT

The work load on legal fraternity is tremendous and with passing days it is getting even more tedious and cumbersome. So, the inclusive work of both the fields is becoming a necessity for the legal industry to work in an efficient way. Various technological developments have helped the legal field to wipe out its infamies. Therefore, an effort is made to elaborate some of them, which are as follows:-

[7]Sally Kane, "Legal Technology and the Modern Law firm", *available at*:
https://www.thebalancecareers.com/technology-and-the-law-2164328 (Last Modified November 12, 2018).
[8]KPMG, "Reimagining the future of work in the legal work", *available at:*
https://home.kpmg/au/en/home/insights/2018/07/future-of-work-legal-sector.html (Last Modified July 05, 2018).

- Lawyer-client telecommunication chambers- To solve any legal issue a direct and un-interrupted conversation between a lawyer and his client is mandatory for any law suit to be successful in its claim. Therefore, to achieve long-distance communication, all time access and productive methodology, this aspect of technology is really playing well. According to **'Law Firm Flexibility Benchmarking'**[9] survey more than 60 percent of the law firms worldwide are adapting the tech and benefiting as well. Out of the above benefits, the major assistance which this technology provides us is the plenty of time which it saves in negating the counterproductive activities like travelling, transfer of important documents and the list goes on.
- Block Chain mechanisms- This technology can be considered as one of the most unique tech, as it gives impetus to the legal fraternity in trying out new avenues. The way this mechanism functions is really impressive, first of all its creates a platform by which different people share their responses or opinions and gets connected with each other, then these opinions are calculated to provide a single outcome (which is totally based on consensus) by the help of designed algorithms.[10] Nowadays, a modern system of creating contracts and agreements are introduced which use these block chain techs in formulating them. The server presents the conditions enshrined in the contract and in turn presents with the results based on the response given by the parties. A regulating authority was also established named as **'Global Legal Block Chain Consortium'**; its main motive was to act as a bulwark between Blockchain and Law.
- Legal research databases- Day by day, the legal field is witnessing number of changes. But if we want to highlight the most crucial change which is taking place in the field, then one cannot ignore the importance of legal research.It creates an online storehouse of diverse legal knowledge which helps the councils to search out diverse sphere of any particular specification related to the case and to prepare an adequate draft of their findings which could help their parties'at last. The major sources[11] which provide such intrinsic details are **LexisNexis**, **Hein online, SCC online**, **Manupatra**, **Fastcase**, **Westlaw Edge**etc.
- Technically equipped Chatbots and Robots- The legal issues and problems which are occurring in the contemporary time, requires great amount of accuracy and precision and the same can be provided by the involvement of these Chatbots and Robots which are enabled with systems that

[9]First light, "5 ways technology is changing the legal profession", *available at:* https://www.firstlight.net/5-ways-technology-is-changing-the-legal-profession/ (Last Modified May 15, 2018).
[10]Bruce Orcutt, "Three technologies transforming the legal world", *available at:* https://www.lawtechnologytoday.org/2018/07/3-technologies-transforming-legal/ (Last Modified July 25, 2018).
[11] Supra note 8.

totally relates with specific fields of law.[12] This innovative breakthrough was achieved through numerous deliberations and experiments carried out by different scientists and engineers. The basic nomenclature of this technology is to create a human like response system that helps to bring about stability and good governance in the respective field. Some of the considerable innovations which can be highlighted are **Do Not Pay** (which resolves the disputes regarding parking tickets), **Rocket Lawyer** (which helps in creating legal documents, registering their law officers etc.), **Claim IT** (pushes people to claim for their rights and receive compensation), and the list goes on.

- Electronic exploration of litigating sources- The methodology used in the field of litigation requires considerable resources like necessary documents, reports and evidences without which no party can support his or her claim. Now, the documentation of these reports and evidences has changed its form and has been converted to computerized files and PDF's, this transition resulted in the formation of several software's and techniques which can electronically explore these files and help the councils to continue with their works effectively.[13] This technology is also known as **'Electronic Database Discovery'** which got identified by the declaration of certain rules in the statues of US.
- Emergence of analytics- The use of analytics as an essential facility is being accepted by all the branches of the subject whether it is corporate, litigation or judiciary. Analytics try to clear all the background issues which are involved with the claim and try to automate the designated work in an understandable sequence.[14] This mechanism also help in the creation of certain underrated concepts which coveys a very deep and substantial meaning. Some of the most prominent names indulged with analytics are **Lex Machina** (a project of LexisNexis) which covers IPR and safekeeping laws;there are some law offices as well which contributes in judicial analytics like Ravel law.
- Usage of biotechnology and forensics- The 'Scope of Law' has always been a debatable topic and no one in the field has come up with a concept that can limit the scope of law, the best example which can support the last supposition is the introduction of Biotechnology and Forensics.[15] They

[12]Alex Heshmaty, "Legal tech in 2018: threats and opportunities", *available at:* https://www.lawsociety.org.uk/news/blog/legal-tech-2018-threats-and-opportunities/ (Last Modified June 13, 2018).
[13] "7 Ingenious Tech Solutions for the legal Industry", *available at:* https://www.newgenapps.com/blog/tech-solutions-for-legal-industry-technology-report (Last Modified July 19, 2018).

[14]Bob Ambrogi, "The 20 most important legal technology developments 2018", *available at:* https://www.lawsitesblog.com/2018/12/20-important-legal-technology-developments-2018.html (Last Modified December 26, 2018).
[15]Pragati Narayan, "How technology transformed the legal profession", *The Pioneer*, Apr.5, 2011.

came up with a new work culture in the field and have strengthened the backbone of Criminal Investigation system. These technologies are fully capable to trace out any evidence concealed in the crime scene and put forth hundreds of inferences emerging from that particular clue. To elaborate few of the techniques[16], there is **DNA sequencing** in which the culprits are recognized by their DNA profiles, and then there is **Alternative Light Photography** in which the scientist can get to any internal injury which is not visible on the outer body etc.

- Modernized Courtrooms- The most important aspect for any lawyer or judge is the presence of necessary infrastructure and equipment's in a courtroom as it is the supreme place where justice is delivered. In the olden days, courtrooms were basically managed by the Jury and not by any of these designated technologies. But, the changing times and demand made the inclusion of different modern techs like legal research software's, e-documents, highly equipped PC's etc. Among, all these the most essential technology which has helped the courtrooms to modernize is of Video Conferencing that helps to simplify the justice delivery system by making the party available even in distinguished circumstances when he or she cannot be present in person. Some of the prominent cases which introduced **Video Conferencing** and provided it legal sanctity are **Sucha Singh vs Ajmer Singh**[17] (in which the court allowed the council to examine the witness through Skype or Whatsapp) and **Mohd. Ajmal Amir Kasab vs State of Mahrashtra**[18] (in which the court allowed Kasab to appear via Video Conferencing).
- Relevance of artificial intelligence- If there is a comparison between artificial intelligence and other technical mechanics which contribute to the field of law, artificial intelligence surpasses them all. The basic work of AI is to perform multiple functions with the help of machines; they create a set procedure or formulas on which these machines function.[19] These AI enabled tools increases the efficiency of the profession by analyzing, decoding and solving the complications which they encounter. According to a survey an investment of over 300 million dollars is made on artificial intelligence yearly by leading law firms. The extensive performers which brought revolution in the field of AI are **LawGeex** (a smart interface which helps to resolve contract related issues),**ROSS**

[16]Willow Dawn Becker, "10 Modern Forensic Science Technologies", *available at:* https://www.forensicscolleges.com/blog/resources/10-modern-forensic-science-technologies (last visited on February 25, 2019).
[17] (2017) CR-182.
[18] AIR 2012 SC 3565.
[19]Sterlin Miller, "Artificial Intelligence: A breakthrough for the legal technology",*The Times,* Aug.26,2010.

Intelligence(provides solutionfor case writing, legal fact analysis etc.), **Luminance** (an in-house data reviewing AI tool) etc.[20]

DETRIMENTAL EFFECTS OF TECHNOLOGY DEGRADING THE LEGAL PROFESSION

Every thought, idea or concept existing in this world has a positive side and a negative side; there cannot be an idea which has only a positive or a negative side. Thus in the same way there are two sides of technological advancement and both of them play a crucial role in helping out the original concept to dissolve out its anomalies and become an ideal concept. Some of the considerable negative effects of technological development are as follows:-

- Shortage of requisite capital- To run any business, the basic necessity is to maintain an adequate resource of capital or monetary funds, in absence of which no business or initiative would succeed. The same condition lies with modern day law offices in which large amount of capital investment is required to install all the mandatory components which becomes indispensable for the overall infrastructural development of the firm.[21] Sometimes, these investments become too huge to afford (like for example any prominent AI enabled interface) by any law firms and leads to the complete loss of the firm. Therefore, there are number of such modern day techs which are over-priced and also need learned hands to handle these mechanics.
- Age of Hackers and Cons- Since, the birth of highly equipped technologies like PC's, Desktops, Tablets, I pad's and various messaging devices like E-mails, Facebook messenger etc. the risk of being hacked and traced has been doubled.[22] A new era of treachery and fraud has arrived after the establishment of these technologies. As several law firms use block chain and cloud based technologies to save and preserve important information's related to their client, the task of protecting them from such hackers and coders becomes a burdensome challenge. Hence, this aspect of technological enhancement makes the life many law firms a tough task to achieve.

[20]Supra note 14.
[21]LlyodLangenhoven, "The symbiotic relationship between lawyer and legal tech", *available at:* https://www.herbertsmithfreehills.com/latest-thinking/the-symbiotic-relationship-between-lawyer-and-legal-tech (Last Modified October 8, 2018).
[22]Sumit Kumar," Risks involved in the legal profession",*Hindustan Times,*June 17,2015.

- Established customs and regulations- Many intellectual minds who are serving the profession right now have not got accustomed to these technologies and mechanics.[23]Therefore, in their view these techniques are not up to the mark, they are full of glitches and fault, they are not client oriented etc. It is also true that these mechanisms nullify the established customs and practices prevailing since time immemorial which were completely foolproof to any irregularities.
- Decrement in job prospects for young graduates- Each year almost lakhs of law students become law graduates and keep their first step into the real legal arena in which job prospects are decreasing constantly. The main reason behind the continuous curtailment of jobs in numerous corporates and conglomerates is because the emerging technologies have taken place of the humans; as compared to humans they are much more efficient, productive and accurate.[24] So this drawback of technology should be timely checked, if one wants to see great minds regularly hitting the floor with their innovative thoughts.

CRITICAL ANALYSIS OF THE POSITIVE AND NEGATIVE ASPECTS OF TECHNOLOGY

The appropriate methodology used by any scholar or an organization in framing out their opinion follows a basic rule of 'cumulative inquiry' in which they investigate the current situation of the inquired subject and also review the general sentiments of the common people in relation to the subject. Therefore, the same standards and approach must be incorporated in order to critically evaluate a fact.

If we get into the intrinsic aspects of both the negative and positive outsets of technological development affecting the field of law, then we would have find out that at some point the benefits arising from the development is overpowering the negative results.[25] Like for example if these technologies are reducing the job probabilities then in shadow of that, they are also increasing the effectiveness and authenticity of the field. But that doesn't mean we would start ignoring the negative side of it because, as we all know that 'Improvement is the resultant of thesis and anti-thesis' which is enough to reflect the significance of the negative perspective in any designated field of research.

[23]Erika Winston, "Is technology making the practice of law better or worse", *available at:* https://www.timesolv.com/is-technology-making-the-practice-of-law-better-or-worse/ (Last Modified October 18, 2018).
[24]Martin Ford, *Rise of the Robots: Technology and the threat of a jobless future,* (Basic Books, New York, 2015).
[25] "The positive and negative effects of technology in law enforcement", *available at:* https://policetechnology.wordpress.com/the-postive-and-negative-effects-of-technology-in-law-enforcement/ (last visited on February 21, 2019).

CONCLUSION

The ongoing ruckus which the society is witnessing these days increases the need for a highly potent and an advanced legal system which is only possible when these developing technologies or disruptive technologies amalgamate with the legal profession. These technologies create new dimensions in the field of law as they positively influence each and every aspect of the profession. They are also competent to tackle any kind of error or flaw which occurs in the system and also provides solution for them.

To make the combination of technology and law an everlasting one several measures must be applied by the governing authorities to dissolve out the contingencies which occur in the proper functioning of these technologies. Like, for example they must introduce funds generating schemes by which these expensive technologies can be installed by most of the legal offices or firms; they should provide for skill based training courses which can help the law graduates in getting quick jobs, the authorities must also implement varied Data protection laws which would help to keep a check on the activities of hackers; therefore many such policies should be introduced which can help in strengthening the relation between the two subjects.

The Evolution of Legal Personhood And Dignity Of non-Human Animals: From Property To Person

Shrabani Kar

ABSTRACT

The old paradigm of seeing animals as mere object or property is no longer defensible, neither from an ethical nor a legal point of view. Animals have been considered as mere things even under the law, but they are now increasingly recognized as sentient beings. The object of according animals with the status of 'person', is to ensure that they are not subjected to unnecessary cruelty or treated as property as per the whims and fancies of humans. The idea is to give more value to animals in terms of how they are perceived and treated, thereby elevating their status from mere secondary living beings placed on the earth to fulfill the purpose of human lives. Where inanimate objects are recognized to have rights and enjoy a legal status, it is only fair that living non-human animals be given a like status.

INTRODUCTION

The theory of legal personhood has been a relatively peripheral topic in jurisprudence for at least 50 years. The definition of rights and personhood excludes animals on the claim that only natural persons or legal personalities have rights, protections, privileges, responsibilities, and legal liability. There are generally two types of person which the law has recognized namely, natural person and legal persons. Natural person refers to human beings where as legal persons also known as artificial, juristic or fictitious persons are regarded as real or imaginary beings to whom personality is attributed by way of fiction where it does not exist in fact. For example, corporation, companies are legal persons which are guaranteed rights under the law. They have power to sue and be sued. Unlike natural persons, legal person cannot move to a court of law on their own and need a guardian on their behalf to do so. Hence, companies are legal persons, which function through their board of directors or other members. Similarly, idols and deities are juristic person and can hold property.

Common law doesn't recognize animals as natural person as they have no natural or legal rights. For centuries, man has dominated everything on this planet both living and non living including animals. The human and animal relationship is defined as one of owner and property. Animals have always been the subject of cruelty. They are treated as objects that exist solely for the benefit and the use of humans. They are caged, beaten, stripped of its dignity and killed by humans. Humans have a long-standing relationship with animals. The common law has always considered animals as property and are subject of human ownership.

Human relationship with non-human animals has also been accepted within the structure of a master-servant relationship.

In this manner, animals were given a property status and they can be utilized by the owners for purposes that are in contrary to the animal's advantage. It was also accepted that animals didn't have any ethical standing since they needed rationality and autonomy. When animals are considered property by virtue of thus status they are considered to be objects under law which means they are incapable of holding rights.[1]

THEORIES ON HUMAN-ANIMAL RELATIONSHIP

The most common justification is the traditional western view of the human-animal relationship, which is that man holds a position which is superior to animals. This has religious origins based on the belief that god gave humans dominion over all living creatures.[2]

St Thomas Aquinas exemplified this view. He stated that "man, being made in the image of god is above other animals who are therefore rightly subjected to man's government and intended for his benefit".[3] Aquinas noted one exemption to this general principle, which is if any bible section seems to disallow brutality to animals.

William Blackstone in his writings in the 18th century approved and affirmed the religious justification for the property status of animals.[4]

Another justification used for the property status of animals derives from John Locke. According to the liberal theory of John Locke, only rational beings are capable of holding rights and are subjected to obligations. Animals are excluded from being part of the moral society and have no intrinsic value as they lack reason and rationality.[5] it is this "supremacy of humans thinking that underpinned Locke's labor theory of how property is attained, and its inclusion of animals".[6]

Salmond says that "beasts are not persons, either natural or legal. They are merely things-often the objects of rights and duties but never the subject of them". As stated in the archaic codes animals were penalized if they were found guilty of homicide. Sutherland refers to certain instances where bulls were punished. "If an ox gore a man or a woman that they die: then the ox shall be surely stoned and his flesh shall not be eaten".[7] Thus, the status of animals has always remained more object-oriented or utility-based. The animals were treated as property same as that of a table or

[1] Immanel Kant Lectures on Ethics 239-40(Louis infield, trans, Harper torchbooks, 1963).
[2] Genesis 1:26-28.
[3] Gary L Francione, Introduction to Animal Rights – Your Child or the dog? 154 (Temple University Press, Philadelphia, 2000).
[4] Gary Steiner ,Cosmic Holism And Obligations Toward Animals: A Challenge To Classical Liberalism (2007)
[5] Mike Radford, Animal Welfare Law in Britain 100 (Oxford University Press, New York, 2001).
[6] Ibid.
[7] Sutherland, Principles 0f Crimin0l0gy, 44.

chair. The property status is indicatory of a lower position occupied by animals, as a result of which adequate liability is not imposed in instances involving suffering and infliction of pain upon them. The law gives no recognition to the animal's inherent value and any animal protection offered in the legal system caters to human interest instead of the animals independent interests.

However, there are two cases where animals possess legal rights. The first one being cruelty to animals is a criminal offence. Secondly, a trust for the benefit of particular class of animals as opposed to one for individual animals is valid and enforceable as a public and charitable trust.

Modern philosophers no longer hold these views. Peter singer's *animal liberation*, for example, refutes Descarte's assertion that animals have no interests because they are not sentient. [8]Singer asserts that the interests of humans and animals should receive equal moral consideration because both have the ability to suffer feel pain and experience enjoyment.[9]

Gray Lawrence Francione an American legal scholar is known for his work on animal rights theory. He is a pioneer of the abolitionist theory of animal rights, arguing that animal welfare regulation is theoretically and practically unsound, serving only to prolong the status of animals as property by making the public feel comfortable about using them. He argues that non-human animals require only one right, the right not to be regarded as property.[10]

Richard D Ryder, British writer, psychologist and animal rights activist, says "there is physiological, biochemical and behavioural evidence that many animal species suffer the way humans do. So they deserve similar rights. Personhood derives from having the capacity to suffer, not from intelligence or having a similar appearance to humans".

The claim for legal personhood for nonhuman animals is further strengthened by the decisions of various high court of our country. In the words of Blackstone, "*legal personality plays an important part in making a thing count in the eyes of the law. The conferral of legal personality upon rightless objects or beings carries with it legal recognition that those objects or beings have "worth and dignity" in their own right. Until we attribute personality to a rightless entity, we are likely to be unable to conceive of it as "anything but a thing for the use of 'us' – those who are holding rights at the time.*"It is crucial we grant animals "personhood" because they can't speak up, they can't picket, make petitions or elect government officials who will give them rights–they need us to qualify their worth and grant them rights.

[8] Peter Singer, *Animal Liberation10-15* (Harper Collins, revised ed, 2002).
[9] Ibid.
[10] Francione, Gary L. (July 13, 2015). "Debates: Veganism without Animal Rights". *European Magazine*. Retrieved May 13, 2017.

ENTRUSTING LEGAL PERSONALITY TO ANIMALS

In a groundbreaking judgment in the case of Karnail Singh v. State of Haryana[11] the Punjab and Haryana high court, recognized all animals in the animal kingdom, including avian and aquatic species, as legal entities. All citizens of the state of Haryana were declared persons *in loco parentis* (in place of a parent), which will enable them to act as guardians for all nonhuman animals within the state of Haryana. This decision is the latest in a trend where courts are adopting eco-centric rather than anthropocentric views on legal issues concerning the protection of animals and the environment. The court also quoted, "*the shelter of the legal umbrella would also provide more effective protection of animal interests than is available under current animal welfare law. As legal persons, animals could be recognized as parties to legal actions, because they would have the independent standing that they currently lack*."

The rationale behind bestowing legal personhood on animals is to shield them from the infliction of harm or injury by humans. In other words, the animal personhood movement hopes to force humans to treat animals as legal persons and, as a result, to remedy the inadequacy of existing animal protections.

THE RATIONALE BEHIND THE DECISION

Narayan Dutt Bhatt v. Union of India and others[12]

The Uttrakhand high court on 4th July 2018, whereby the members of animal kingdoms were assigned legal personality. The judgment was an outcome, due to public interest litigation on the health of transport animals (including donkeys, horses and other such animals) which were used along the 14 km route from the town of Banbasa Uttrakhand, India to Mahendra Nagar, Nepal.[13]However, there are many opportunities for desecration of this judgment because every citizen of Uttrakhand has been declared as loco parentis but the question remains, how shall they take care of the animals, or to what extent they shall be responsible which has not been clearly provided. This brings up another question what kind of rights to animals enjoy? Can they own property? Can they vote? Will animals having the same rights as humans mean they can't be killed and lead to death of meat industry? Such question still remains unanswered.

Another historic decision by the Supreme Court, *N.R. Nair v. Union of India*, the supreme court opined that legal rights must be granted to animals and should not be restricted to humans alone. The courts have subsequently reiterated the idea that animals must be protected as they have an

[11] 2019 SCC Online P&H 704
[12] (PIL) NO. 43 OF 2014
[13] Narayan Dutt Bhatt v Union of India and others writ petition(PIL) No. 43 of 2014

intrinsic value themselves. On the basis of this justification, the supreme court, in *Animal welfare board Of India vs. A. Nagaraja*[14], accorded animals, certain rights, such as, the right to live with dignity; freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behavior. [15] In Nagaraja supreme court recognized the fundamental right of animals to live with dignity and honour, by expanding the definition and scope of article 21 of the constitution of India, so to include within its ambit animal life as well. The court laid down that 'life' meant more than "mere survival or existence or instrumental value for human beings. [16] It is pertinent to mention that the law also specifically states protection of animals from 'unnecessary pain and suffering. However, this definition is full of grey areas — how do we define unnecessary? What is suffering? What is distress?

The fundamental principle behind this judgment is found in the Isha Upanishads which states about the equality of all species found, as the basis of our culture and tradition. Jeremy Bentham the father of the utilitarian school of jurisprudence stated that when deciding on a being's rights, "the question is not 'can they reason?' nor 'can they talk?' but 'can they suffer?' he points to the capacity for suffering as the essential attribute that gives a living being the right to equal consideration.

All animals suffer in the same way and to same degree that humans do. Therefore they should have similar rights as that of human beings.

GLOBAL DEVELOPMENTS WITH RESPECT TO THE LEGAL STATUS OF ANIMALS

Under the Australian law animals are classified as 'property', at least since colonialism. However, in recent years the felicity of the legal status of animals as property has been questioned and because of this we have witnessed a number of attempts by the lawmakers in Australia who have even taken steps to end practices that are harmful to animals. Several countries have made an effort to resolve the issue of arbitrary classification of animals as mere objects and property. Countries like Austria[17], Germany[18] and Switzerland[19] have amended their civil codes to proclaim that animals are not objects and that they should not to be dependent upon the laws identifying with objects.

[14] (2014) 7 SCC 547
[15] Animal Welfare B0ard 0f India v. A. Nagaraja, (2014) 7 SCC 547, 64.
[16] Animal Welfare B0ard 0f India v. A. Nagaraja, (2014) 7 SCC 547, 72.
[17] Austrian Civil Code. art 285.
[18] German Civil Code.90a.
[19] Swiss Civil Code. art 641a.

Endeavors are likewise in progress in different nations to change the legal status of some specific animals. For example, in United States, there are lawsuits seeking to declare chimpanzees as legal person. Similar suit is filed in Argentina too, while Romania is thinking about enactment that would give legitimate personhood to dolphins.

CONCLUDING REMARKS

The question remains whether the world is ready to accord personhood to non-human animals. The purpose of granting legal personhood to animals is still in its infancy. It is obligatory on our part to persistently transform and develop our legal system to bestow more protection to animals, not because animals are legal person, but the entire human community needs to be accountable for the treatment of animals. The aim of extending legal status to animals in some of the countries is praiseworthy, admirable and truly humane. The human-animal relationship has been reformulated from the status quo of owner and property to that of guardian and ward. It is commendable that some section of our society is working for the voiceless and unguarded non humans. A world where animals are treated as living beings to say the least, and further to enjoy protected rights as 'person' might seem like a distant reality to some, to some it might be insignificant and to some it might be utopian, nonetheless it is gradually beginning to become a reality amidst support and resistance alike and the desire of their protection remains lighted to some extent, provided some more efforts are seriously needed in this direction.

AN INSTITUTIONAL ANALYSIS OF THE THREE PILLARS OF INDIAN CIVIL AVIATION INDUSTRY: BCAS, AAI, AND AERA

Dipanita Roy

INTRODUCTION

Post 1990 we witnessed our economy being opened up for the LPG (Liberalization, Privatization & Globalisation) Model of economy rather than the closed one. This had an effect on almost every sphere of economic activities in the nation; one among the many significantly affected was the Indian Civil Aviation Sector.

Civil Aviation in India Traces its root back to British colonial era and the first recorded domestic civil flight was from Allahabad to Naini in 1911.[1] Post-independence; Indian parliament in the year 1953 passed the Air Corporation Act, 1953[2] nationalizing the Air Industry as well as marked the inception of our spear-head in the Indian Civil Aviation, the Air India.

Aviation is a sector with huge potential in India. In spite of only 10% of the total potential civil airspace being utilised, this growing industry has shown an exemplary growth. It has even being predicted that it may attain a growth rate of 9.2% per annum in increase of passenger traffic to 580.78 million in 2027.[3]

With this there was need of regulatory body for the civil aviation and with the adoption of the LPG model in 1990's this need was tuned into and necessity for standing active in international sphere. This marked the establishment of various regulators of the civil aviation industry in India, some to be named are Ministry of Aviation, DGCA, BCAS, AERA, AAI etc.

In this project, the compiler will be analysing the institutional framework of the latter three institutions/regulators of the Civil Aviation Industry in India. We will observe the guiding principles of these institutions, their primary objectives and effectiveness in achieving the same and ending this work with a conclusion including compiler's opinion.

[1] Beginning of Aviation in India - Bharat Rakshak Archived 27 February 2012 at the Wayback Machine.
[2] http://lawmin.nic.in/ld/P-ACT/1962/A1962-17.pdf
[3] https://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp171_en.pdf

BUREAU OF CIVIL AVIATION SECURITY (BCAS)

An attached division of Ministry of Civil Aviation; Bureau of Civil Aviation Security (BCAS). It came into existence in the year 1978; post the 1976 Air India highjack of 1976 after the recommendation of the Pande Committee.[4] Initially as a cell, BCAS was recognised as an independent department of MoCA (Ministry of Civil Aviation) in the year 1987 after the 1985 Kanishka Tragedy.[5]

This bureau at present have eight regional offices covering major metro cities like Delhi, Hyderabad, Mumbai, etc. headed by commissioner of security (civil aviation), empowered to execute and enforce Annexure 17 of the Chicago Convention of ICAO.[6] The Commissioner of BCAS has the responsibility of Development, Implementation and Maintenance of the National Civil Aviation Program.[7]

BCAS has prime objective of ensuring the safe transaction of goods and passengers and in other allied activities of Civil Aviation. This can be referred from the background and development of this department. Its primary objectives are[8]:

1. Laying down Aviation Security Standards in accordance with Annex 17 to Chicago Convention of ICAO for airport operators, airlines operators, and their security agencies responsible for implementing AVSEC measures.
2. Monitoring the implementation of security rules and regulations and carrying out survey of security needs.
3. Ensure that the persons implementing security controls are appropriately trained and possess all competencies required to perform their duties.
4. Planning and coordination of Aviation security matters.

Including afore mentioned, BCAS is also vested with the power conducting Surprise/Dummy checks to test professional efficiency and alertness of security staff, mock exercise to test efficacy of Contingency Plans, as well as operational preparedness of the various agencies.[9]

As we have observed this department has been active from its inception and has learnt from its past. Post 1999 Air India Highjack, we have not witnessed any many security breaches at the civil

[4] http://bcasindia.gov.in/aboutus/aboutus.html#functions
[5] http://bcasindia.gov.in/aboutus/aboutus.html#functions
[6] https://www.theairlinepilots.com/forumarchive/quickref/icao/annex17.pdf
[7] Supra 3
[8] Supra 3
[9] Supra 3

airports nor do any major incident comprising any security lapse. From the recent reports of MoCA, we have seen this department have been quite active in not only conducting its primary function of ensuring security in civil aviation in the domestic sphere by doing regular surprise as well as dummy raids of the security installations, enforcement of Annexure 17 of ICAO[10] but has also been active in the international sphere especially with the neighbouring countries, for E.g.: Organising training session of Aviation Security Training by BCAS to Nepalese Aviation Personal for development of regional cooperation in Civil Aviation Security .[11]

AIRPORTS ECONOMIC REGULATORY AUTHORITY (AERA)

For a healthy and thriving market, competition is a must, but with government being the major stake holder in the civil aviation sector in India, initially minimum to nil till late 2000. Inclusively the rapid growth trajectory of air traffic since 2004 – 05, made it necessary for the establishment of an independent economic regulator for Indian Civil Aviation Industry.[12] Hence, AERA was established in the year 2009. The Airports Economic Regulatory (AERA) is a statutory body constituted under the Airports Economic Regulatory of India Act, 2008 (27 of 2008) notified vide Gazette Notification dated 5th December 2008. The AERA was established by the Government vide its notification no GSR 317 (E) dated 12.05.09 with its head office at Delhi.[13]

The statutory functions of the AERA as enshrined in the Airports Economic Regulatory of India Act, 2008 are as below:

1. To determine the tariff for the aeronautical services taking into consideration:
   - 1.2 The capital expenditure incurred and timely investment in improvement of airport facilities.
   - 1.3The service provided its quality and other relevant factors.
   - 1.4 The cost for improving efficiency.
   - 1.5 Economic and viable operation of major airports.
   - 1.6 Revenue received from services other than the aeronautical services.
   - 1.7 The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise.
   - 1.8 Any other factor which may be relevant for the purposes of this Act.
2. To determine the amount of the Development Fees in respect of major airports.

[10] http://www.pib.nic.in/newsite/erelcontent.aspx?relid=79267
[11] https://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp285_en.pdf
[12] https://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp171_en.pdf
[13] http://aera.gov.in/content/innerpage/objective--and-functions.php

3. To determine the amount of the Passengers Service Fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934.
4. To monitor the set Performance Standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any department or executive body.
5. To call for such information as may be necessary to determine the tariff.[14]

Hence, we can see that the primary work of AERA is concerning tariff and other economical activities of the Indian civil aviation Industry. The enacting legislation is framed with a pro-public approach but also taking the corporate interest in view, therefore for the same the legislation mandates AERA to determine the tariff once every five years. This tariff can also be amended if considered in public interest, regularly in the span of five years.[15]

Regulatory Philosophy, Approach, Systems and Developments

Pursuant to its inception, AERA has set in motion an open and transparent process of establishing its regulatory philosophy and approach. For the same an inclusive process has been adopted which comprises of intensive stake holder consultations. This is also to evolve a detailed but effective procedures and framework for determination of tariff, as well maintaining a market standard by monitoring competition in the market.

AERA proposed to use the interests of passengers and cargo facility users as the touchstone for discharge of its regulatory functions. This has hence been the core of all the actions of this regulator. Inspired by the same, AERA has classified its regulatory ambit in three broad categories and proposes to adopt following approach to economic regulation, thereof:

S. No.	Aeronautical Services	Proposed approach
1.	Services Provided by the airport operators	Price Cap regulation on 'single till' basis.
2.	Air Navigation Services	Cost Plus fair rate of return based regulation.

[14] Ibid
[15] https://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp171_en.pdf

3.	Services provided by cargo facility operators, ground handling service providers and fuel farm form operators / fuel access providers.	(a) If Service is not 'material', or it is material but provided on competitive basis- light touch regulation. (b) If service is material but not provided on competitive basis- price cap regulation.

The proposed approach in economic regulation of airports is broadly in synchronization with the approach adopted by the regulators of nation's international counterparts, viz.: the United Kingdom, South Africa and the Republic of Ireland. This also signals to the jurisprudential nature of these quasi-socialist nations whose influence is also on our constitution and other legislations. This signifies that the actions of the industry are expected to be Pro-corporate but with a Customer interest centric approach.

Current Status

The regulatory philosophy and approach in respect of economic regulation of ANS has been finalized. Detailed guidelines to operationalize the same was released, for the same, showing the example of its inclusive approach; AERA for setting out the procedure to be followed for tariff determination as well as information requirements for the same, issued public notice and call for stakeholder consultation.

The first tariff determination period commenced from April, 2011 for which a multiyear tariff proposal was submitted by service providers and other stakeholders by October, 2010.

The concession agreements in respect of the private airports was finalized and entered into by the Government before the establishment of the regulator. Thus, the inputs of the Government are considered to be of special relevance in so far as economic regulation of services provided by the airport operators is concerned. Government is in the process of finalizing its views in the matter.

Afore mentioned also portrays a dark side of our Civil Aviation industry, The Huge stake of government in the sector. This attribute has long been blamed for the log jam in this industry. We all saw a boom in the market players in early 2000 but till 2009-12, the industry saw a decline in profit. This caused a chain of event of Merger and Acquisitions as well as market exit. Therefore,

causing a steep deterioration in market competition. Still in this sector of huge potential only two private Air Lines; Go Air and Indigo incur profit.[16] Our spearhead, the Air India is among the most rusted and running under loss from a long time. Including this it is also an interesting as well as worrying fact that according to ICAO only 5% of the total operational civil airports in the nation are profitable.[17]

Therefore, it shows that at some aspects, especially the market standards and economical outputs, it will be compilers opinion that private stakeholder be increased over the government. For the step a PPP approach has been adopted by the government.

In the meantime, AERA has tested its proposed systems and procedures, applying draft policy and approach, in the cases relating to determination of user development fee (UDF) at Ahmadabad and Thiruvananthapuram airports. The same was later extended to the other prime commercial airports, for e.g.: Delhi, Hyderabad, etc.

Afore mentioned actions and attributes of AERA is likely to impart regulatory certainty to the airport infrastructure sector in India. With the successful implementation of PPP model in developing airport infrastructures, examples for the same can be seen by GMR's Partnership in Hyderabad as well as Delhi airport. Government influenced by the same has recently also vetted the option of adopting the PPP model in the restructuring of Air India as well as even the option of providing air navigation support being given by the private players in some domestic jurisdiction is being vetted by the concerned departments.

These all shows the example of exemplary effectiveness as well as efficiency in AERS's action to achieve the goals set by this department in interest of the civil aviation Industry.

AIRPORT AUTHORITY OF INDIA (AAI)

Airports Authority of India (AAI) was constituted by an Act of Parliament and came into being on 1st April 1995 by merging erstwhile National Airports Authority and International Airports Authority of India.[18] The merger brought into existence a single Organization vested with the responsibility of planning, organizing and maintenance of the national civil aviation industry. This responsibility includes the creation of infrastructure and conducive environment in both ground and air activities of the civil aviation industry.[19]

[16] https://qz.com/423243/only-two-big-airlines-in-india-made-a-profit-in-the-last-year/
[17] https://www.icao.int/Meetings/a39/Documents/WP/wp_201_en.pdf
[18] http://www.airportsindia.org.in/public_notices/aaisite_test/orign.jsp
[19] http://civilaviation.gov.in/sites/default/files/moca_000740.pdf

At present, AAI manages 125 airports, which include 18 International Airport, 07 Customs Airports, 78 Domestic Airports and 26 Civil Enclaves at Defence airfields. AAI provides air navigation services over 2.8 million square nautical miles of air space. During the year 2013-14, AAI handled aircraft movement of 1536.60 Thousand [International 335.95 & Domestic 1200.65], Passengers handled 168.91 Million [International 46.62 & Domestic 122.29] and the cargo handled 2279.14 thousand MT [International 1443.04 & Domestic 836.10].[20]

The following are this department's primary functions[21]:

1. Passenger Facilities

Among the core functions of the AAI, this includes the construction, modification & management of the passenger terminals, development & management of cargo terminal, development and management of apron infrastructure; this includes the construction and maintenance of the runways, parallel taxiways, etc.

Inclusive of all this, the provision of other facilities likes means of communications, air navigation support, as well as surveillance, including the requisite provisions for the same. As well as, other facilities for smooth functioning of airports by ensuring safe passage, and operation of aircraft; in broader picture the civil aviation industry.

2. Air Navigation Services

The Air Navigation Services are still an exclusive task of the state via AAI. But this does not mean that the infrastructures required are still obsolete. With the reduction in major air accidents, attributed to the fault of navigation support, it is accepted that the government has been quite successful in maintaining the technological upgrade required for the effective and seamless navigation support to the aircrafts.

AAI has been successful in implementation of its plans for transition to acquire and utilise satellites for the purpose of Communication, Navigation, Surveillance and Air Traffic Management. A number of co-operation agreements and memoranda of co-operation have been signed with US Federal Aviation Administration, US Trade & Development Agency, European Union, Air Services Australia and the French Government Co-operative Projects and Studies, as well as with different Indian private entities after the recent Make in India strategy of the government, has initiated to gain and learn from their acquired experience and to productively use its knowledge. Through these activities more and more executives of AAI are being exposed to the latest

[20] Ibid
[21] http://www.airportsindia.org.in/public_notices/aaisite_test/orign.jsp

technology, modern practices & procedures being adopted to improve the overall performance of Airports and Air Navigation Services.

Induction of latest state-of-the-art equipment, both as replacement and old equipment and also as new facilities to improve standards of safety of airports in the air is a continuous process. Adoptions of new and improved procedure go hand in hand with induction of new equipment. Some of the major initiatives in this direction are introduction of Reduced Vertical Separation Minima (RVSM) in India air space to increase airspace capacity and reduce congestion in the air; implementation of GPS and Geo Augmented Navigation (GAGAN) jointly with ISRO which when put to operation would be one of the four such systems in the world.

3. Security

The continuing security environment has brought into focus the need for strengthening security of vital installations. There was thus an urgent need to revamp the security at airports not only to thwart any misadventure but also to restore confidence of travelling public in the security of air travel as a whole, which was shaken after 9/11 tragedy. With this in view, a number of steps were taken including deployment of CISF for airport security, CCTV surveillance system at sensitive airports, latest and state-of-the-art X-ray baggage inspection systems, premier security & surveillance systems. Smart Cards for access control to vital installations at airports are also being considered to supplement the efforts of security personnel at sensitive airports.

4. Aerodrome Facilities

In Airports Authority of India, the basic approach to planning of airport facilities has been adopted to create capacity ahead of demand in our efforts. Towards implementation of this strategy, a number of projects for extension and strengthening of runway, taxi track and aprons at different airports has been taken up. Extension of runway to 7500 ft. has been taken up to support operation for Airbus-320/Boeing 737-800 categories of aircrafts at all airports.

5. HRD Training

A large pool of trained and highly skilled manpower is one of the major assets of Airports Authority of India. Development and Technological enhancements and consequent refinement of operating standards and procedures, new standards of safety and security and improvements in management techniques call for continuing training to update the knowledge and skill of officers and staff. For this purpose AAI has a number of training establishments, viz. NIAMAR in Delhi, CATC in Allahabad, Fire Training Centres at Delhi & Kolkata for in-house training of its

engineers, Air Traffic Controllers, Rescue & Fire Fighting personnel etc. NIAMAR & CATC are members of ICAO TRAINER programme under which they share Standard Training Packages (STP) from a central pool for imparting training on various subjects. Both CATC & NIAMAR have also contributed a number of STPs to the Central pool under ICAO TRAINER programme. Foreign students have also been participating in the training programme being conducted by this institution

6. IT Implementation

Information Technology holds the key to operational and managerial efficiency, transparency and employee productivity. AAI initiated a programme to indoctrinate IT culture among its employees and this is most powerful tool to enhance efficiency in the organization. AAI website has been popular giving a host of information about the organization besides domestic and international flight information of interest to the public in general and passengers in particular.

7. Functions of AAI

The functions of AAI are as follows[22]:

1. Design, Development, Operation and Maintenance of international and domestic airports and civil enclaves.
2. Control and Management of the Indian airspace extending beyond the territorial limits of the country, as accepted by ICAO.
3. Construction, Modification and Management of passenger terminals.
4. Development and Management of cargo terminals at international and domestic airports.
5. Provision of passenger facilities and information system at the passenger terminals at airports.
6. Expansion and strengthening of operation area, viz. Runways, Aprons, Taxiway etc. Provision of visual aids.
7. Provision of Communication and Navigation aids, viz. ILS, DVOR, DME, Radar etc.
8. Inclusive of all this the AAI is vetting possible PPP ventures in different functions of Civil Aviation Industry[23] including the operation and management of the airports as well as even

[22] http://www.airportsindia.org.in/public_notices/aaisite_test/orign.jsp
[23] http://civilaviation.gov.in/sites/default/files/moca_000740.pdf

vetting and experimenting the private partnership model in the spectrum of air navigation.[24] This also includes the intensely vetted strategy of PPP for Air India.[25]

CONCLUSION

In conclusion, the compiler would like to opine that all the three regulatory authorities dealt above in this work has a mix-connotation of both socialistic approach as well as a capitalistic approach, hence trying to maintain a middle ground entertaining the interest of the both.

As well as, we have also observed that these regulatory authorities plays an important role in maintaining a good diplomatic relationship in the international spheres, inclusively serving the best economical interest of all the allied states.

With the inclusive nature and stakeholder approach adopted, these authorities / departments have been able to exemplify their performance and effectiveness in achieving their objectives. The best example for the same will be the development of BCAS from a cell to an independent department following its experiences.

From the same, we can conclude with the view that the dealt analysis of the institutional framework of BCAS, AERA & AAI shows the effectiveness and constant development and evolving with need of time attribute of these authorities. But still lot is needed to be done as in India, the legislative civil aviation infrastructure is still developing and hence is behind to various of its international counterpart.

[24]http://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/airport-compilerity-of-india-mulls-partially-privatising-ahmedabad-jaipur-airports/articleshow/56605220.cms
[25]http://www.firstpost.com/business/economic-survey-air-india-privatisation-will-be-key-to-improve-indian-airlines-intl-market-share-3919809.html

UNIFORM CIVIL CODE: PROSPECTS AND CHALLENGES

Akshit Tyagi

INTRODUCTION

"Making India Secular necessarily means demarcating religion out of our Social Institutions"

Unity in diversity has always been the hallmark of our great nation. We have a rich cultural heritage and equally rich customs as well. India not only have diverse cultures but diverse religions as well. It has been 70 years since we have gained independence. The Constitution of India came into force in 1950 by the immense hard work put by the framers of our constitution. Though the word 'secular was not initially the part of Preamble to The Constitution, still it had its presence in the very essence of the Constitution. The word 'secular' was added in the Indian Constitution as a result of the 42nd Amendment in order to put additional emphasis on the secular status of Indian for the omission of any possible confusion among people, against the rising undercurrent of communalism, which gradually emerged after the bitter occurrences during the Indo-Pak separation. However, India unlike Pakistan and several other countries of the world never opted for an official religion for the state. Secularism pervades the constitution provisions, which give full opportunity to all persons to profess, practice and propagate the religion of their choice.

Now when we talk about the term Civil Code it is used to cover the entire set of law governing the personal matters like marriage, divorce, maintenance, adoption and inheritance. So, the concept Uniform Civil Code essentially means unifying all these laws in set of one secular laws dealing with these aspects that will apply to all citizens of India irrespective of their religious backgrounds. Though the exact dimensions of uniform code have not been laid down, it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are oppressive and outdated.

Article 35 of the draft Constitution of India was added as Article 44 under part IV as the Directive Principals of State Policy. However even after so many years of adoption of our Constitution, Uniform Civil Code remains a constitutional dream to be fulfilled. The implementation of Uniform Civil Code is imperative for the protection of the oppressed as well as for the promotion of national integrity and unity.[1] Secularizing India has to begin with a Uniform Civil Code that ensures equal rights to all citizens without exceptions. "Religion impinges on every human rights in the civil law-whether it is birth, death, marriage, divorce the religions have laws on all of these. So making India secular necessarily means demarcating religion out of our social institutions.

[1]Shambhavi, "Uniform Civil Code: The Necessity and The Absurdity", 1 ILI Law Review, p. 2, (2017)

CONCEPT OF UNIFORM CIVIL CODE AND ITS CONTROVERSIES

Uniform Civil Code generally refers to that part of law which deals with the family affairs of an individual and denotes uniform law for all citizens, irrespective of their religion, caste or tribe. The need for uniform civil code is inscribed in article 44. This article is included in Part IV of the Constitution dealing with directive principals of state policy. The legal nature of DPSP is such that it cannot be enforced by any court and therefore these are non-judicial rights. The Constitution further calls upon the state to apply these principles in making laws as these principles are fundamental in the governance of the country. Article 44, which deals with UCC states that: "The state shall endeavor to secure for the citizens, a Uniform Civil Code throughout the territory of India". Now the objective of this article is to effect an integration of India by bringing in all communities into a common platform which is at present governed by personal laws which do not form the essence of any religion.[2]

An objection was taken to this provision in the constituent assembly by several Muslim Members who apprehended that their personal law might be abrogated. This objection was met by pointing out:

(i) That India has already achieved a uniformity of law over a vast area

(ii) That though there was diversity in personal laws, there was nothing sacrosanct about them

(iii) The secular activities such as, inheritance, covered by personal laws should be separated from religion

(iv) That a uniform law applicable to all would promote national unity

(v) That no legislature would forcibly amend any personal law in future if people were opposed to it.[3]

In this connection reference may also be made to the discussion under Article 25, which guarantees freedom of conscience and profession, practice and propagation of religion.[4] However secular activity associated with religious practice is exempted from this guarantee. It could, therefore plausibly be argued that personal laws pertain to secular activities and hence fall within the regulatory power of the state.

In India the personal laws have always been the main cause of communal conflict among people. One of the basic problems with the absence of a Uniform Civil Code applicable throughout India is that it goes against the concept of equality which is one of the basic tenets of our constitution. By having different personal laws for different religions we are, in a sense undermining the credibility of the secular ethos of

[2]Basu D.D. (2008, 20th edition) Introduction to the constitution of India, New Delhi, Universal Law Publishing Company, p.24.
[3]VII CAD 540-2
[4]Supra, chapter XXIX, section B

India. A uniform civil code will also help in simplifying the complex legal process that governs matter related to personal laws.

The issue between the personal laws and the uniform civil code was very soon embedded in conflictual communal politics. The secular consensus had broken down and the communal conflicts were escalating. However, when we look on the other side we observe that the time is still not mature to implement Uniform Civil Code. Polarization in the society along the religious lines is still very much alive in our country. If the concept of Uniform Civil Code is implemented now in such a society, it may lead further complications. Moreover in a country like India, religion is not just a casual part of people's life. Here religion plays a primary role in the lives of most of the people. Another argument against the uniform civil code is that its imposition will violate an individual's Fundamental Right given to him by the Constitution of India. Article 26(b) says "Subject to the public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion. Now those who are against the implementation of uniform civil code are of the opinion that matters like marriage, divorce and inheritance are religious affairs and Constitution guarantees freedom of such activities and therefore the implementation of Uniform Civil Code will be the violation of that.

The SC has emphasized that steps be initiated to enact uniform civil code as envisaged by Article 44. Reviewing the various laws prevailing in the area of marriage in India, the Court has said in Ms Jordan Diengdeh v. SS Chopra[5]…the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform.

CONSTITUENT ASSEMBLY DEBATES AND UNIFORM CIVIL CODE

Diversity-conscious realism prevailed over uniform ideology and the Indian Constituent Assembly soon got down to formulating India's new Constitution of 1950. Law reform was written into the national programme of development; the existing plurality of laws with the personal law system as a central element was now simply re-anchored within the overarching framework of the Indian Constitution. This presents an intricate compromise between uniformity and diversity, centrality and localism. Although the Constitution seems to be similar to the American Constitution, it is actually typically Indian, full of recognition of differences between various groups of people and respectful of diversity at many levels.[6]

Personal laws attracted the attention of the Constituent Assembly and heated debates in favour of Uniform Civil Code and against it took place. The Uniform Civil Code was debated under Article 35. Muslim members strongly opposed it whereas most of the Hindu members supported it. B.R. Ambedkar opined in favour of interference in personal laws. During the course of debates in the constituent Assembly B.R.

[5] Ms Jorden Diengdeh v SS Chopra, AIR 1985 SC 934, 940 : (1985) 3 SCC 62.

[6] Quoted from Werner Mernski, The Uniform Civil Code Debate in India: New Developments and Changing Agenda, German Law Journal

Ambedkar clearly expressed his intent to reform the Indian society by adoption of a civil code for all the segments of the society. He had then opposed the delegates who wished to immortalize personal laws, especially Muslim representatives who showed themselves very attached to the *Shariat.*[7]

To put in his own words, he said "I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for?" As far as Article 35[8]was concerned, he allayed the fears of the Muslim community when he went on to say that "they have read rather too much into Article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country." Though Ambedkar was supported by Gopalaswamy Ayyangar and others but Jawaharlal Nehru intervened in the debate. Nehru said in 1954 in the Parliament, "I do not think at the present time the time is ripe for me to try to push it (Uniform Civil Code) through."13 Since the Uniform Civil Code was a politically sensitive issue, the founding fathers of the Constitution arrived at an honourable compromise by placing it under Article 44 as a Directive Principle of State Policy.

EFFECTS OF UNIFORM CIVIL CODE ON THE CONCEPT OF SECULARISM

The Preamble to the Constitution of India states that India is a secular, democratic, republic. This means that the state does not have a religion of its own and that it should not discriminate any individual on the basis of their religion. A religion is only to be considered as a relation of the man with God. The process of Secularization and uniform civil code are intimately connected like cause and effect. In the case of SR Bommai v Union of India[9] as per Justice Jeevan Reddy, it was held that religion is a matter of an Individual's faith and cannot be mixed with secular activities and can be regulated by the state by enacting a law.

The Principle of Uniform Civil Code essentially involves the question of secularism. So secularism is a concept or principle which needs to be analyzed in a detailed way. In India, there exists a concept of positive secularism as distinguished from the doctrine of secularism accepted by the United States i.e. there is a wall of separation between the religion and the state. In India, positive secularism separates spiritualism with individual faith. Now when we analyse the difference we discover the reason is that America and the European States went through the stages of renaissance, reformation and enlightenment and thus they can enact a law stating that State shall not interfere with the religion. On the contrary, a country like India has not undergone any kind of renaissance or reformation and thus the responsibility lies on the state to interfere in the matters of religion so as to remove the impediments in the governance of the state.

[7]Christophe Jafferlot, Outlook, Aug. 2003
[8]Now Article 44 which was Article 35 of the Draft Constitution
[9] SR Bommai v UOI, 1994(2) SCR 664, AIR 1994 SC 1918

The reason why a country like India cannot undergo a renaissance is very clear. We have discussed above how there is prevalence of not only different religions in the country but also their own personal legislative laws. This is why chances are, that the conflicts, instead of decreasing may go on increasing and showing reverse effects on the laws that are made. For instance, a practice or a tradition in one's personal law may be acceptable but on the other hand, it may not be acceptable to the people of other personal laws. So, when the traditions will be in practice, the nature of the conflict will transform itself from general differences to strong enmity. The question of the human rights of Indian women depends largely upon Gender just Uniform Civil Code. Hence, it is needed to be understood whether uniformity in personal laws will definitely lead to the equal status of women in the society or would just remain a communal agenda.

RELATION BETWEEN UNIFORM CIVIL CODE AND PERSONAL LAWS

When we conduct a study of the personal laws, we come to know that the women have always been considered inferior to the position of men and that India is a patriarchal society since the ancient times. The women are considered inferior in most of the personal matters as compared to men, especially when it comes to the discussion of the topic of the matrimony or the succession, adoption or even the inheritance. There have been various instances which petrify my opinion. Personal Laws does not fall under the ambit of Article 13 and Article 372 of the Constitution, still it does not give prerogative to numerous religious assemblages to promulgate and practice arbitrary and discriminatory customs and beliefs, which are not merely in direct infringement to the principles enshrined under Article 14 and other Fundamental Rights but against the very fabric and objective of the Constitution.

Under the ***Hindu Law*** specifically, in the year 1955 and 1996, the Hindu women did not enjoy equal rights along with the Hindu men be it anything or any matter. Before 1955 polygamy was prevalent among the Hindus. The Hindu women could not hold any property as its absolute owner except in the case of Stridhan. She had only limited estate which was passed onto the legal last full heirs of the male owner called revisionary on her death. She owned a limited interest, in the sense that whenever an issue came up for the desertion of the property and mortgaging or selling the property, she could not do it on her own. When it came to the matter of adoption a Hindu women did not have the right to adopt a child on her own. She could not be natural guardian of her children during the life of her husband. These examples are illustrative enough to show the patriarchal nature of the Indian society. Even though the Hindu law has been codified, certain discriminatory provisions still exist even today.

When it comes to discussing about the ***Muslim Law***, in the Pre Islamic Arabia, the women enjoyed a secondary status because since then it has been a patriarchy since then. The women since then were considered secondary to men. The advent of Islam has contributed much when it comes to the

deterioration of the Muslim women and the escalation of their problems. The Holy Quran gives equal rights to men and women and places women in a respectable position. However, there are certain aspects in Islam that render the position of Muslim women especially the wives insecure and inferior. In Islam, a man is allowed to marry four times whereas the women cannot and if they do they are treated as unchaste and impure.

Even in the matter of succession, a Muslim woman is discriminated against the assertion of certain Muslim scholars that the Islam in this regard is more progressive and liberal. The legal position is that when two scholars or residuary of opposite sex but of the same degree inherit the property of the deceased, the Muslim male gets twice the share of the female. Even in the matter of maintenance, the Muslim wife is not required to be maintained beyond the Iddat period. The Criminal Procedure Code which imposes an obligation on the husband to maintain his wife including divorced wife until she maintains herself is a secular law and is applicable to all, however there is a controversy regarding the Muslim men following this provision.

In the famous case of ***Mohd. Ahmed Khan v. Shah Bano Begum***[10], Thee SC speaking through Y.V. Chandrachud, the then Chief Justice held that the Section 125 of the CrPC is applicable also to the Muslims and that even a Muslim husband is also liable to maintain his divorced wife beyond the iddat period.

The judiciary in India has taken note of the injustice done to the women in the matters of many personal laws. It has been voicing its concern through a number of judgements indicating the necessity to have uniformity in personal matters of all the citizens. The constitution not only guarantees a person‘s freedom of religion and conscience, but also restraints the state from making any discrimination on the ground of religion .Whenever the issues of secularism and national integrity comes up for discussion, the debate on practicality of Uniform Civil Code always springs up.‘ Uniform Civil Code in legal parlance means —administration of same set of civil laws to govern all people without any discrimination of religion wherein all personal law will be governed by their own religious personal laws.

It has been observed that the orthodox group of the society does not want a uniform Code and they argue that it will interfere with their religious ideologies and practices but then in such a case we need to draw a distinction between the Essential Religious and Secular activities and then steps has to be taken to establish a Uniform Civil Code which meets the need of progressive and developing societies.

UNIFORM CIVIL CODE AND GENDER JUSTICE

As we have already discussed how the personal laws violate the rights of the women and do not consider them as equal to men and consider them secondary, we wish to convey that the Indian society is trapped in the vicious circle of the patriarchy dogma that they are not even able to see and respect the human

[10]Mohd. Ahmed Khan v Shah Bano Begum, AIR 1985 SC 945

rights of the women. There is a lot off controversy regarding the gender justice and the uniform civil code in being. There is a lot to consider before opting for a uniform civil code, we need to think whether or whether not to bring in the concept and a common civil law to everyone in the country, with so much of diversity and the legal pluralism existing in the country. Women empowerment has always been the talk of the town since decades now and not much has been done when the question of the personal laws and the women arises. Women empowerment in the core areas like the social status, gender bias, health, security and the main core empowerment are of exigent needs. The Indian state has in fact encouraged codifying the tribal communities laws but there are problems with it that they are ever evolving and keep on changing from time to time.

Article 44 of the Indian Constitution expects from the State to secure a Uniform Civil Code for all the citizens of India. There is no Uniform Civil Code in India but a Uniform Civil Code exists. There exists a uniformity in the law when it comes to the legal criminal procedures but when it comes to the personal law there is no uniformity and there cannot be any uniformity because of the prevalence of the diversity in the country. The laws relating to every religion, be it Hindu, Christian, Parsi and Muslims are different and vary from one religion to another.

It is a known fact that in the personal laws of all the communities, gender justice is inbuilt and it is a result of the socio economic conditions under which they are evolved. That is why there is a need to reform the personal laws. When it comes to the personal laws women undergo many difficulties and experiences in their lives like the severe trauma in matters relating to the marriage, divorce and inheritance. Polygamy, desertion and triple talaq are just a few examples to show the possibilities of the harassment against women. Indian women are formally granted equality in political rights through Indian Constitution but due to the different personal laws, women experience inequality, deprivation and violence. Within the family their position is pitiable.

When it comes to the real sense of equality the Supreme Court in certain cases has opined a need for the legislation for a common civil code or a uniform civil code envisaged by article 44 of India's Constitution should be enacted. It said in Shah Bano's Case[11] in 1985, in Sarla Mudgal Case[12] in 1995 and in Vallamattam case[13] in 2003. A critical look at the constitutional debate, legislative enactments and judicial decisions very clearly indicate the lack of seriousness in ensuring justice to women. Gender issues need to be addressed very seriously and therefore the personal laws can be amended and need to be amended rather than bringing up a whole new uniform civil code.

[11] Mohd. Ahmed Khan v Shah Bano Begum, AIR 1985 SC 945
[12] Sarla Mudgal v UOI, AIR 1995 SC 1531
[13] John Vallamattom and anr. v UOI, AIR 2003 SC 2902

NECESSITY OF UNIFORM CIVIL CODE

It is a known fact that to unite India and make it a truly secular nation, Uniform Civil Code is needed. But even after 69 years of independence haven't been able to do this and the reasons for why this has not been done are complex and a different topic on its own but it all runs down to political will. Politicians have always found it beneficial to play vote bank politics and try to appease different castes and groups instead of attempting to integrate nation. The objective underlying a uniform civil code is to enhance national integration by elimination contradictions based on religious ideologies. Supreme Court observed that the implementation of a uniform civil code is imperative for both, the protection of the oppressed and the promotion of national integrity and unity. It is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, divorce, adoption, succession and the like are matters of a secular nature, and can therefore be regulated by a law applicable to all persons in a country.[14]

Uniform Civil Code is very much relevant and has also become need of the day in a communally surcharged atmosphere of our country. It may be a strong tool in curbing the virus of communalism in our country.

Mr. Justice Tulzapurkar observed-

"In the context of fighting the poison of communalism the relevance of UCC cannot be disputed, in fact it will provide a juristic solution to communal problem by striking at its root cause, it will foster secular forces so essential in achieving social justice and common nationality."[15]

Uniform Civil Code has become relevant in today's scenario to achieve following goals:-

a. National integration and consolidation

b. As a safeguard against political domination by removing minority fundamentalism and preventing encouragement to communalism.

c. Clarity, simplicity and intelligibility of personal laws.

d. Linkage of justice and equality as secularism, justice, liberty, equality and fraternity are all inseparable from one another.

e. Removal of gender- bias and iniquitous and in-egalitarian provision in personal law and enhancement in women position.

[14]Asha Rani, "Term Paper on Uniform Civil Code", 2 IJARIIT 6
[15]Justice VD Tulzapurkar, "Uniform Civil Code" A.I.R (J) 1987 17.

f. Overlapping provisions of law could be avoided;

g. Litigation due to personal law would decrease;

h. Sense of oneness and the national spirit would be roused, and

i. The country would emerge with new force and power to face any odds finally Defeating the communal and the divisionism forces.[16]

JUDICIAL APPROACH

Judiciary has always stood for the rights of women which is clearly evident from the observations made in the following landmark Cases. However, the depressing Situation is that despite repeated reminders from the Judiciary, No law governing this could see the light of the day. Recently the Government introduced a Bill to deal with this issue in the light of Supreme Court's observation and direction in the Shayara Bano Case[17] but then again it could not see the proper light of the day because of lack of Political Will.

Case: - Mohd Ahmed Khan v. Shah Bano Begum[18]

The court while dealing with the question whether a Muslim women is entitled to maintenance under section 125of Cr.P.C observed that section 125 is secular section and provided maintenance to the women and also stated that article 44 has remained a dead letter.

Y.Y. Chandrachud observed - *"A common civil code which will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies".*

Case: - Sarla Mudgal v. Union of India [19]

While dealing with the case on bigamy –conversion issue, the court observed –"marriage celebrated under on personal laws cannot be dissolved by the application of another personal law to which one of the spouse converts". Conversion does not result in automatic dissolution of marriage and section 494 is applicable and also stressed on taking steps for UCC.

Justice Sahai observed–"A unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity".

Case: - Lily Thomas v. Union of India [20]

Court observed that the directives under part 4 of the constitution are not enforceable in court as they do not create justifiable rights in favour of any person. Supreme Court has no power to give direction for enforcement of directive principles. Supreme Court did not issue any direction for codification of common civil code but emphasised on the need for reform in Personal Laws.

[16]Law Commission of India, FifteenthReport,1960
[17] Shayara Bano v Union of India
[18] AIR 1985 SC 945
[19]AIR 1995 SC 1531
[20]AIR 2000 SC 1650

Case: - John Vallamattom v. Union of India[21]

Justice Khare observed-"A common civil code will help in the cause of national integration by removing all contradiction based on ideologies".

Case: - Shayara Bano v. Union of India[22]

A petition filed before the Supreme Court by *Shayara Ban*o, a 35 year old Muslim woman which calls to ban the practice of triple talaq and declare it as unconstitutional. The practices of polygamy and *halala* was brought under the judicial scanner. It once again raised the question that whether Uniform Civil Code will be the solution in weeding out such practices which are being considered as oppressive and anti-women not only by people belonging to other religion but even group of people belonging to the same religion? It can be inferred from the above judgments that the Hon'ble Supreme Court has reiterated about the need of Uniform Civil Code again and again and has settled the controversies and ambiguities which have arisen due to the apparent conflicts in the personal laws.

NIKAH HALALA

Halala is practice by some sects of Sunni Muslim, in order to remarry to her previous partner. A female divorcee has to marry someone and after consummation she have to dissolve the marriage. In other word a women who sleeps with a stranger to save her marriage.[23] This is very inglorious practice by Sunni Muslim which seems unjust and unnatural even to the follower or Islam. If the women fails to find a partner and consummate the marriage and goes to the previous husband without nikah halala, the children born by that marriage will be Illegitimate. In all cases it is women who has to suffer, in a country like India this is very common practice and women are forced to follow this stigma.

In a well-known Adnan Sami case [24] the husband bluntly used the concept of halala for selfish purpose. Adnan Sami a well-known Pakistani singer (now an Indian Citizen) he married to an Arab girl and divorced her when wife offered him Khula (kind of a divorce which came if effect when wife return her husband's wedding gift) and marries her again two year later. The high court of Bombay gave her relief which she was looking for. But still we have to worry about the women who forced to obey repugnant customs of Islam just for the sake of society.

OBSERVATIONS AND SUGGESTIONS

Uniform Civil Code sets the precedent to ascertain true equality and egalitarianism. It will help in integrating India. Bringing the Uniform Civil Code will be a step toward implementation of India's secularism. Bringing Uniform Civil Code will help address all the loopholes present in different personal

[21] AIR 2003 SC 2902
[22] Shayara Bano v. Union of India SC 2017
[23] Ahmad Athar (2017-04-05) BBC NEWS
[24] Sabah Adnan Same Khan v Adnan Sami Khan AIR 2010

laws. It is a major step towards gender justice as most of the personal laws are gender bias against women. It will reduce vote bank politics. The concept of one nation, is not a neat hash tag but a dire need as observed by M.P. Jain-*" ideal of Uniform Civil Code is eminently desirable to foster national unity and for doing so the courts should stop administering justice according to religion based personal laws*" as also stated by Tahir Mahmood. The problem in implementing Uniform Civil Code is: -

- The first reason why we would like to state that is, if the Uniform Civil Code is enacted and implemented ,there are high chances of massacre, and riots like situations happening again which will lead to the disintegration of the country.
- Secondly, the problem with the Uniform Civil Code and the personal laws will remain the same and there will be no difference because in the Uniform Civil Code, there will be a set standard of rules which will further not be able to cover each and every aspect of the personal law and which will led to even more problems that we have today.
- Thirdly, when it comes to the question of setting standards of the Uniform civil code, which law will prevail over the other will create a major problem for the country.
- Fourthly, even if the law is implemented, it will not be accepted by the people of the country and the reason behind this is the diversity in the country. Different people have different beliefs and opinions and when it comes to religion in India it is not just a way of life but it is considered as something supreme and above everything and in such a situation setting a common standard for all is an invitation to man-made havoc.
- Fifthly, when the people are not willing to accept the code, then for whom is the code being made for. Like it is not justifiable to make laws and keep them documented in the particular sense and if this is only the case then there are personal laws too which are there for the documentation purposes.

SUGGESTIONS

The first step that should be taken is to make the people aware as to what is the actual meaning and scope of Uniform Civil Code. A Commission should be set up to determine the scope and extent of the Code. The Parliament should enact a draft code specifying the contents. Distinction should be drawn between the essential religious practices and the secular practices related to religion. The minorities should be assured that there will be no interference with their Right to Religion. The draft should be made available for the public opinion and nationwide campaigns and discussions should be held. After considering the viewpoint of the commission, the Parliament should enact a code which is applicable throughout the country irrespective of religion, race, caste, creed etc.

The discriminatory practices like triple *talaq* which are in disguise of religious practices and customs must be subjected on the touchstone of Article 14 and 15. Right to Equality which is the basic structure of the Constitution should be given priority over the so called religious practices. In the words of Leila Seth, *"If we can't give them all the rights in one go, let us progress little by little, but let us not be stagnant. Let us move towards gender-just laws and a uniform civil code"*

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